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THE REVISED CODES OF MONTANA OF 1935

CONTAINING THE PERMANENT LAWS OF THE STATE IN
FORCE AT THE CLOSE OF THE TWENTY-FOURTH
LEGISLATIVE ASSEMBLY OF 1935.

IN FIVE VOLUMES

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ASSISTANT CODE COMMISSIONER

VOLUME FOUR

CODE OF CIVIL PROCEDURE

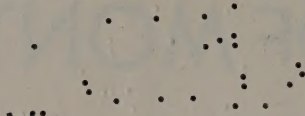
SECTIONS 8783 TO 10707

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OF 1933

THE MONTANA CODE OF CIVIL PROCEDURE
IS A REVISION OF THE MONTANA CODE OF CIVIL PROCEDURE
AS ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA
IN THE YEAR 1933

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CODE OF CIVIL PROCEDURE

CHAPTER 1

DESIGNATION OF COURTS OF JUSTICE AND OF RECORD

- Section 8783. Title of code.
8784. The several courts of this state.
8785. Courts of record.

8783. Title of code. This code shall be known as the Code of Civil Procedure of Montana.

8783
Repealed
S.L. 47, C. 50
Sec. 4, p. 62

History: En. Sec. 1, C. Civ. Proc. 1895;
re-en. Sec. 6237, Rev. C. 1907; re-en. Sec.
8783, R. C. M. 1921. Cal. C. Civ. Proc.
Sec. 1.

References

Cited or applied as section 1, Code of
Civil Procedure, in State ex rel. Nissler v.
Donlan, 32 M 256, 264, 80 P 244.

8784. The several courts of this state. The following are courts of justice of this state:

1. The court of impeachment.
2. The supreme court.
3. The district courts.
4. The justices' courts.

5. The police courts, and such other inferior courts as the legislative assembly may establish in any incorporated city or town.

History: En. Sec. 2, C. Civ. Proc. 1895;
re-en. Sec. 6238, Rev. C. 1907; re-en. Sec.
8784, R. C. M. 1921. Cal. C. Civ. Proc.
Sec. 33.

References

Cited or applied as section 6238, Revised
Codes, in State v. Jackson, 58 M 90, 100,
190 P 295.

8785. Courts of record. The courts enumerated in the first three subdivisions of the last preceding section, and only those courts, are courts of record.

History: En. Sec. 3, C. Civ. Proc. 1895; re-en. Sec. 6239, Rev. C. 1907; re-en. Sec. 8785,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 34.

CHAPTER 2

COURT OF IMPEACHMENT

- Section 8786. Members of the court.
8787. Jurisdiction.
8788. Officers of the court.
8789. Trial of impeachments provided for in the penal code.

8786. Members of the court. The court of impeachment is the senate. When sitting as such court, the senators must be upon oath or affirmation. No person shall be convicted without a concurrence of two-thirds of the senators elected.

History: En. Sec. 6, C. Civ. Proc. 1895; re-en. Sec. 6240, Rev. C. 1907; re-en. Sec. 8786,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 36.

8787. Jurisdiction. The court has jurisdiction to try impeachments, when presented by the house of representatives, of the governor, and other state and judicial officers, except justices of the peace, for high crimes and misdemeanors or malfeasance in office.

History: En. Sec. 7, C. Civ. Proc. 1895; re-en. Sec. 6241, Rev. C. 1907; re-en. Sec. 8787, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 37.

8788. Officers of the court. The officers of the senate are officers of the court.

History: En. Sec. 8, C. Civ. Proc. 1895; re-en. Sec. 6242, Rev. C. 1907; re-en. Sec. 8788, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 38.

8789. Trial of impeachments provided for in the penal code. Proceedings on trial of impeachments are provided for in the penal code.

History: En. Sec. 9, C. Civ. Proc. 1895; re-en. Sec. 6243, Rev. C. 1907; re-en. Sec. 8789, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 39.

CHAPTER 3

SUPREME COURT

- Section 8790. Justices—number increased to five—election and term of office.
- 8791. Term of office and designation of first additional justice.
- 8792. Term of office and designation of second additional justice.
- 8793. Qualifications, salary, powers, and duties of additional justices.
- 8794. Declaration of purpose of law.
- 8795. Law declared an emergency measure.
- 8796. Salaries of justices of supreme court.
- 8797. Computation of years of office.
- 8798. Vacancies.
- 8799. Who shall preside.
- 8800. Terms of supreme court, etc.
- 8801. Decisions to be in writing.
- 8802. Jurisdiction.
- 8803. Original jurisdiction.
- 8804. Appellate jurisdiction.
- 8805. Powers and duties of supreme court on appeals.
- 8806. Concurrence of majority—for what necessary.
- 8807. Pending appeal supreme court may continue injunction, and may grant injunctions when rights of the public require.

8790. Justices—number increased to five—election and term of office. On and after September 1, 1919, the supreme court shall consist of a chief justice and four associate justices, who shall be elected by the qualified electors of the state at large at the general state elections next preceding the expiration of the terms of office of their predecessors, respectively, and shall hold their offices for the term of six years from and after the first Monday of January next succeeding their election.

History: En. Sec. 12, C. Civ. Proc. 1895; re-en. Sec. 6244, Rev. C. 1907; amd. Sec. 1, Ch. 31, Ex. L. 1919; re-en. Sec. 8790, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 40.

8791. Term of office and designation of first additional justice. The first term of office of one of the additional justices of the supreme court hereby provided for shall extend from the first day of September, 1919, to the first Monday of January, 1921; and John Hurley of Valley county, Montana, is hereby named as said justice of the supreme court, and he shall hold said office for said term.

History: En. Sec. 2, Ch. 31, Ex. L. 1919; re-en. Sec. 8791, R. C. M. 1921.

8792. Term of office and designation of second additional justice. The first term of office of the other said additional justice of the supreme court hereby provided for shall extend from the first day of September, 1919, to the first Monday of January, 1923; and George Y. Patten of Gallatin county, Montana, is hereby named as said additional justice of the supreme court, and he shall hold office for said term.

History: En. Sec. 3, Ch. 31, Ex. L. 1919; re-en. Sec. 8792, R. C. M. 1921.

8793. Qualifications, salary, powers, and duties of additional justices. The qualifications, salary, powers, jurisdiction, and duties of each of the additional justices herein provided for shall be in all respects similar to those now possessed, had, enjoyed, and required, by virtue of law, of the justices of the supreme court as heretofore constituted.

History: En. Sec. 4, Ch. 31, Ex. L. 1919; re-en. Sec. 8793, R. C. M. 1921.

8794. Declaration of purpose of law. It is the purpose and intention of this act to exercise the power vested in the legislative assembly by section 5 of article VIII of the constitution of the state of Montana to increase the number of justices of the supreme court to not less nor more than five, and all acts and parts of acts now in effect relating to the supreme court of the state of Montana, and the justices thereof, shall apply with full force and effect to the additional justices herein provided for.

History: En. Sec. 5, Ch. 31, Ex. L. 1919; re-en. Sec. 8794, R. C. M. 1921.

8795. Law declared an emergency measure. This act is declared to be an emergency law, and a law necessary for the immediate preservation of public peace and safety.

History: En. Sec. 6, Ch. 31, Ex. L. 1919; re-en. Sec. 8795, R. C. M. 1921.

8796. Salaries of justices of supreme court. The annual salary of each justice of the supreme court is six thousand dollars.

History: En. Sec. 1, Ch. 43, L. 1905; re-en. Sec. 291, Rev. C. 1907; re-en. Sec. 8796, R. C. M. 1921. Cal. Pol. C. Sec. 736.

8797. Computation of years of office. The years during which a justice of the supreme court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January of the next succeeding year.

History: En. Sec. 13, C. Civ. Proc. 1895; re-en. Sec. 6245, Rev. C. 1907; re-en. Sec. 8797, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 41.

8798. Vacancies. If a vacancy occur in the office of a justice of the supreme court, the governor must appoint an eligible person to hold the office until the election and qualification of a justice to fill the vacancy, which election must take place at the next succeeding general election; and the justice so elected holds the office for the remainder of the unexpired term of his predecessor.

History: En. Sec. 14, C. Civ. Proc. 1895; re-en. Sec. 6246, Rev. C. 1907; re-en. Sec. 8798, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 42.

8799. Who shall preside. The chief justice presides at all sessions of the supreme court, and, in case of his absence, the associate justice having

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Repealed a
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S.L. '49, C.
Secs. 1-5
PP. 389-391

the shortest term to serve presides in his stead. A majority of the justices is necessary to form a quorum or pronounce a decision, but one or more of the justices may adjourn the court from day to day or to a day certain.

History: En. Sec. 15, C. Civ. Proc. 1895; re-en. Sec. 6247, Rev. C. 1907; re-en. Sec. 8799, R. C. M. 1921.

8800. Terms of supreme court, etc. Four terms of the supreme court must be held each year at the seat of government, commencing on the first Tuesdays of March, June, October, and December. The chief justice or any two justices have power to call a special term at any time. If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the state, together with attendants, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the court, or any two justices thereof, may direct the clerk of the supreme court to provide such rooms, attendants, furniture, lights, fuel, and stationery; and the expenses thereof, certified by any two justices to be correct, must be paid out of the state treasury, out of any funds in the state treasury not otherwise appropriated.

History: En. Sec. 16, C. Civ. Proc. 1895; re-en. Sec. 6248, Rev. C. 1907; re-en. Sec. 8800, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 47. due them for their services a charge against the state as a liquidated claim. State ex rel. Schneider v. Cunningham, 39 M 165, 171, 101 P 962.

Operation and Effect

Where the state has failed to make provision for necessary assistants to the supreme court, the court may select and appoint them, and make the compensation

References

Cited or applied as section 6248, Revised Codes, in State ex rel. Hillis v. Sullivan, 48 M 320, 331, 137 P 392.

8801. Decisions to be in writing. In the determination of causes, all decisions of the supreme court must be given in writing, and the grounds of the decision must be stated.

History: Ap. p. Sec. 440, p. 132, Bannack Stat.; re-en. Sec. 597, p. 157, Cod. Stat. 1871; re-en. Sec. 17, C. Civ. Proc. 1895; re-en. Sec. 6249, Rev. C. 1907; re-en. Sec. 8801, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 49.

References

Cited or applied as section 6249, Revised Codes, in State ex rel. Powers v. Dale, 47 M 227, 228, 131 P 670; State v. Jackson, 58 M 90, 100, 190 P 295; State v. Le Due, 89 M 545, 580, 300 P 919.

8802. Jurisdiction. The jurisdiction of the supreme court is of two kinds:

1. Original; and,
2. Appellate.

History: En. Sec. 18, C. Civ. Proc. 1895; re-en. Sec. 6250, Rev. C. 1907; re-en. Sec. 8802, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 50.

8803. Original jurisdiction. In the exercise of its original jurisdiction the supreme court has power to issue writs of mandamus, certiorari, prohibition, injunction, and habeas corpus; also has power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction.

History: En. Sec. 19, C. Civ. Proc. 1895; re-en. Sec. 6251, Rev. C. 1907; re-en. Sec. 8803, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 51.

Operation and Effect

This section does not authorize the vacation or suspension of a prohibitory injunction order pending an appeal from it. Maloney v. King, 26 M 487, 491, 68 P 1012.

8804. Appellate jurisdiction. The appellate jurisdiction of the supreme court extends to all cases at law and in equity.

History: En. Sec. 20, C. Civ. Proc. 1895; re-en. Sec. 6252, Rev. C. 1907; re-en. Sec. 8804, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 52.

8805. Powers and duties of supreme court on appeals. The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court must be given in writing, and a syllabus thereof must be prepared by the court and filed with the opinion; and in giving its decision, if a new trial be granted, the court must pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases must be remitted to the court from which the appeal was taken. In equity cases, and in matters and proceedings of an equitable nature, the supreme court shall review all questions of fact arising upon the evidence presented in the record, whether the same be presented by specifications of particulars in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless, for good cause, a new trial or the taking of further evidence in the court below be ordered; provided, that nothing herein shall be construed to abridge, in any manner, the powers of the supreme court in other cases.

History: En. Ch. 1, Ex. L. 1903; re-en. Sec. 6253, Rev. C. 1907; re-en. Sec. 8805, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 53.

Constitutionality

This section does not purport to impose on the supreme court any additional jurisdiction, and hence is not unconstitutional. *Finlen v. Heinze*, 32 M 354, 380, 80 P 918.

Court May Dispose of Water Right Case Based on Evidence Alone

The supreme court may in a case wherein the title to a water right is sought to be quieted and defendant enjoined from further interference therewith dispose of the merits of the appeal upon a review of the evidence alone. *Pew v. Johnson*, 35 M 173, 178, 88 P 770.

Disposition of an Appeal From a Foreclosure of a Mechanics' Lien

The procedure for the foreclosure of a mechanics' lien being neither strictly at law nor in equity, but a blending of both, the supreme court on appeal in such a cause may not enter a judgment finally disposing of it, where certain issues of fact raised by the pleadings were never fully tried in the district court. *Wertz v. Lamb*, 43 M 477, 484, 117 P 89.

Disposition of Cases Where Nonsuit or Directed Verdict for Defendant Should Have Been Entered

In actions at law, where the plaintiff should have been nonsuited, or a directed

verdict for the defendant should have been entered, and the proper motion was made and denied, the supreme court will generally direct a final disposition of the cause. *Wertz v. Lamb*, 43 M 477, 484, 117 P 89.

Duty of Court on Reversal of Divorce Decree

Where a decree of divorce must be reversed, it becomes the duty of the supreme court to determine the questions of law and fact presented by the record upon the whole case, and to make such disposition of it as the circumstances require. In doing this, it may consider written evidence that was erroneously excluded by the trial court, but incorporated in the record, as properly before it. *Bordeaux v. Bordeaux*, 43 M 102, 111, 115 P 25.

Erroneous Admission of Evidence

In a suit to determine water rights, the findings will not be disturbed because of the erroneous admission of evidence, where the remainder of the evidence preponderates in favor of the findings. *Hays v. Buzard*, 31 M 74, 84, 77 P 423.

Examination of Evidence in Equity Proceedings and Disposition of Cases

In equity cases, the supreme court may examine the evidence and determine a question of fact for itself, but it cannot overturn the findings of the trial court unless there is a decided preponderance of the evidence against them. *Bordeaux v.*

8805
101 Mont. 9
52 P (2d) 169
101 Mont. 448
54 P (2d) 867
101 Mont. 549
54 P (2d) 878

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71 P (2d) 890
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Bordeaux, 32 M 159, 166, 80 P 6; Finlen v. Heinze, 32 M 354, 377, 80 P 918; Delmoe v. Long, 35 M 139, 159, 88 P 778; Watkins v. Watkins, 39 M 367, 369, 102 P 860; Copper Mountain Min. & S. Co. v. Butte & Corbin etc. Min. Co., 39 M 487, 494, 104 P 5, 40, 133 Am. St. Rep. 595; Murray v. Butte-Monitor T. M. Co., 41 M 449, 453, 110 P 497; O'Neil v. O'Neil, 43 M 505, 511, 117 P 889; Leigland v. Rundle L. & A. Co., 64 M 154, 164, 208 P 1075; Kummrow v. Bank of Fergus County, 66 M 434, 437, 214 P 1098; Stephenson v. Rainbow Flying Service, Inc., 99 M 241, 42 P 2d 735.

The findings of a trial court will not be set aside in equity cases unless there is a decided preponderance in the evidence against them; and, when the evidence furnishes reasonable grounds for different conclusions, the findings will not be disturbed. Gibson v. Morris State Bank, 49 M 60, 72, 140 P 76; Scott v. Prescott, 69 M 540, 549, 223 P 490; Shepherd & Pierson Co. v. Baker, 81 M 185, 193, 262 P 887.

In an equity suit in which the evidence is all before the supreme court, it may, under this section, determine a fact on which the trial court failed to make a finding. Walsh v. Hoskins, 53 M 198, 207, 162 P 960.

The supreme court, on appeal in equity cases, must review and determine all questions of fact, due allowance being made for the more advantageous position occupied by the trial judge in passing upon the credibility of the witnesses, as well as questions of law, unless for good cause shown a new trial should be ordered. Barnard Realty Co. v. City of Butte, 55 M 384, 391, 177 P 402; Giebler v. Giebler, 69 M 347, 353, 222 P 436.

The findings of the trial court will not be set aside unless there is a decided preponderance in the evidence against them; and, when the evidence as it appears in the record, fully considered, furnished reasonable grounds for different conclusions, the findings must not be disturbed. Stettheimer et al. v. City of Butte, 60 M 111, 115, 198 P 455.

On appeal in an equity case, where there is little or no conflict in the evidence which in itself is unsatisfactory in character and furnishes no substantial basis for the findings of the trial court, the supreme court will not hesitate to set them aside and finally determine the rights of the parties. Gray v. Grant et al., 62 M 452, 473, 206 P 410.

In an equity case, where the contention is made that the evidence is insufficient to support the findings of the court, the supreme court in its review thereof will

go no further than to determine whether there is a decided preponderance against them, and when it furnishes reasonable grounds for differing conclusions they will not be disturbed. Nolan v. Benninghoff et al., 64 M 68, 72, 208 P 905.

Under subdivision 3 of Rule VII of the supreme court, in equity cases and matters of an equitable nature where questions of fact are presented for review, the testimony must be presented by question and answer; if not so presented, the appellant is not entitled to have the evidence considered for any purpose, and in such circumstances, if it does consider it, the appellate court will place greater reliance upon the court's findings than would otherwise be necessary. Security State Bank v. McIntyre, 71 M 186, 200, 228 P 618; Stephenson v. Rainbow Flying Service, Inc., 99 M 241, 42 P 2d 735.

The supreme court in an equity case is not bound by any finding of the trial court even though unchallenged, but under this section may, upon examination of the evidence, determine a question of fact for itself and overturn such finding if there is a decided preponderance of the evidence against it. Stanton v. Occidental Life Ins. Co. et al., 81 M 44, 65, 261 P 620.

While, in equity cases, the supreme court may review all questions of fact arising upon the evidence presented in the record (this section), it is without original jurisdiction to decide a question of fact depending upon conflicting evidence not passed upon by the trial court. Hoppin v. Lang, 81 M 330, 333, 263 P 421.

Final Judgment on Appeal of Equity Cases Favored

Where the supreme court, on appeal in an equity case, reverses the judgment, but no cause appears why a new trial or the taking of further testimony should be ordered, it will enter a judgment finally determining the cause. North R. E. etc. Co. v. Billings L. & T. Co., 36 M 356, 367, 93 P 40.

Since the evident purpose of this section is to expedite the entry of final judgment in equity cases, and thus put an end to litigation, it is the duty of the parties to introduce all their testimony in the trial court, in order to enable the appellate tribunal to carry out its intent. Stevens v. Trafton, 36 M 520, 530, 93 P 810.

The supreme court will, on appeal in an equity case, the evidence introduced at the trial of which is all contained in the record and presents no substantial conflict, order such modifications of the decree, based upon an erroneous interpretation of the evidence, as will render a retrial unnecessary. Bielenberg v. Eyre, 44 M 397, 400, 120 P 243.

In an equity case, the decree in which was founded upon incompatible theories, the supreme court will dispose of the cause on its merits, all the evidence being presented in the record, by eliminating from the decree findings based upon the erroneous theory, and adopting those founded upon the correct one supported by the evidence. *Lowry v. Carrier*, 55 M 392, 397, 177 P 756.

Without an appeal from the whole judgment and having the entire record before it for review, the court cannot comply with this section, which provides that "In equity cases, * * * the supreme court shall review all questions of fact arising upon the evidence presented in the record, * * * and determine the same, as well as questions of law. * * *" *Lohman v. Poor et al.*, 68 M 579, 585, 220 P 1094.

In an equity case it is the duty of the parties to introduce all of their testimony to enable the supreme court, under this section, to determine finally the questions properly determinable. *Feeley v. Feeley*, 72 M 84, 94, 231 P 908.

Under this section, on appeal in an equity case the supreme court must review all questions of law and of fact and may, where all the facts are presented, determine the case finally for the purpose of putting an end to further litigation. *State v. District Court et al.*, 77 M 594, 600 et seq., 251 P 1061.

On appeal from a decree of the district court settling the accounts of an administrator, the supreme court will, in a proper case as where an estate has been in process of administration for ten years, where the same matter has been before it on a previous appeal, and discrepancies appear in the court's computations, make final and independent disposition of the case with due regard for the findings of the trial court. In *re Connolly's Estate*, 79 M 445, 451, 257 P 418.

No Trial de Novo

The review under this section may go no further than to determine whether there is a decided preponderance in the evidence against the findings in the trial court; the supreme court will not undertake to try a case de novo and determine it as does the district court. *Pope v. Alexander*, 36 M 82, 90, 92 P 203, 565.

Power to Weigh Evidence in an Appeal From Action to Determine Heirship

The supreme court has power, under this section, to weigh the evidence, in an action under section 10324, to determine heirship, though it mainly consists of depositions, and to reverse the judgment if the findings are found to be against the weight of evidence. In *re Colbert's Estate*, 51 M 455, 469, 153 P 1022.

Provision in Granting a New Trial That the Court Must "Pass Upon and Determine All Questions of Law" is Not Binding

The provision of this section, that the supreme court, in granting a new trial, must in its decision "pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case," is not binding upon that court. *State ex rel. La France Copper Co. v. District Court*, 40 M 206, 208, 105 P 721.

Review of Evidence Limited to Record

On appeal from a decree in a suit for enforcing a mortgage evidenced by an instrument, in form a warranty deed, it is the duty of the supreme court to review and determine all questions of law and of fact, arising from the proof produced; but the court is powerless to do this unless the material evidence is embodied in the record. *Yellowstone Nat. Bank v. McCullough*, 51 M 590, 597, 154 P 919.

When Cause Will Be Remanded With Directions to Modify

Where in an action for services rendered, the plaintiff, an expert accountant, was properly entitled to recover but the trial court erred in refusing to limit recovery for the services of an assistant to the amount actually paid by him, to-wit, two dollars per day, and the jury awarded five dollars a day, and the excess in the judgment could readily be determined by mathematical calculation, the judgment will not be reversed and a new trial ordered, but the cause will be remanded with instruction to modify the judgment. *Callan v. Hamble*, 73 M 321, 328, 236 P 550.

In a mortgage foreclosure proceeding in which the widow of the decedent mortgagor was made defendant as executrix of his estate, rendition of a decree awarding plaintiff a personal judgment against her in her representative capacity, while error, was not such as required its reversal, it being subject to correction by the trial court without affecting any substantial rights of the parties. *Rochester v. Bennett*, 74 M 293, 307, 240 P 384.

When Court May Affirm When Either of Two Inconsistent Defenses Are Established in Equity

Under the power given the supreme court by this section, on appeal in equity cases, where defendant in an action to quiet title to a right of way for a ditch over plaintiff's land, relied upon the inconsistent defenses of adverse possession and grant in him under sections 2339 and 2340, United States Revised Statutes, the judgment in favor of defendant will nevertheless be affirmed where the evidence

shows establishment of his right on either theory. *Dahlberg v. Lannen*, 84 M 68, 82, 274 P 151.

When Court May Direct Entry of Proper Final Judgment

Under this section, the supreme court has the power, on reversal of the judgment appealed from, to direct entry of the proper judgment in favor of appellant where the record contains a full recital of all that took place at the trial and it is apparent that the respondent, after submitting all the evidence at his command in resistance of appellant's cause, failed to defeat or diminish the latter's claim. *Alley v. Butte & Western Min. Co.*, 77 M 477, 497, 251 P 517.

Where there is no substantial conflict in the evidence, the function of the trial court is to determine the law applicable to the evidence viewed as an agreed statement of facts, and on appeal the supreme court is in as favorable a position as the trial court to make such determination, and will make final disposition of the cause (this section). *Dunn v. Beck*, 80 M 414, 425, 260 P 1047.

Where in a mechanics' lien foreclosure suit judgment was entered against one improperly made a party defendant, the supreme court has authority under this section to correct the error by directing entry of a proper judgment. *Arnold et al. v. Genzberger et al.*, 96 M 358, 372, 31 P 2d 396.

When Supreme Court Will Dismiss Complaint

Where plaintiff had full opportunity to introduce all his evidence in support of his claim against defendants as alleged partners of a third with whom he made the contract under which he rendered services, but failed to produce sufficient to sustain a judgment against them, the cause will not be remanded for a new trial but with direction to dismiss the complaint. *Bresee v. Smith et al.*, 73 M 312, 320, 237 P 492.

References

Cited or applied as section 21, Code of Civil Procedure, in *Bordeaux v. Bordeaux*, 26 M 533, 536, 69 P 103; *Finlen v. Heinze*, 27 M 107, 112, 69 P 829, 70 P 517; as Laws of 1903, chapter 1, in *Forrester v. Boston & M. Co.*, 30 M 181, 186, 76 P 2; as section 21, Code of Civil Procedure, as amended, in *Forrester v. Boston & M. Co.*, 32 M 240, 243, 79 P 1061; as Laws of 1903, page 7, in *Kennedy v. Dickie*, 36 M 196, 199, 92 P 528; *Lozar v. Neill*, 37 M 287, 297, 96 P 343; as section 6253, Revised Codes, in *Foster v. Winstanley*, 39 M 314, 326, 102 P 574; *Bosanatz v. Ostronich*, 57 M 197, 207, 187 P 1009; *Violet et al. v. Martin*, 62 M 335, 343, 205 P 221; *Humble v. St. John et al.*, 72 M 519, 234 P 475; *McDaniel v. Hager-Stevenson Oil Co.*, 75 M 356, 359, 243 P 582; *Billings v. Missoula W. P. Sash Co.*, 88 M 322, 332, 292 P 714; *Security Bldg. & Loan Assn. v. Shallow*, 96 M 498, 510, 31 P 2d 732.

8806. Concurrence of majority—for what necessary. The concurrence of a majority of the justices of the supreme court is necessary for the issuance of any writ, or the transaction of any business, except such as can be done at chambers; provided, that each of the justices has power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or judge thereof, or before any district court in the state, or any judge thereof.

History: En. Sec. 22, C. Civ. Proc. 1895; re-en. Sec. 6254, Rev. C. 1907; amd. Sec. 1, Ch. 34, L. 1921. Cal. C. Civ. Proc. Sec. 54.

8807. Pending appeal supreme court may continue injunction, and may grant injunctions when rights of the public require. The supreme court may continue in force an injunction order made by a district court, or judge, or grant an injunction order and writ pending an appeal to the supreme court from an order of a district court, or judge, refusing or dissolving an injunction, upon such terms and under such rules as the supreme court may establish. No action to obtain an injunction must be commenced in the supreme court, except in cases where the state is a party, or in which the public is interested, or the rights of the public are involved, but the proper district court has jurisdiction of all injunctions,

and the commencement of all actions therefor, except as in this section provided. The supreme court may provide rules for the commencement and trial of actions for injunctions in that court.

History: En. Sec. 23, C. Civ. Proc. 1895; re-en. Sec. 6255, Rev. C. 1907; re-en. Sec. 8807, R. C. M. 1921.

Operation and Effect

An order vacating a temporary restraining order is an order dissolving an injunction from which an appeal lies, and the supreme court could continue the injunction order in force pending an appeal from the order of the district judge dissolving the injunction. *Bennett Bros. Co. v. Congdon*, 20 M 208, 214, 50 P 556.

This section does not have reference to staying the operation or effect of injunction orders. It has to do only with interlocutory orders of the district court or judge, and not with final judgments. *Maloney v. King*, 26 M 492, 493, 68 P 1014. See *Finlen v. Heinze*, 27 M 107, 117, 69 P 829, 70 P 517.

The supreme court has inherent power to preserve the subject of litigation and the status of the parties pending an appeal; and may enjoin the operation of a mine and require it to be preserved in statu quo pending an appeal in case involving the title thereto. *Finlen v. Heinze*, 27 M 107, 118, 69 P 829, 70 P 517.

Supreme Court May Not Modify or Vacate a Perpetual Injunction Pending Appeal

The supreme court is without authority to grant an order modifying or vacating a perpetual injunction pending appeal from a judgment embracing it. *Maloney v. King*, 26 M 492, 493, 68 P 1014.

When Original Jurisdiction Will Be Granted

Under the constitutional grant of original jurisdiction to the supreme court, where the facts stated, in an application for the writ of injunction, present a case affecting the interests of the whole people

of the state, the court has jurisdiction to issue the writ. *State ex rel. Clarke v. Moran*, 24 M 433, 442, 63 P 390.

No action can be commenced originally in the supreme court, for an injunction, in a case where a city is seeking to provide a water supply and to construct a system for itself. *State ex rel. City of Helena v. Helena W. W. Co.*, 43 M 169, 176, 115 P 200.

Id. To authorize the supreme court to issue the writ of injunction in the exercise of its original equity jurisdiction, as distinguished from its power to grant the writ to preserve the subject of the action pending appeal, the rights of the "public" must be involved; the term "public" applies to the affairs of the state or some subdivision thereof, as opposed to those of a private citizen.

The supreme court has the power to issue a writ of injunction in a case wherein public interests are involved; hence a taxpayer could properly invoke its jurisdiction in that behalf in a matter involving the incurring of indebtedness for the purpose of erecting a high school building, the school district against which the writ was prayed being a public corporation and an instrumentality of the state government to perform the public function of educating the future citizens of the state; and in taking steps for the erection of a schoolhouse, it acts in a governmental, and not in a private or proprietary capacity. *State ex rel. Fisher v. School Dist. No. 1*, 97 M 358, 364, 34 P 2d 522.

References

Cited or applied as section 23, Code of Civil Procedure, in *Gaffney Mercantile Co. v. Hopkins*, 21 M 13, 14, 52 P 561; *State v. Montana Ore Purchasing Co.*, 22 M 352, 56 P 1134.

8808-8811. Omitted.

CHAPTER 4

DISTRICT COURTS

- Section 8812. Judicial districts defined.
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 8814. Salaries of district judges.
 8815. Salaries of judges not to be paid until certain affidavit filed.
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- 8823. Governor may require judge to hold court in another county.
- 8824. Expenses of judges holding court in other counties.
- 8825. Itemized statements—verification—filing.
- 8826. Terms of court.
- 8827. Adjournments—terms in districts of more than one county.
- 8828. Jurisdiction of two kinds.
- 8829. Original jurisdiction.
- 8830. Appellate jurisdiction.
- 8831. Process.
- 8832. Terms and departments of court in districts having more than one judge.

8812. Judicial districts defined. In this state there are seventeen judicial districts, distributed as follows:

- First district: Lewis and Clark and Broadwater counties.
- Second district: Silver Bow county.
- Third district: Deer Lodge, Granite, and Powell counties.
- Fourth district: Missoula, Mineral, Lake, Ravalli, and Sanders counties.
- Fifth district: Beaverhead, Jefferson, and Madison counties.
- Sixth district: Gallatin, Park, and Sweet Grass counties.
- Seventh district: Dawson, McCone, Richland, and Wibaux counties.
- Eighth district: Cascade and Chouteau counties.
- Ninth district: Teton, Pondera, Toole, and Glacier counties.
- Tenth district: Fergus, Judith Basin, and Petroleum counties.
- Eleventh district: Flathead and Lincoln counties.
- Twelfth district: Liberty, Hill, and Blaine counties.
- Thirteenth district: Yellowstone, Big Horn, Carbon, Stillwater, and Treasure counties.

Fourteenth district: Meagher, Wheatland, Golden Valley, and Mussel-shell counties.

Fifteenth district: Roosevelt, Daniels, and Sheridan counties.

Sixteenth district: Custer, Carter, Fallon, Prairie, Powder River, Garfield, and Rosebud counties.

Seventeenth district: Phillips and Valley counties.

History: En. Sec. 6256, Rev. C. 1907; re-en. Sec. 8812, R. C. M. 1921; amd. Sec. 1, Ch. 91, L. 1929.

8813. Number of judges. In each judicial district there must be the following number of judges of the district court, who must be elected by the qualified voters of the district, and whose term of office must be four years, to-wit: In the first, second, fourth, eighth, thirteenth and sixteenth, two judges each, in all other districts one judge each.

History: En. Sec. 1, p. 156, L. 1901; re-en. Sec. 6264, Rev. C. 1907; re-en. Sec. 8813, R. C. M. 1921; amd. Sec. 2, Ch. 91, L. 1929.

Operation and Effect

Where the district courts are divided into departments, the court presided over by each of the judges is the district court and not a departmental court; neither department is a court of concurrent juris-

diction with the other, and in the absence of rules either judge has full authority to proceed in any matter properly before the court. *State v. Great Northern Utilities Co.*, 86 M 442, 445, 284 P 772.

References

Cited or applied as section 32, Code of Civil Procedure, before amendment, in *State ex rel. Breen v. Toole*, 32 M 4, 6, 79 P 403.

8814. Salaries of district judges. The annual salary of each district judge is four thousand and eight hundred dollars.

History: En. Sec. 1, Ch. 176, L. 1919; re-en. Sec. 8814, R. C. M. 1921.

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New district
Created
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Amended
S.L. 17, C. 111
Sec. 1, p. 149

8815. Salaries of judges not to be paid until certain affidavit filed.

The state auditor shall not draw a warrant in payment of the services of any justice of the supreme court or judge of the district court until such justice or judge shall have filed with the auditor an affidavit that no cause, motion, or other proceeding in his court remains pending and undecided for a period of ninety days after the same shall have been submitted for decision, unless casualty or sickness shall have intervened.

History: En. Sec. 1, Ch. 85, L. 1917;
re-en. Sec. 8815, R. C. M. 1921.

References

National Bank v. American Brewing Co.,
79 M 605, 614, 257 P 1043.

8816. Expenses when sitting out of district. Every judge who shall sit in the place of another judge in the trial or hearing of an action or proceeding in a district other than his own, or in the supreme court, shall be paid his actual expenses while engaged in that service as follows: His actual traveling expenses in going from the county seat which he makes his place of residence to the place of trial, and return, and his board and lodging while engaged in the trial or hearing.

8816
Ref. to
S.L. '49, C. 17
Sec. 1, P. 29

History: En. Sec. 1, Ch. 3, L. 1907; Sec. 293, Rev. C. 1907; re-en. Sec. 8816, R. C. M. 1921.

8817. Audit of expense account. As soon as his services in connection with the trial or hearing are concluded, the judge shall certify in detail the amount of money necessarily and actually expended by him for his traveling expenses and board and lodging, as above specified, and shall file the claim for such services with the state board of examiners, who shall audit it, and if found correct by them, they shall transmit the claim to the state auditor, with their approval indorsed thereon, and the state auditor must draw his warrant for the amount so approved in favor of the claimant, or his assigns, in the order in which the same was approved.

History: En. Sec. 2, Ch. 3, L. 1907; Sec. 294, Rev. C. 1907; re-en. Sec. 8817, R. C. M. 1921.

8818. Terms of office. The term of office of judges of the district court begins on the first Monday of January next succeeding their election.

History: En. Sec. 33, C. Civ. Proc. 1895;
re-en. Sec. 6267, Rev. C. 1907; re-en. Sec.
8818, R. C. M. 1921. Cal. C. Civ. Proc.
Sec. 68.

References

Cited or applied as section 6267, Revised
Codes, in State ex rel. Patterson v. Lentz,
50 M 322, 338, 146 P 932.

8819. Computation of years of office. The years during which a judge of a district court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January of the next succeeding year.

History: En. Sec. 34, C. Civ. Proc. 1895; re-en. Sec. 6268, Rev. C. 1907; re-en. Sec. 8819, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 69.

8820. Vacancies. If a vacancy occur in the office of judge of a district court, the governor must appoint an eligible person to hold the office until the election and qualification of a judge to fill the vacancy, which election must take place at the next succeeding general election, and the judge so elected holds office for the remainder of the unexpired term.

History: En. Sec. 35, C. Civ. Proc. 1895; re-en. Sec. 6269, Rev. C. 1907; re-en. Sec. 8820, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 70.

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Operation and Effect

A judge appointed to fill a vacancy can serve no longer than until the next general election in point of time, and until his successor is elected and qualified; neither the legislature nor the governor can extend the term beyond that thus definitely fixed by the constitution. *State ex rel.*

Patterson v. Lentz, 50 M 322, 339, 146 P 932; overruling *State ex rel. Livesay v. Smith*, 35 M 523, 90 P 750.

References

Cited or applied as section 35, Code of Civil Procedure, in *State ex rel. Breen v. Toole*, 32 M 4, 8, 79 P 403.

8821. District courts by judges of other counties. A judge of the district court of any judicial district may hold the district court in any county of another district than his own at the request of the judge thereof, and, upon the request of the governor, it is his duty to do so; and in either case the judge holding the court has the same power either in court or chambers as a judge thereof.

History: En. Sec. 36, C. Civ. Proc. 1895; re-en. Sec. 6270, Rev. C. 1907; re-en. Sec. 8821, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 71.

has no power, while in his own district, to try on the merits and finally dispose of causes arising in another county. *Eustance v. Francis*, 52 M 295, 298, 157 P 573.

Operation and Effect

This section does not enlarge the authority given by the constitution, and is in accordance therewith. *Farleigh v. Kelly*, 24 M 369, 373, 62 P 495, 685.

This section contemplates that the invited judge shall go into the district to which he is invited for that purpose; he

References

Cited or applied as section 36, Code of Civil Procedure, in *State ex rel. Carleton v. District Court*, 33 M 138, 155, 82 P 789; as section 6270, Revised Codes, in *State ex rel. Mannix v. District Court*, 51 M 310, 315, 152 P 753.

8822. Judges pro tempore. A civil action in the district court may be tried by a judge pro tempore, who must be a member of the bar of the state, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and in such case any order, judgment, or decree, made or rendered therein by such judge pro tempore, shall have the same force and effect as if made or rendered by the court with the regular judge presiding. A judge pro tempore shall, before entering upon his duties, be sworn to try the cause.

History: En. Sec. 37, C. Civ. Proc. 1895; re-en. Sec. 6271, Rev. C. 1907; re-en. Sec. 8822, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 72.

8823. Governor may require judge to hold court in another county. If for any cause a district court is not or cannot be held in any county by the judge or judges thereof, or by a district judge requested by such judge or judges to hold such court, or if the business of the court in any county is not or cannot be dispatched with reasonable promptness, the governor may, upon application of any interested person, by an order in writing, require some district judge to hold court in said county for such time as may be specified in the order.

History: En. Sec. 164, C. Civ. Proc. 1895; re-en. Sec. 6312, Rev. C. 1907; amd. Sec. 1, Ch. 33, L. 1915; re-en. Sec. 8823.

8824. Expenses of judges holding court in other counties. Each district judge of a judicial district in this state, composed of more than one county, when, for the purpose of holding court and disposing of judicial business, he goes to a county of his judicial district, other than the county in which he resides, and therein holds court or transacts judicial business,

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503

8824
Ref. to
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Sec. 1, P. 29

shall be paid all of his actual and necessary expenses of transportation and living, incurred on account thereof, and all expenditures made therefor, from the time he leaves his place of residence until he returns thereto.

History: En. Sec. 1, Ch. 91, L. 1911; re-en. Sec. 8824, R. C. M. 1921.

Operation and Effect

A district judge whose district is composed of more than one county and who, while at the county seat of a county in

his district other than that of his residence on judicial business, is called as a witness in a cause and remains there for the purpose of giving his testimony, is entitled to witness fees. Bullard v. Zimmerman et al., 88 M 271, 280, 292 P 730.

8825. Itemized statements—verification—filing. Twice a year, on the first days of January and July of each year, or within three days thereafter, such district judge, who may desire to avail himself of the provisions of this act, shall make out an itemized claim against the state of Montana, showing, with dates and particulars, all moneys by him within the last preceding six months paid out and expended for and on account of such expenses; and shall verify such claim by making thereon or appending thereto his sworn affidavit that the items of the claim are true and correct, and are wholly unpaid, and that the expenditures therein enumerated were actually and necessarily made in the discharge of official business while away from home. He shall then file such claim with the clerk of the state board of examiners. At the first meeting of the board thereafter, the state board of examiners shall allow such claim, if properly verified, as above provided, and order a warrant drawn in payment thereof, and the state auditor shall thereupon, and in pursuance thereof, draw and issue a warrant of the state of Montana in payment of such claim, and forward the same to the claimant and take a receipt therefor.

History: En. Sec. 2, Ch. 91, L. 1911; re-en. Sec. 8825, R. C. M. 1921.

8826. Terms of court. The district court of each county which is a judicial district by itself has no terms, must be always open for the transaction of business, except on legal holidays and non-judicial days, and must hold its sessions at the county seat. Juries for the trial of causes must be called on the first Monday of every alternate month, if the judge so directs, and oftener if the public business requires. In each district where two or more counties are united the judge thereof must fix the term of court in each county in his district, which must be held at the county seat, and there must be at least four terms a year in each county. The judge of such district court must, within ten days after the first day of December of each year, make an order which must designate the times at which the terms of court are to be held in each county in his district during the coming year, beginning with the first day of January following such order, and must cause such order, or a copy thereof, to be filed in the office of the clerk of the district court in each county in his district, and such clerk must cause the same to be published in some newspaper printed in his county for three successive weeks immediately after the filing of such order, the costs of which shall be a county charge, and no change of time of holding the terms of court so fixed in any county must be made during the year; provided, that nothing in this section shall be construed to prevent the calling of a special term of court, with or without a jury, when in the opinion of the presiding judge the same is

necessary. The district judge may adjourn a term of district court in one county to a future day certain, and in the meantime hold court in another county.

History: En. Sec. 38, C. Civ. Proc. 1895; amd. Sec. 1, p. 156, L. 1901; Sec. 6272, Rev. C. 1907; re-en. Sec. 8826, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 73.

References

Cited or applied as section 38, Code of Civil Procedure, before amendment, in *Whitbeck v. Montana Central Ry. Co.*, 21 M 102, 105, 52 P 1098.

8827. Adjournments—terms in districts of more than one county. Adjournments from day to day, or from time to time, are to be construed as recesses in the session or term, and shall not prevent the court from sitting at any time. In districts where two or more counties are united, court may be held, causes tried, with or without a jury, and business transacted in any county from the beginning of the term to the beginning of the next term in the same county, notwithstanding the time or term fixed for holding said district court in another county in the same district, to the same extent and effect, and with like power as if there were no other term of court held or fixed in such other county. The judge of such district may hold court in one county of such district, try causes, with or without a jury, and transact business, while at the same time court may be held, causes tried, with or without a jury, and business transacted in any other county of such district by any other district judge of the state, when requested or assigned thereto as provided in section 8821.

History: Ap. p. Sec. 39, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 184, L. 1907; Sec. 6273, Rev. C. 1907; re-en. Sec. 8827, R. C. M. 1921.

8828. Jurisdiction of two kinds. The jurisdiction of the district court is of two kinds:

1. Original; and,
2. Appellate.

History: En. Sec. 40, C. Civ. Proc. 1895; re-en. Sec. 6274, Rev. C. 1907; re-en. Sec. 8828, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 75.

8829. Original jurisdiction. The district court has original jurisdiction in all cases at law and in equity, including all cases which involve the title or right of possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all cases in which the debt, damage, claim, or demand, exclusive of interest, or the value of the property in controversy, exceeds fifty dollars; and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for; of actions of forcible entry and unlawful detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of actions of divorce, and for annulment of marriage; and of all such special actions and proceedings as are not otherwise provided for. And such courts have the power of naturalization, and to issue papers therefor, in all cases where they are authorized to do so by the laws of the United States. Said courts and judges thereof have power also to issue, hear, and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction, and other original remedial writs, and also all writs of habeas corpus, on petition by, or on behalf of any person held

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174 P.(2d) 570.
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(dissent)

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in actual custody in their respective districts. Injunctions, writs of prohibition, and habeas corpus may be issued and served on legal holidays and non-judicial days.

History: En. Sec. 41, C. Civ. Proc. 1895; re-en. Sec. 6275, Rev. C. 1907; re-en. Sec. 8829, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 76.

Jurisdiction as Probate Court

Though the district court sitting in probate is without power, as a general rule, to determine questions of equitable cognizance, yet where a determination of such questions is a necessary incident to the carrying out of the powers expressly granted to it, it may take jurisdiction. In re Stinger Estate, 61 M 173, 201 P 693.

Held, that the district court sitting in probate is not the probate court of territorial days and therefore not an inferior court, but is a court of record exercising the general jurisdiction granted it by the Constitution adopted in 1889, the limitation placed upon its jurisdiction by statute relative to the exercise of its probate powers not affecting its character as a

court of general jurisdiction. Thelen v. Vogel et al., 86 M 33, 40, 281 P 753.

Jurisdiction as to Naturalization Proceedings

The district courts of Montana possess concurrent jurisdiction with the federal courts (within the limitations prescribed by Act of Congress relating to the subject) to naturalize aliens, and therefore when such power is exercised by them, the proceeding is a judicial and not a political one, and hence the supreme court may, on certiorari, review a judgment rendered in such a proceeding. State ex rel. Weisz v. District Court et al., 61 M 427, 202 P 387.

References

Cited or applied as section 6275, Revised Codes, in In re Riley's Estate, 54 M 17, 19, 165 P 1105; Greenough v. Rannel, 71 M 578, 230 P 1094; Bullard v. Zimmerman et al., 82 M 434, 442, 268 P 512.

8830. Appellate jurisdiction. The district court has appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective districts as may be prescribed by law, and consistent with the constitution.

History: En. Sec. 42, C. Civ. Proc. 1895; re-en. Sec. 6276, Rev. C. 1907; re-en. Sec. 8830, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 77.

Operation and Effect

Where an appeal from a justice's court was never perfected, that court had ex-

clusive jurisdiction of the cause and nothing done by the district court therein could affect the judgment rendered by the justice, and dismissal of the attempted appeal was correct. Greenough v. Rannel, 71 M 578, 230 P 1094.

8831. Process. The process of the district court extends to all parts of the state; provided, that all actions for the recovery of the possession of, quieting the title to, or the enforcement of liens upon real property, must be commenced in the county in which the real property, or any part thereof, affected by such action or actions, is situated.

History: En. Sec. 43, C. Civ. Proc. 1895; re-en. Sec. 6277, Rev. C. 1907; re-en. Sec. 8831, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 78.

Operation and Effect

An action to ascertain, determine and decree the extent and priority to the use of water partakes of the nature of an action to quiet title to real property. Whitecomb v. Murphy, 94 M 562, 566, 23 P 2d 980.

Id. In an action to adjudicate water rights on a main river and its tributaries

the district court of a county in which plaintiff's lands lay and through which the main river flowed had jurisdiction to adjudicate the rights to waters of a tributary flowing entirely within another county, under section 11, Article VIII, Constitution, and this section, and the above rule.

References

Bullard v. Zimmerman et al., 82 M 434, 442, 268 P 512; Heinecke v. Scott et al., 95 M 200, 208, 26 P 2d 167.

8832. Terms and departments of court in districts having more than one judge. In each judicial district which has now or may hereafter have

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more than one judge, as many terms or sessions of court may be held at the same time as there are judges in the district, either elected or appointed to, called into, or assigned to the performance of the duties of holding court therein. The judges elected or appointed to hold office in each judicial district, having more than one judge, may divide the court into departments, prescribe the order of business, and make rules for the government of such court. They must apportion the business of the court among themselves as equally as may be, but in case of their failure to make such apportionment for any cause, the supreme court, upon application of any interested person, shall make an order apportioning such business, and cause the same to be entered upon the minute-book of the district court in each county in such district, and such order shall remain in full force and effect until modified or repealed by the authority making it. The failure or refusal of any district judge to carry out the terms of such order shall constitute a contempt of the supreme court.

History: En. Sec. 44, C. Civ. Proc. 1895; re-en. Sec. 6278, Rev. C. 1907; amd. Sec. 1, Ch. 7, L. 1915; re-en. Sec. 8832, R. C. M. 1921.

Distribution of Business

The distribution of business is personal to the judges, and is not a subject within the purview of court rules. *State ex rel. Little v. District Court*, 49 M 158, 163, 141 P 151.

Id. The law clearly implies that, upon a change in the personnel of the judges, there shall be a redistribution of the business if that is necessary to meet the convenience and choice of the judges.

Id. This section treats of the division of court business and the enactment of court rules as entirely independent matters.

Id. The judges "must" apportion the business as equally as may be.

Id. Where a district court has two judges, and there exists no agreement as to the apportionment of the business of the court

between them or their departments, either one, when in open court, possesses all the power and authority of the district court to hear and determine a case of which such court has jurisdiction.

Jurisdiction of Departments

Where a court has taken cognizance of a cause, it is beyond the power of any other court of concurrent jurisdiction, or of any other department of the same court, to interfere. *State ex rel. Little v. District Court*, 49 M 158, 164, 141 P 151.

Where the district court is divided into departments, the court presided over by each of the judges is the district court and not a departmental court; neither department is a court of concurrent jurisdiction to the other, and in the absence of rules either judge has full authority to proceed in any matter properly before the court. *State v. Great Northern Utilities Co.*, 86 M 442, 445, 284 P 772.

CHAPTER 5

JUSTICE AND POLICE COURTS

- Section 8833. Justices' courts and justices.
 8834. Courts—where held—when open for business.
 8835. Holding court for another justice within county—holding court outside township in criminal case to save expense.
 8836. Territorial extent of civil jurisdiction.
 8837. Terms of office.
 8838. Vacancies.
 8839. Oath and bond of justice of the peace.
 8840. Jurisdiction of justices' courts.
 8841. Concurrent jurisdiction.
 8842. Criminal jurisdiction.
 8843. Police courts.

8833. Justices' courts and justices. There must be at least two justices' courts in each of the organized townships of the state, for which two justices of the peace must be elected by the qualified electors of the township at the general state election next preceding the expiration of the term of office of his predecessor.

History: En. Sec. 60, C. Civ. Proc. 1895; re-en. Sec. 6279, Rev. C. 1907; re-en. Sec. 8833, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 85.

References

Cited or applied as section 60, Code of Civil Procedure, in *Shea v. Regan*, 29 M 308, 316, 74 P 737.

8834. Courts—where held—when open for business. A justice's court may be held at any place selected by the justice holding the same, in the township for which he is elected or appointed; and such court is always open for the transaction of business, except on legal holidays and non-judicial days; provided, that said justice may hold court beyond the limits of his township as provided in section 8835 of this code.

History: En. Sec. 61, C. Civ. Proc. 1895; re-en. Sec. 6280, Rev. C. 1907; re-en. Sec. 8834, R. C. M. 1921; amd. Sec. 1, Ch. 92, L. 1933. Cal. C. Civ. Proc. Sec. 104.

8835. Holding court for another justice within county—holding court outside township in criminal case to save expense. A justice of the peace of any township may hold the court of any other justice of the peace of the same county at his request, and while so acting is vested with the power of the justice for whom he so holds court, in which case the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice for whom he so holds the court; provided, further, that whenever it shall appear to said justice that, in any criminal case because of the distance and number of witnesses involved, it would effect a substantial saving to hold court in a township beyond the limits of his township, he shall issue his certificate of necessity therefor and notify the justice or justices of said township wherein said court is to be held, and shall enter said order on his docket. In such an event the said justice shall have full and complete jurisdiction to hold said court in said designated township. The actual traveling expenses of said justice in holding court outside the confines of his township shall be a proper charge against the county.

History: En. Sec. 62, C. Civ. Proc. 1895; re-en. Sec. 6281, Rev. C. 1907; re-en. Sec. 8835, R. C. M. 1921; amd. Sec. 2, Ch. 92, L. 1933. Cal. C. Civ. Proc. Sec. 105.

8836. Territorial extent of civil jurisdiction. The civil jurisdiction of justice's courts extends to the limits of the county in which they are held, and mesne and final process of any justice court in a county may be issued to and served in any part of the county.

History: Ap. p. Sec. 550, p. 151, Bannack Stat.; re-en. Sec. 656, p. 167, Cod. Stat. 1871; re-en. Sec. 716, 1st Div. Rev. Stat. 1879; re-en. Sec. 736, 1st Div. Comp. Stat. 1887; amd. Sec. 63, C. Civ. Proc. 1895; re-en. Sec. 6282, Rev. C. 1907; re-en. Sec. 8836, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 106.

References

Cited or applied as section 6282, Revised Codes, in *Pierson v. Daly*, 49 M 478, 482, 143 P 957.

8837. Terms of office. The term of office of justices of peace is two years from the first Monday in January next succeeding their election.

History: En. Sec. 64, C. Civ. Proc. 1895; re-en. Sec. 6283, Rev. C. 1907; re-en. Sec. 8837, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 110.

8838. Vacancies. If a vacancy occurs in the office of a justice of the peace, the county commissioners of the county must appoint an eligible person to hold the office for the remainder of the unexpired term.

History: En. Sec. 65, C. Civ. Proc. 1895; re-en. Sec. 6284, Rev. C. 1907; re-en. Sec. 8838, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 111.

8839. Oath and bond of justice of the peace. Every justice of the peace elected or appointed, after he has received his certificate of election or appointment, shall, before entering upon the duties of his office, be required to execute an undertaking to the state of Montana in the penal sum of two thousand dollars, with at least two sufficient sureties, who shall justify according to law, and which said undertaking shall be approved by the county clerk, and, in addition, such justice shall take the constitutional oath of office, which oath or affirmation shall be endorsed upon his official undertaking, which shall be filed with the county clerk.

History: En. Sec. 1, p. 99, L. 1901; re-en. Sec. 6285, Rev. C. 1907; amd. Sec. 1, Ch. 35, L. 1921; re-en. Sec. 8839, R. C. M. 1921.

8840. Jurisdiction of justices' courts. The justice courts have jurisdiction:

1. In actions arising on contract for the recovery of money only, if the sum claimed does not exceed three hundred dollars;

2. In actions for damages not exceeding three hundred dollars for taking, detaining, or injuring personal property, or for injury to real property where no issue is raised by the verified answer of defendant involving the title to or possession of the same; in actions for damages not exceeding three hundred dollars for injury to the person; provided, that in actions for false imprisonment, libel, slander, criminal conversation, seduction, malicious prosecution, bastardy, abduction, and alienation of affections, the justice of the peace shall not have jurisdiction;

3. In actions to recover the possession of personal property, if the value of such property does not exceed three hundred dollars;

4. In actions for a fine, penalty, or forfeiture, not exceeding three hundred dollars, given by statute, or the ordinance of an incorporated city or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

5. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not exceed three hundred dollars, though the penalty may exceed that sum;

6. To take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed does not exceed three hundred dollars.

History: Ap. p. Sec. 546, p. 150, Bannack Stat.; amd. Sec. 655, p. 167, Cod. Stat. 1871; re-en. Sec. 715, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 46, L. 1883; re-en. Sec. 735, 1st Div. Comp. Stat. 1887; amd. Sec. 66, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 76, L. 1907; Sec. 6286, Rev. C. 1907; re-en. Sec. 8840, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 112.

Actions Arising on Contract

The first subdivision of this section does not clothe the justice of the peace courts with jurisdiction to entertain an action brought against a sheriff for damages for non-performance of an official duty and to recover a penalty imposed for its non-performance, such an action not being one arising on contract. *Oppenheimer v. Regan*, 32 M 110, 115, 79 P 695.

Jurisdiction Based on Amount Demanded

The jurisdiction of a justice of the peace, in an action for a fine, penalty, or forfeiture, is not dependent upon the amount that the plaintiff might recover, but upon the amount that he demands. *Reynolds v. Smith*, 48 M 149, 151, 135 P 1190.

No Equity Jurisdiction

A justice's court has no equity jurisdiction, and the district court on appeal has the same extent of jurisdiction as the justice's court has. *Mettler v. Adamson*, 38 M 198, 203, 99 P 441.

Scope of Powers

Inasmuch as this section grants powers under limitations prescribed by the constitution—which are mandatory and prohibitory—it must be construed as not granting others than those which come clearly within its terms, or which are necessarily implied thereby. *Oppenheimer v. Regan*, 32 M 110, 117, 79 P 695.

When Justice Court Cannot Be Deprived of Jurisdiction by Interposing Equity

A justice of the peace is not deprived of jurisdiction because the plaintiff frames

his case on the theory of equitable relief, if it appears from his pleading that he is entitled to other relief. *Anderson v. Red Metal Min. Co.*, 36 M 312, 319, 93 P 44.

Where an action in a justice's court was, at its commencement, strictly a legal action, and different defendants have been properly substituted, they cannot deprive the justice's court of jurisdiction by interposing an equitable defense, such as fraud, which it cannot entertain. *Mettler v. Adamson*, 38 M 198, 203, 99 P 441.

Id. In an action before a justice of the peace, on account for labor performed, a proper substitution of parties defendant does not have the effect of converting the cause from a legal into an equitable action, and of depriving the justice of jurisdiction to proceed.

Id. The constitutional prohibition, that justices' courts shall have no equity jurisdiction, extends to those matters only of which a court of equity has exclusive cognizance; interpleader by substitution of parties is permitted in courts proceeding according to the course of the common law, and this permission extends to justices' courts.

References

Cited or applied as section 66, Code of Civil Procedure, before amendment, in *State ex rel. Matthews v. Taylor*, 33 M 212, 215, 83 P 484; *Walter v. Cox*, 36 M 20, 24, 91 P 1063; *McKenzie v. Doran*, 31 M 593, 596, 104 P 677.

8841. Concurrent jurisdiction. The justices' courts have concurrent jurisdiction with the district courts within their respective townships in actions of forcible entry and unlawful detainer.

History: En. Sec. 67, C. Civ. Proc. 1895; re-en. Sec. 6287, Rev. C. 1907; re-en. Sec. 8841, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 113.

8842. Criminal jurisdiction. The justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

1. Petit larceny.
2. Assault in the third degree, as defined in section 10978 of the Penal Code.
3. Breaches of peace, riots, routs, affrays, committing a wilful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

History: En. Sec. 68, C. Civ. Proc. 1895; re-en. Sec. 6288, Rev. C. 1907; re-en. Sec. 8842, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 115.

Extent of Jurisdiction

A justice of the peace elected in one township was held to have jurisdiction of

an offense against local option committed in another township in the same county. *State v. O'Brien*, 35 M 482, 494, 496, 90 P 514.

The offense of living together in open and notorious cohabitation, in a state of fornication, is a misdemeanor, and falls within the jurisdiction of a justice of the

peace. *Hosoda v. Neville*, 45 M 310, 312, 123 P 20.

Justices of the peace have exclusive jurisdiction of petit larceny. In *re Jones*, 46 M 122, 125, 126 P 929.

Scope of Act

The sections of the statute enumerating the classes of cases of which justice of the

peace may take cognizance confine them strictly to the constitutional limitations. *Shea v. Regan*, 29 M 308, 316, 74 P 737.

References

Cited or applied as section 68, Code of Civil Procedure, in *State ex rel. Jackson v. Kennie*, 24 M 45, 56, 60 P 589.

8843. Police courts. Police courts are established in incorporated cities and towns, and their organization, jurisdiction, and powers are provided for in the Political Code.

History: En. Sec. 80, C. Civ. Proc. 1895; re-en. Sec. 6289, Rev. C. 1907; re-en. Sec. 8843, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 121.

References

Shampagne v. Keplinger, 78 M 114, 119, 252 P 803.

CHAPTER 6

GENERAL PROVISIONS RESPECTING THE POWERS, PROCEEDINGS, AND HOLDING OF COURTS OF JUSTICE

- Section 8844. Powers respecting conduct of business.
 8845. Courts of record may make rules.
 8846. When rules take effect.
 8847. Sittings of court to be public.
 8848. Sittings of court—when private.
 8849. Days on which courts, etc., may be held.
 8850. Non-judicial days.
 8851. Adjournments from non-judicial days.
 8852. Adjournment for absence of judge.
 8853. Adjournment till next regular session.
 8854. Change in certain cases of place of holding court.
 8855. Parties to appear at place appointed.
 8856. When sheriff to provide courtrooms, etc.

8844. Powers respecting conduct of business. Every court has power:

1. To preserve and enforce order in its immediate presence;
2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;
3. To provide for the orderly conduct of proceedings before it or its officers;
4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;
5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every other matter appertaining thereto;
6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code;
7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;
8. To amend and control its process and orders so as to make them conformable to law and justice.

History: Ap. p. Sec. 452, p. 134, Ban-nack Stat.; re-en. Sec. 609, p. 159, Cod. Stat. 1871; re-en. Sec. 529, p. 178, L. 1877; re-en. Sec. 529, 1st Div. Rev. Stat. 1879; re-en. Sec. 546, 1st Div. Comp. Stat. 1887; amd. Sec. 110, C. Civ. Proc. 1895; re-en. Sec. 6292, Rev. C. 1907; re-en. Sec. 8844, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 128.

Operation and Effect

The district court has full power to amend a writ of attachment by virtue of this section. *Wilson v. Barbour*, 21 M 176, 183, 53 P 315.

This section adds nothing to the powers already possessed by courts of general jurisdiction, for it is merely declaratory of the common law. *May v. Northern Pacific Ry. Co.*, 32 M 522, 531, 81 P 328.

8845. Courts of record may make rules. Every court of record may make rules, not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules must not impose any tax or charge upon any legal proceedings, or give any allowance to any officers for services. In case of the failure or refusal of any district court to adopt and promulgate rules of court, the supreme court may, upon the application of any interested person, adopt and promulgate rules for the government of such court, and when adopted and promulgated such rules shall remain in full force and effect until modified or repealed by the authority adopting them. Any judge who shall fail or refuse to comply with and carry out in good faith the rules of court adopted by the supreme court, as herein provided for, shall be guilty of a contempt of the supreme court.

History: En. Sec. 111, C. Civ. Proc. 1895; re-en. Sec. 6293, Rev. C. 1907; amd. Sec. 1, Ch. 6, L. 1915; re-en. Sec. 8845, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 129.

Operation and Effect

Rules of court, when once adopted, under the limitations prescribed by law, become binding upon the court and litigants, for they have the force of statutes within the limitations of their application, and should be enforced, except when the court, for good cause shown, in a particular case, may relax them in order that justice may be done. *Martin v. De Loge*, 15 M 343, 344, 39 P 312; *State ex rel. King v. District Court*, 25 M 202, 210, 64 P 352; *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 324, 70 P 1114; *State ex rel. Nissler v. Donlan*, 32 M 256, 262, 80 P 244; *State ex rel. Connors v. Foster*, 36 M 278, 281, 92 P 761; *State ex rel. Little v. District Court*, 49 M 158, 161, 141 P 151.

Rules of court are binding upon district courts and their officers in so far as such courts and officers have to do with appellate procedure. *Montana etc. Co. v. Boston etc. Min. Co.*, 33 M 400, 405, 84 P 706; *State ex rel. Connors v. Foster*, 36 M 278, 281, 92 P 761.

A rule of the district court that agreements between attorneys, relating to causes pending, will be disregarded by the court, unless made in open court and entered in the minutes or reduced to

writing, subscribed by the party, or his attorney, against whom they are urged, has no application to an executed oral agreement or stipulation admittedly entered into by an attorney. *Bush v. Baker*, 46 M 535, 546, 129 P 550.

Id. The requirement of a district court rule that where, after perfection of an appeal from a justice's court, appellant fails to file the transcript and papers in the district court within ten days thereafter, such appeal shall be subject to dismissal, is not jurisdictional.

A rule of court, assigning all of the criminal cases to one of the judges of a district court, will not preclude another judge of the same court from assuming jurisdiction of a criminal case. *State ex rel. Little v. District Court*, 49 M 158, 161, 141 P 151.

Id. It seems that each judge of a district court which has more than one judge has authority to make rules of court for the control of the business before the department over which he presides, provided they are confined to legitimate subjects for government by court rules.

Id. Court rules adopted by a judge are not binding on his successor.

References

Cited or applied as section 111, Code of Civil Procedure, before amendment, in *State ex rel. Clark v. District Court*, 30 M 442, 444, 76 P 1006; *Rowan v. Gazette Printing Co. et al.*, 69 M 170, 176, 220 P 1104.

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8846. When rules take effect. Rules adopted by any court take effect thirty days after their publication.

History: En. Sec. 112, C. Civ. Proc. 1895; re-en. Sec. 6294, Rev. C. 1907; re-en. Sec. 8846, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 130.

References

Cited or applied as section 112, Code of Civil Procedure, in *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 324, 70 P 1114.

8847. Sittings of court to be public. The sittings of every court of justice must be public, except as provided in the next section.

History: En. Sec. 450, p. 134, Bannack Stat.; re-en. Sec. 607, p. 159, Cod. Stat. 1871; re-en. Sec. 527, p. 178, L. 1877; re-en. Sec. 527, 1st Div. Rev. Stat. 1879; re-en. Sec. 544, 1st Div. Comp. Stat. 1887; re-en. Sec. 100, C. Civ. Proc. 1895; re-en. Sec. 6290, Rev. C. 1907; re-en. Sec. 8847, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 124.

Operation and Effect

The power does not exist anywhere to exclude from the courtroom anyone sui juris who comes into the presence of the court when there is accommodation for him, and who conducts himself in a becoming manner, except in the civil actions enumerated in the following section. *State v. Keeler*, 52 M 205, 217, 156 P 1080.

8848. Sittings of court—when private. In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and exclude all persons except the officers of the court, the parties, their witnesses, and counsel; provided, that in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all witnesses in the cause.

History: Ap. p. Sec. 451, p. 134, Bannack Stat.; re-en. Sec. 608, p. 159, Cod. Stat. 1871; re-en. Sec. 528, p. 178, L. 1877; re-en. Sec. 528, 1st Div. Rev. Stat. 1879; re-en. Sec. 545, 1st Div. Comp. Stat. 1887; amd. Sec. 101, C. Civ. Proc. 1895; re-en.

Sec. 6291, Rev. C. 1907; re-en. Sec. 8848, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 125.

References

Cited or applied as section 101, Code of Civil Procedure, in *State v. Keeler*, 52 M 205, 217, 156 P 1080.

8849. Days on which courts, etc., may be held. Courts of justice may be held and judicial business transacted on any day, except as provided in the next section.

History: En. Sec. 466, p. 136, Bannack Stat.; re-en. Sec. 588, p. 135, Cod. Stat. 1871; re-en. Sec. 513, p. 174, L. 1877; re-en. Sec. 513, 1st Div. Rev. Stat. 1879; re-en.

Sec. 530, 1st Div. Comp. Stat. 1887; re-en. Sec. 120, C. Civ. Proc. 1895; re-en. Sec. 6295, Rev. C. 1907; re-en. Sec. 8849, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 133.

8850. Non-judicial days. No court must be open, nor must any judicial business be transacted, on Sunday, on the first day of January, on the twenty-second day of February, on the thirtieth day of May, on the fourth day of July, on the first Monday of September, on the twenty-fifth day of December, on a day on which an election is held throughout the state, on a day appointed by the president of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict.
2. To receive a verdict, or discharge a jury.

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; but injunctions, writs of prohibition, and habeas corpus may be issued and served on any day.

History: Ap. p. Sec. 467, p. 136, *Ban-nack Stat.*; re-en. Sec. 589, p. 155, *Cod. Stat.* 1871; re-en. Sec. 514, p. 174, *L.* 1877; re-en. Sec. 514, 1st Div. Rev. Stat. 1879; re-en. Sec. 531, 1st Div. Comp. Stat. 1887; amd. Sec. 121, *C. Civ. Proc.* 1895; re-en. Sec. 6296, Rev. C. 1907; re-en. Sec. 8850, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 134.

Operation and Effect

Service of summons on Sunday is not a nullity, but a mere irregularity, and a judgment based upon it is not void, but voidable. *Burke v. Interstate Sav. & Loan Assn.*, 25 M 315, 327, 64 P 879, 87 Am. St.

Rep. 416; *Hauswirth v. Sullivan*, 6 M 203, 9 P 798, overruled.

Every holiday, including Sunday, is qualifiedly a non-judicial day; but the prohibition of the statute extends only to strictly judicial acts, and some of them are excepted. *State ex rel. Hay v. Alderson*, 49 M 387, 410, 142 P 210.

Id. The prohibition of this section extends only to strictly judicial acts, and some of them are excepted; it does not prohibit the doing of a ministerial act, such as the publishing of an amendment to the state constitution.

8851. Adjournments from non-judicial days. If any day mentioned in the last section happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it must be considered appointed for or adjourned to the next day.

History: Ap. p. Sec. 467, p. 136, *Ban-nack Stat.*; amd. Sec. 589, p. 155, *Cod. Stat.* 1871; re-en. Sec. 514, p. 174, *L.* 1877; re-en. Sec. 514, 5th Div. Rev. Stat. 1879;

re-en. Sec. 531, 5th Div. Comp. Stat. 1887; amd. Sec. 122, *C. Civ. Proc.* 1895; re-en. Sec. 6297, Rev. C. 1907; re-en. Sec. 8851, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 135.

8852. Adjournment for absence of judge. If no judge attend on the day appointed for the holding or sitting of a court, or on a day to which it may have been adjourned, before noon, the sheriff or clerk may adjourn the same until the next day, at ten o'clock a. m., and if no judge attend on that day, before noon, the sheriff or clerk may adjourn the same until the following day, at the same hour, and so on, from day to day for six days, unless the judge, by written order or telegram, directs it to be adjourned to some day certain, fixed in said order or telegram, in which case it must be so adjourned.

History: Ap. p. Sec. 589, p. 515, *Cod. Stat.* 1871; re-en. Sec. 514, p. 174, *L.* 1877; re-en. Sec. 514, 5th Div. Rev. Stat. 1879; re-en. Sec. 531, 5th Div. Comp. Stat. 1887;

amd. Sec. 130, *C. Civ. Proc.* 1895; re-en. Sec. 6298, Rev. C. 1907; re-en. Sec. 8852, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 139.

8853. Adjournment till next regular session. If no judge attend for six days, and no written order or telegram be made or sent, as provided in the last section, the sheriff or clerk must adjourn the term until the time appointed for the holding of the next regular term.

History: Ap. p. Sec. 589, p. 515, *Cod. Stat.* 1871; re-en. Sec. 514, p. 174, *L.* 1877; re-en. Sec. 514, 5th Div. Rev. Stat. 1879; re-en. Sec. 531, 5th Div. Comp. Stat. 1887;

amd. Sec. 131, *C. Civ. Proc.* 1895; re-en. Sec. 6299, Rev. C. 1907; re-en. Sec. 8853, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 140.

8854. Change in certain cases of place of holding court. The judge of the district court authorized to hold or preside at a court appointed to be held at a particular place, may, by an order filed with the clerk, and published as he may prescribe, direct that the court be held or continued at any other place in the county than that appointed, when war, insurrection, pestilence, or other public calamity, or the danger thereof, or the

destruction or danger of the public building appointed for the holding the court may render it necessary; and may, in the same manner, revoke the order, and, in his discretion, appoint another place in the same county for holding the court.

History: En. Sec. 140, C. Civ. Proc. 1895; re-en. Sec. 6300, Rev. C. 1907; re-en. Sec. 8854, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 142.

8855. Parties to appear at place appointed. When the court is held at the place appointed, as provided in the last section, every person held to appear at the court must appear at the place so appointed.

History: En. Sec. 141, C. Civ. Proc. 1895; re-en. Sec. 6301, Rev. C. 1907; re-en. Sec. 8855, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 143.

8856. When sheriff to provide courtrooms, etc. If suitable rooms for holding the district court and chambers of the judge of said court be not provided in any county, by the board of county commissioners thereof, together with the attendants, furniture, fuel, lights, and stationery, sufficient for the transaction of business, the court, or the judge thereof, may direct the sheriff of the county to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the judge to be correct, are a charge against the county treasury, and must be paid out of the general fund thereof.

History: En. Sec. 142, C. Civ. Proc. 1895; re-en. Sec. 6302, Rev. C. 1907; re-en. Sec. 8856, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 144.

Operation and Effect

It is only after the sheriff has refused to perform the duties of court attendant, either in person or by deputy, and the board of county commissioners has declined to furnish the district court with assistance, that a district judge may appoint his own attendant, fix his compensation, and compel payment thereof out of

the public funds. *State ex rel. Hillis v. Sullivan*, 48 M 320, 329, 137 P 392; *State ex rel. Schneider v. Cunningham*, 39 M 165, 101 P 962, distinguished.

Sections 4465, 4774, 4790, and this section of the code cannot be effectively assailed as invasions of the inherent power of the district court, because the power of the court, as organized by the constitution, did not include the right to appoint attendants without prior recourse to the sheriff and to the county. *State ex rel. Hillis v. Sullivan*, 48 M 320, 329, 137 P 392.

CHAPTER 7

SEALS OF COURTS

- Section 8857. What courts have seals.
 8858. Seal of supreme court.
 8859. Seals of district courts.
 8860. Clerk of court to keep seal.
 8861. Seals of courts—to what documents affixed.

8857. What courts have seals. Each of the following courts shall have a seal:

1. The supreme court.
2. The district courts.

History: En. Sec. 462, p. 135, Bannack Stat.; re-en. Sec. 585, p. 155, Cod. Stat. 1871; re-en. Sec. 510, p. 174, L. 1877; re-en. Sec. 510, 1st Div. Rev. Stat. 1879; re-en. Sec. 527, 1st Div. Comp. Stat. 1887; amd. Sec. 150, C. Civ. Proc. 1895; re-en. Sec. 6303, Rev. C. 1907; re-en. Sec. 8857, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 147.

Operation and Effect

A writ of mandate to compel the clerk to issue an execution with the seal, bearing the former name of a county, is the proper remedy, where the legislature, by a void act, has attempted to change the name of a county. *State ex rel. Sackett v. Thomas*, 25 M 226, 235, 64 P 503.

8858. Seal of supreme court. The seal of the supreme court is circular in form, and not less than one and three-fourth inches in diameter, on which is engraved the words, "Supreme Court, State of Montana," with the word "Seal" in the center thereof, which seal must be procured by the clerk of the supreme court at the expense of the state, and an impression thereof, certified to by the clerk, must be filed with the secretary of state.

History: En. Sec. 1, p. 206, L. 1891; re-en. Sec. 151, C. Civ. Proc. 1895; re-en. Sec. 6304, Rev. C. 1907; re-en. Sec. 8858, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 148.

8859. Seals of district courts. The seals of the district courts are circular, not less than one and three-fourths inches in diameter, and having in the center the word "Seal," and the following inscription surrounding the same: ".....District Court,.....County, Montana," inserting the number of the district and the name of the county, which seal must be procured by the clerk of the court at the expense of the county, and an impression thereof, certified by the said clerk, filed with the secretary of state.

History: En. Sec. 2, p. 206, L. 1891; re-en. Sec. 152, C. Civ. Proc. 1895; re-en. Sec. 6305, Rev. C. 1907; re-en. Sec. 8859, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 149.

References

Cited or applied as section 152, Code of Civil Procedure, in *State ex rel. Sackett v. Thomas*, 25 M 226, 235, 64 P 503.

8860. Clerk of court to keep seal. The clerk of the court must keep the seal thereof.

History: En. Sec. 153, C. Civ. Proc. 1895; re-en. Sec. 6306, Rev. C. 1907; re-en. Sec. 8860, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 152.

8861. Seals of courts—to what documents affixed. The seal of a court need not be affixed to any proceeding therein or document, except:

1. To a writ;
2. To the certificate of probate of a will or of the appointment of an executor, administrator, or guardian;
3. To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk.

History: Ap. p. Sec. 464, p. 135, *Bannack Stat.*; repealed Sec. 751, p. 187, *Cod. Stat.* 1871; en. Sec. 154, C. Civ. Proc. 1895; re-en. Sec. 6307, Rev. C. 1907; re-en. Sec. 8861, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 153.

NOTE.—For history of earlier acts, see *State ex rel. Hillis v. Sullivan*, 48 M 320, 137 P 392.

CHAPTER 8

QUALIFICATIONS AND RESIDENCE OF JUDICIAL OFFICERS

- Section 8862.** Qualifications of justices of supreme court.
8863. Qualifications of district judges.
8864. Residence of district judges.
8865. Residence and qualifications of justices of the peace.

8862. Qualifications of justices of supreme court. No person shall be eligible to the office of justice of the supreme court unless he shall have been admitted to practice law in the supreme court of the territory or

state of Montana, be at least thirty years of age, and a citizen of the United States, nor unless he shall have resided in the state at least two years next preceding his election.

History: En. Sec. 160, C. Civ. Proc. 1895; re-en. Sec. 6308, Rev. C. 1907; re-en. Sec. 8862, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 156.

8863. Qualifications of district judges. No person shall be eligible to the office of judge of the district court unless he be at least twenty-five years of age, and a citizen of the United States, and shall have been admitted to practice law in the supreme court of the territory or state of Montana, nor unless he shall have resided therein at least one year next preceding his election. He need not be a resident of the district for which he is elected at the time of his election, but after his election he shall reside in the district for which he is elected during his term of office.

History: En. Sec. 161, C. Civ. Proc. 1895; re-en. Sec. 6309, Rev. C. 1907; re-en. Sec. 8863, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 157.

8864. Residence of district judges. Each district judge must reside at some county seat in his district.

History: En. Sec. 162, C. Civ. Proc. 1895; re-en. Sec. 6310, Rev. C. 1907; re-en. Sec. 8864, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 158.

8865. Residence and qualifications of justices of the peace. Every justice of the peace must reside in the township in which his court is held, and no person is eligible to the office of justice of the peace unless he shall have been a citizen of the United States and a resident of the county, in which he is to serve, for one year next preceding his election or appointment.

History: En. Sec. 163, C. Civ. Proc. 1895; re-en. Sec. 6311, Rev. C. 1907; re-en. Sec. 8865, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 159.

CHAPTER 9

POWERS OF JUDGE AT CHAMBERS

Section 8866. Habeas corpus—issuance and return of writ—powers of justices individually—certiorari in contempt proceedings.

8867. Powers of district court at chambers.

8867.1. Jurisdiction of district judges co-extensive with the state.

8866. Habeas corpus—issuance and return of writ—powers of justices individually—certiorari in contempt proceedings. Each of the justices of the supreme court shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the supreme court, or before any district court of the state, or any judge thereof; and such writs may be heard and determined by the justice or court, or judge, before whom they are made returnable. Each of the justices of the supreme court may also issue and hear and determine writs of certiorari in proceedings for contempt in the district court.

History: En. Sec. 170, C. Civ. Proc. 1895; re-en. Sec. 6313, Rev. C. 1907; re-en. Sec. 8866, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 165.

Operation and Effect

An application for a writ of habeas corpus will be dismissed if it appears that

the petitioner is not "held in actual custody." In re O'Brien, 29 M 530, 548, 75 P 196.

References

Cited or applied as section 170, Code of Civil Procedure, in Franzman v. Davies, 32 M 251, 253, 80 P 251.

8867. Powers of district court at chambers. The judge of the district court may, at chambers, issue, hear, and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction, and other original and remedial writs, and also all writs of habeas corpus on petition by, or on behalf of, any person held in actual custody in his district, and grant all orders and writs which are usually granted in the first instance upon an ex parte application, and, at chambers, hear and dispose of such orders and writs; and may also, at chambers, hear and determine any matter necessary in the exercise of his powers in matters of probate, or in any action or proceeding provided by law, and any action in which all party defendants have made default, and may issue any process, make any order, and make and enter any default judgment. When default judgments are entered in default cases, as herein provided, the judge shall forward to the clerk of the court of the county in which the action is pending the judgment so made, together with a minute of the proceedings had thereon, which shall be by said clerk incorporated into the minutes of the said court. If a jury is necessary, the judge may open court and obtain a jury as in other cases.

History: Ap. p. Sec. 477, p. 138, *Bannack Stat.*; amd. Sec. 624, p. 161, *Cod. Stat.* 1871; re-en. Sec. 684, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 704, 1st Div. *Comp. Stat.* 1887; amd. Sec. 171, *C. Civ. Proc.* 1895; re-en. Sec. 6314, *Rev. C.* 1907; re-en. Sec. 8867, *R. C. M.* 1921; amd. Sec. 1, *Ch.* 79, *L.* 1931. *Cal. C. Civ. Proc. Sec.* 166.

Operation and Effect

Where there has been disobedience of an order made at a term of court, the judge at chambers in vacation has power to punish the same as a contempt. *State ex rel. Northern Pac. Ry. Co. v. Loud*, 24 M 428, 431, 62 P 497.

The power of a judge at chambers to determine any matter left pending in the district into which he has been called

ceases when he has returned to his own district. *State ex rel. Mannix v. District Court*, 51 M 310, 318, 152 P 753.

When a district judge was invited to another district to hear and determine an action to quiet title, but at chambers in his own county, sustained a motion for judgment on the pleadings, the judgment so rendered was made without jurisdiction. *Eustance v. Francis*, 52 M 295, 298, 157 P 573.

See section 8867.1.

References

Cited or applied as section 171, *Code of Civil Procedure*, in *Farleigh v. Kelly*, 24 M 369, 372, 62 P 495, 685; *State ex rel. Grissom v. Justice Court*, 31 M 258, 262, 78 P 498.

8867.1. Jurisdiction of district judges co-extensive with the state. The jurisdiction of the judges of the district courts of the state of Montana, in rendering and signing judgments and making findings and rendering decrees, making orders to show cause and all ex parte orders, in chambers, shall be co-extensive with the boundaries of the state of Montana, as to all matters presented to or heard by them, and of which they have jurisdiction, and such judgments, findings, decrees and orders, when so rendered, made or signed, shall have the same force and effect as to matters under their jurisdiction as if done in open court, in the county in which the action, proceeding or matter is pending or was heard.

History: En. Sec. 1, *Ch.* 53, *L.* 1923.

Quaere

May a district judge under the provisions of this section, declaring the jurisdiction of district judges in certain judicial matters co-extensive with the state, settle

a bill of exceptions outside of the county in which the cause was tried? *Hale et al. v. Belgrade Co., Ltd., et al.*, 75 M 99, 104, 242 P 425.

References

State v. Dale Rosensteel, 94 M 609.

CHAPTER 10

DISQUALIFICATIONS OF JUDICIAL OFFICERS

Section 8868. Cases in which judge may be disqualified—calling in another judge.

8869. Certain judges not to practice law.

8870. No judicial officer to have partner practicing law.

8871. Judges not to act in certain cases after term has expired.

8868. Cases in which judge may be disqualified—calling in another judge. Any justice, judge, or justice of the peace must not sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;

2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;

3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment, order, or decision appealed from;

4. When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. Such affidavit may be made by any party to an action, motion, or proceeding, personally, or by his attorney or agent, and shall be filed with the clerk of the district court in which the same may be pending at least five days before the day appointed or fixed for the hearing or trial of any such action, motion, or proceeding (providing such party shall have had notice of the hearing of such action, motion, or proceeding for at least the period of five days and in case he shall not have had notice for such length of time, he shall file such affidavit immediately upon receiving such notice). Upon the filing of the affidavit, the judge as to whom said disqualification is averred shall be without authority to act further in the action, motion, or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. No more than two judges can be disqualified for bias or prejudice, in said action or proceeding, at the instance of the plaintiff, and no more than two at the instance of the defendant, in said action or proceeding, and this limitation shall apply however many parties or persons in interest may be plaintiffs or defendants in such action or proceeding. If there be more than one judge in any judicial district in which said affidavit is made and filed, upon the first disqualification of a judge in the cause, another judge, residing in the judicial district wherein the affidavit is made and filed, must be called in to preside in such action, motion, or proceeding; and upon the second or any subsequent disqualification of a judge in the cause, a district judge of another judicial district of the state must be called in to preside in such action, motion, or proceeding, or the action, motion, or proceeding transferred to a district judge of another judicial district of the state; when another judge has assumed jurisdiction of an

action, motion, or proceeding, the clerk of the district court in which the same was pending, shall at once notify the parties or their attorneys of record in the same, either personally or by registered mail, of the name of the judge called in, or to whom such action, motion, or proceeding was transferred. Such second or subsequent affidavit of disqualification shall be filed with the clerk of the district court in which such action, motion or proceeding may be pending within three days after the party or his attorney of record, filing such affidavit, has received notice as to the judge assuming jurisdiction of such action, motion, or proceeding.

History: Ap. p. Sec. 453, p. 134, *Ban-nack Stat.*; re-en. Sec. 610, p. 159, *Cod. Stat.* 1871; re-en. Sec. 530, p. 179, *L.* 1877; re-en. Sec. 530, 1st Div. Rev. Stat. 1879; re-en. Sec. 547, 1st Div. Comp. Stat. 1887; amd. Sec. 180, *C. Civ. Proc.* 1895; amd. Ch. 3, 2d Ex. L. 1903; re-en. Sec. 6315, *Rev. C.* 1907; amd. Sec. 1, Ch. 114, *L.* 1909; re-en. Sec. 8868, *R. C. M.* 1921; amd. Sec. 1, Ch. 93, *L.* 1927. *Cal. C. Civ. Proc.* Sec. 170.

Applicable to Probate Proceedings

The provisions of this section are applicable to probate proceedings. *State ex rel. Nissler v. Donlan*, 256, 263, 80 P 244. See *State ex rel. Carleton v. District Court*, 33 M 138, 141, 82 P 789; *State ex rel. Goodman v. District Court*, 46 M 492, 495, 128 P 913.

This section applies to all civil actions and special proceedings of a civil nature, including probate proceedings; a judge who files an order of distribution may be disqualified by the statutory affidavit, even after such filing. *State ex rel. Goodman v. District Court*, 46 M 492, 495, 128 P 913.

Constitutionality

This section, prior to the amendment thereof, was held to be constitutional. *State ex rel. Anaconda C. M. Co. v. Clancy*, 30 M 529, 77 P 312; *State ex rel. Durand v. District Court*, 30 M 547, 549, 77 P 318.

Construction of This Statute

This section and section 9098 are companion measures, and are to be construed together. *State ex rel. Lohman v. District Court*, 49 M 247, 251, 141 P 659; *State ex rel. Sell v. District Court*, 52 M 457, 459, 158 P 1018; *State ex rel. Wooster v. District Court*, 58 M 50, 52, 190 P 133.

Extent of Disqualification Where Judge Has Been Attorney for a Party

The disqualification of a judge to act as such in any case where he has been attorney for either party does not extend to a formal act, such as ordering the issuance of an open venire for a jury to try such case where the regular panel has been discharged. *Littrell v. Wilcox*, 11 M 77, 80, 27 P 394.

A judge who had been attorney for an administratrix is not disqualified to try a proceeding brought by certain creditors of the estate to remove her as such administratrix. Nor does the mere fact that he has an allowed claim against the estate disqualify him from trying such proceeding. *State ex rel. McCormick v. Woody*, 14 M 455, 457, 36 P 1043.

Not Applicable to Contempt Proceedings

This section held not to apply to contempt proceedings. *State ex rel. Boston & M. Co. v. Judges*, 30 M 193, 196, 76 P 10; *State ex rel. Durand v. District Court*, 30 M 547, 549, 77 P 318; *State ex rel. Nissler v. Donlan*, 32 M 256, 265, 80 P 244; *State ex rel. Carleton v. District Court*, 33 M 138, 141, 82 P 789; *Brindjong v. Brindjong*, 96 M 481, 484 et seq., 31 P 2d 725.

Notice of Affidavit of Disqualification Need Not Be Given to Adverse Party

Notice of the filing of an affidavit disqualifying a judge need not be given to the adverse party. *State ex rel. Jenkins v. District Court*, 32 M 595, 597, 81 P 351.

It is not necessary for the plaintiff, when he files a disqualifying affidavit to secure a change of venue, to give notice to his adversary. *State ex rel. Lohman v. District Court*, 49 M 247, 249, 141 P 659.

Power of Judge Called In From Another District

Where a district judge, after trying a cause, deemed himself disqualified from acting upon a motion for a new trial, and called upon a judge of another district to sit in his place for that purpose, the latter had the same power in the premises as the judge who called him. *Hill v. Nelson Coal Co.*, 40 M 1, 5, 104 P 876; *Rowan v. Gazette Printing Co. et al.*, 69 M 170, 174, 220 P 1104.

A motion for a new trial must be submitted to, heard and determined by the court and not the judge thereof, and where, after motion made, the judge who tried the cause was disqualified by the filing of an affidavit and a judge of another district was called in and assumed jurisdiction of the cause, he became vested

with all the authority over it which the disqualified judge theretofore possessed. *Russell v. Sunburst Refining Co.*, 83 M 452, 463, 272 P 998.

Powers of Judge After Disqualification

When a district judge is disqualified for imputed bias, he is without authority to act further in the action in which he is disqualified, except to arrange the calendar of business, call in another judge or transfer the cause, if a transfer is proper. *Rowan v. Gazette Printing Co. et al.*, 69 M 170, 174, 220 P 1104.

Id. If there be more than one judge in a district, the one first disqualified for imputed bias in a given case must call in another judge of the same district, and if all the local judges are disqualified, a judge of another district must be called to preside in the action.

After an order appointing a receiver had been made by the district court, the plaintiff filed a disqualifying affidavit against the presiding judge who thereupon caused to be entered a further order setting aside the one appointing the receiver and then transferred the cause to another department of the court. Held, on certiorari, that upon the filing of the disqualifying affidavit the presiding judge lost jurisdiction to make any order in the cause other than to set it for trial, call in another judge or transfer the cause, and that therefore, the order attempting to annul the order of appointment was void. *State v. District Court et al.*, 83 M 377, 379, 272 P 553.

Proof of Alleged Bias and Prejudice is Neither Required Nor Permitted

A disqualification of the presiding judge is wrought by the filing of an affidavit, imputing bias and prejudice to him, at any time before the day fixed for the hearing. The imputation may be made in the language of the statute, and proof of facts showing actual bias and prejudice is not required nor permitted. *State ex rel. Grogan v. District Court*, 44 M 72, 75, 119 P 174.

Provisions Not Applicable to Notaries Public

The provisions of this statute do not include notaries public, nor apply to their actions in taking and certifying an acknowledgment to a deed. *First National Bank v. Roberts*, 9 M 323, 339, 23 P 718.

Relationship of Judge

The refusal of a change of venue asked for because of the relationship of the presiding judge to defendant in the action, though clearly erroneous, was not so far without jurisdiction as to render him personally liable for costs incurred by plain-

tiff in his proceeding by writ of supervisory control to compel transfer of the action. *State ex rel. Loundaigin v. Tattan*, 56 M 211, 214, 181 P 984.

Right May Be Waived

Like the peremptory challenge of a juror, the disqualification of a district judge for imputed bias is waived if not exercised at the proper time. *Washoe Copper Co. v. Hickey*, 46 M 363, 365, 128 P 584; *State ex rel. Jacobs v. District Court*, 48 M 410, 415, 138 P 1091.

Where, after the filing of a disqualifying affidavit against the judge before whom a cause was pending, counsel agreed to try it before a certain district judge, their action constituted a waiver of the right of either party to thereafter disqualify such judge under the provisions of subdivision 4 of this section. *Washoe Copper Co. v. Hickey*, 46 M 363, 365, 128 P 584.

Id. A waiver of the right conferred upon the parties to an action or proceeding, by subdivision 4 of this section, to disqualify a district judge, by the filing of an affidavit of the character mentioned therein, is not contrary to public policy.

Where a defendant, who filed an affidavit charging bias and prejudice on the part of the district judge before whom the cause was pending, moved for a transfer thereof to an adjoining district, assuring the court that a like objection to the judge of the neighboring court did not exist, he waived his right to disqualify the latter. *Stair v. Lunke*, 56 M 130, 133, 180 P 569.

Right of District Judge to Call Other Judges

A district judge who deems himself disqualified in a matter pending in his court may call one trial judge after another until he can secure the services of one able to preside at the trial of the cause. *Curry v. McCaffery*, 47 M 191, 195, 131 P 673.

Id. The filing of the affidavit here provided for brings on the only situation in which a trial judge, disqualified to sit, must call in a fellow judge of his district rather than a judge from outside.

Id. Unless the disqualification of a trial judge to preside in a cause pending before him is brought about by the filing of the affidavit mentioned in this section, he is not required to first call upon another judge or judges of his own district before he can invite a judge of another district to act in his stead.

Right to Disqualify Cannot Be Abridged

The right conferred upon parties by this section to disqualify a district judge for imputed bias or prejudice cannot be

abridged merely because it is subject to abuse. State ex rel. Carleton v. District Court, 33 M 138, 143, 82 P 789; State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 263, 146 P 539; State ex rel. Working v. District Court, 50 M 435, 439, 147 P 614; State ex rel. Carroll v. District Court, 50 M 506, 508, 148 P 312.

Right to File Disqualifying Affidavit Not Applicable to Criminal Cases

Held, that proceedings for the removal of civil officers under section 11702, are criminal in their nature, and that therefore neither party has the right to file an affidavit disqualifying a district judge for imputed bias or prejudice under this section. State v. District Court, 61 M 558, 559, 202 P 756.

Statute to be Construed Liberally

A statute providing for the disqualification of a district judge by the filing of an affidavit that the party making it has reason to believe, and does believe, that he cannot have a fair and impartial trial before such judge because of the latter's bias and prejudice, should be liberally construed with a view to effect its object and promote justice. Gehlert v. Quinn, 38 M 1, 3, 98 P 369.

When Affidavit of Disqualification Must Be Filed

With the exception of the last paragraph under this heading the annotations given here apply to the section before amendment in 1927.

The disqualifying affidavit cannot be filed after the trial of the case has been begun, after which period no change of venue can be granted. State ex rel. Anacanda C. M. Co. v. Clancy, 30 M 529, 543, 77 P 312.

The affidavit of disqualification is not effective to interrupt a hearing after the day fixed for it, no matter whether it be a final hearing or trial, or merely a step taken in the case involving a decision of some controverted matter. State ex rel. Nissler v. Donlan, 32 M 256, 266, 80 P 244.

Id. Prohibition does not lie to stay a district judge from proceeding further in the hearing of a motion made in a probate proceeding, where an affidavit of disqualification was not filed before the day fixed for the hearing of such motion.

The affidavit imputing bias and prejudice on the part of the district judge may be filed by attorney or client, after a trial has been had and while a motion for a new trial is pending, at any time before the day set for the hearing of such motion; and the filing thereof does not constitute contempt. State ex rel. Carleton v. District Court, 33 M 138, 144, 82 P 789.

An affidavit disqualifying a district judge from further acting in the admin-

istration of an estate, filed after the court had made its decree of distribution, was in time, where a proceeding for partition had been initiated; in such a case the administration is not finally disposed of by the decree, but is deemed to be pending until the confirmation of the report of the commissioners and the final vesting of title in the allottees. State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

Id. In a probate proceeding, the jurisdiction continues until the whole proceeding is disposed of by some final action by the judge, releasing the parties and their property from the control of the court; and, until such final action, the judge may be disqualified by the statutory affidavit.

The affidavit of disqualification must be filed before the day originally fixed for the hearing; it cannot be filed during a continuance of the case. State ex rel. Jacobs v. District Court, 48 M 410, 415, 138 P 1091.

Id. Actual disqualification on the part of a judge may be made at any time after as well as before the date fixed for a hearing, and it is therefore available in probate proceedings whenever it is made to appear; but the privilege to impute bias to a judge where none may exist belongs to a different order of things, and its existence may fairly be limited to a given time.

The date of the disqualifying affidavit is of no consequence; it is the filing of the affidavit which ipso facto works the disqualification of the judge. State ex rel. Lohman v. District Court, 49 M 247, 249, 141 P 659.

Where the petition in a proceeding seeking the restoration of an incompetent to capacity was filed just before the closing hour of the business day, and service upon the guardian of such person was made at 11 o'clock p. m. of the same day, the hearing having been ordered set for the following day at 2 o'clock p. m., the course pursued deprived the guardian of the right of disqualification conferred by this section, and the order fixing the day of hearing was annulled as an abuse of discretion. State ex rel. Carroll v. District Court, 50 M 506, 509, 148 P 312.

Held, that the provision of this section, requiring an affidavit disqualifying a district judge for imputed bias or prejudice to be filed at any time before the day fixed for the hearing or trial of an action, motion or proceeding, does not permit its filing after verdict and before entry of judgment. In re Miller's Estate, 71 M 330, 336, 229 P 851.

Where a party seeking to disqualify a district judge for imputed bias or prejudice, unable to comply with the provision of this section, requiring filing of the dis-

qualifying affidavit five days before hearing, instead of filing it "immediately" upon receiving notice, permitted a day to elapse before filing it, the affidavit was too late to be effectual. (Mr. Justice Angstrom dissenting.) *Brindjong v. Brindjong*, 96 M 481, 484 et seq., 31 P 2d 725.

When Change of Venue Should Be Ordered

A change of venue should not be ordered by a disqualified judge until after endeavor to secure another judge has failed, and then only pursuant to the provision of sections 9098 and 9099 and an order of a district judge transferring a cause to another county, after an affidavit of disqualification had been filed against him, without observing the statutory requirements, was in excess of jurisdiction and void. *State ex rel. Sell v. District Court*, 52 M 457, 459, 158 P 1018.

When Jurisdiction Ceases on Filing Affidavit

Where a disqualifying affidavit was filed after a motion to strike portions of a pleading had been submitted and taken under advisement, the jurisdiction of the court over the cause ceased after ruling on the motion. *State ex rel. Grice v. District Court*, 37 M 590, 597, 97 P 1032.

The filing of the affidavit mentioned in subdivision 4 of this section ipso facto works a disqualification of the judge against whom it is directed, unless the party filing it has waived his statutory right to do so. *Washoe Copper Co. v. Hickey*, 46 M 363, 364, 128 P 584.

The filing of the affidavit at any time prior to the day set for the trial of an action or the hearing of a motion or proceeding, ipso facto works a disqualification of the judge against whom it is directed, and thereafter he is without authority to act further in any judicial capacity in connection with the action or proceeding. *State ex rel. Goodman v. District Court*, 46 M 492, 494, 128 P 913; *State ex rel. Sherman v. District Court*, 51 M 220, 224, 152 P 32; *State ex rel. Bitter Root Valley Irr. Co. v. District Court*, 51 M 305, 309, 152 P 745; *State ex rel. Brandegee v. Clements*, 52 M 57, 62, 155 P 271.

After a disqualifying affidavit had been filed against a district judge, he was deprived of further jurisdiction in the matter of hearing a renewed motion to set aside a default, and exceeded his authority in vacating the order granting a rehearing thereof, the reason or reasons which prompted his action being immaterial. *State ex rel. Working v. District Court*, 50 M 435, 439, 147 P 614.

Who May Disqualify

In an action in conversion against a sheriff, the plaintiff at whose instance and request the sheriff, under a writ of attachment, levied upon the property in controversy, and who had indemnified the officer, was the real party in interest in the action in conversion, and could file an affidavit disqualifying the trial judge, although he had not intervened and was not a party to the record. *Gehlert v. Quinn*, 38 M 1, 3, 98 P 369.

By the appointment of a receiver in aid of a suit by the state against a bank to have it declared insolvent and its business wound up, the corporation was not deprived of its right, as a party to the suit, to disqualify the judge before whom it was pending for imputed bias and prejudice. *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 261, 146 P 539.

A defendant, though in default, is still a "party," so far at least as to entitle him to move to set it aside, or to take and prosecute an appeal, and as such may, by filing the affidavit prescribed by this section, disqualify the district judge, who, after denying the motion to vacate, had granted a rehearing. *State ex rel. Working v. District Court*, 50 M 435, 439, 147 P 614.

A guardian of the person and estate of an incompetent is a "party," within the meaning of this section, to a proceeding to have such incompetent declared competent, and may therefore exercise the right to disqualify the district judge by filing the affidavit provided for therein. *State ex rel. Carroll v. District Court*, 50 M 506, 508, 148 P 312.

The disqualifying affidavit need not be made by or on behalf of all the plaintiffs or all the defendants who may constitute "either party," but must be made by any one of several co-plaintiffs or co-defendants. *State ex rel. Bitter Root Valley Irr. Co. v. District Court*, 51 M 305, 308, 152 P 745.

Habeas corpus seeking the release of an incompetent from the custody of her guardian on the ground that she was competent and illegally restrained of her liberty, being a proceeding civil in its nature, the guardian had the right to disqualify the judge who issued the writ for imputed bias and prejudice. *State ex rel. Brandegee v. Clements*, 52 M 57, 61, 155 P 271.

References

Cited or applied as section 180, Code of Civil Procedure, before amendment, in *Wilson v. Harris*, 21 M 374, 431, 54 P 46; *State ex rel. Gnose v. District Court*, 30 M 188, 75 P 1109; *State ex rel. Boston & M.*

Co. v. Judges, 30 M 193, 196, 76 P 10; Finlen v. Heinze, 32 M 354, 382, 80 P 918; Gassert v. Strong, 38 M 18, 30, 98 P 497; as section 6315, Revised Codes, before amendment, in Bean v. Missoula Lumber

Co., 40 M 31, 34, 104 P 869; Stephens v. Nacey, 47 M 479, 483, 133 P 361; as amended in State ex rel. Wooster v. District Court, 58 M 50, 52, 190 P 133; Pineus v. Davis, 95 M 375, 380, 26 P 2d 986.

8869. Certain judges not to practice law. No justice, or judge of a court of record, county clerk, or clerk of any court, or sheriff, must practice law in any court in this state, nor act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings before any department of the state or general government, or courts of the United States, during his continuance in office, nor must any justice of the peace practice law before any justice's court in the county in which he resides.

History: Ap. p. Secs. 454, 455, p. 134, Bannack Stat.; re-en. Secs. 611, 612, p. 159, Cod. Stat. 1871; re-en. Secs. 531, 532, p. 179, L. 1877; re-en. Secs. 531, 532, 1st Div. Rev. Stat. 1879; re-en. Secs. 548, 549, 1st

Div. Comp. Stat. 1887; re-en. Sec. 181, C. Civ. Proc. 1895; re-en. Sec. 6316, Rev. C. 1907; re-en. Sec. 8869, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 171.

8870. No judicial officer to have partner practicing law. No justice, judge, or other elective judicial official, must have a partner acting as attorney or counsel in any court of this state.

History: En. Sec. 456, p. 135, Bannack Stat.; re-en. Sec. 613, p. 159, Cod. Stat. 1871; re-en. Sec. 533, p. 179, L. 1877; re-en. Sec. 533, 1st Div. Rev. Stat. 1879; re-en.

Sec. 550, 1st Div. Comp. Stat. 1887; amd. Sec. 182, C. Civ. Proc. 1895; re-en. Sec. 6317, Rev. C. 1907; re-en. Sec. 8870, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 172.

8871. Judges not to act in certain cases after term has expired. A judge, after the expiration of his term of office, must not act as attorney or counsel in any action or special proceeding which has been before him in his official character.

History: En. Sec. 183, C. Civ. Proc. 1895; re-en. Sec. 6318, Rev. C. 1907; re-en. Sec. 8871, R. C. M. 1921.

CHAPTER 11

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS

Section 8872. Powers of judges out of court.

8873. Powers of judicial officers as to conduct of proceedings.

8874. To punish for contempt.

8875. To take acknowledgments and affidavits.

8876. Certificate of proof.

8872. Powers of judges out of court. A justice or judge may exercise out of court all the powers expressly conferred upon a justice or judge, as contradistinguished from the court.

History: En. Sec. 190, C. Civ. Proc. 1895; re-en. Sec. 6319, Rev. C. 1907; re-en. Sec. 8872, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 176.

References

Cited or applied as section 190, Code of Civil Procedure, in Farleigh v. Kelly, 24 M 369, 372, 62 P 495, 685.

8873. Powers of judicial officers as to conduct of proceedings. Every judicial officer has power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty.

2. To compel obedience to his official orders, as provided in this code.
3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code.
4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

History: En. Sec. 191, C. Civ. Proc. 1895; re-en. Sec. 6320, Rev. C. 1907; re-en. Sec. 8873, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 177.

8874. To punish for contempt. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this code.

History: En. Sec. 192, C. Civ. Proc. 1895; re-en. Sec. 6321, Rev. C. 1907; re-en. Sec. 8874, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 178.

8875. To take acknowledgments and affidavits. Each of the justices of the supreme court, and judges of the district courts, has power in any part of the state, and every justice of the peace within his county, to take and certify:

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument.
2. The acknowledgment of satisfaction of a judgment of any court.
3. An affidavit or deposition to be used in this state.

History: En. Sec. 459, Bannack Stat.; 524, 1st Div. Comp. Stat. 1887; amd. Sec. re-en. Sec. 582, p. 155, Cod. Stat. 1871; 193, C. Civ. Proc. 1895; re-en. Sec. 6322, re-en. Sec. 507, p. 174, L. 1877; re-en. Sec. Rev. C. 1907; re-en. Sec. 8875, R. C. M. 507, 1st Div. Rev. Stat. 1879; re-en. Sec. 1921. Cal. C. Civ. Proc. Sec. 179.

8876. Certificate of proof. The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate, under the hand and seal of the clerk of the county in which the justice resides, setting forth that such justice, at the time of taking such proof or acknowledgment, was authorized to take the same, and that the clerk is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.

History: En. Sec. 194, C. Civ. Proc. 1895; re-en. Sec. 6323, Rev. C. 1907; re-en. Sec. 8876, R. C. M. 1921.

CHAPTER 12

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS

- Section 8877. Subsequent applications for orders refused—when prohibited.
8878. Violations of preceding section.
8879. Proceedings not affected by vacancy in office.
8880. Proceedings to be in English language.
8881. Abbreviations and figures.
8882. Means to carry jurisdiction into effect.

8877. Subsequent applications for orders refused—when prohibited. If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is

granted conditionally, no subsequent application for the same order shall be made to any other judge, except of a higher court; but nothing in this section refers to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same.

History: En. Sec. 457, p. 135, Bannack Stat.; re-en. Sec. 614, p. 159, Cod. Stat. 1871; re-en. Sec. 534, p. 179, L. 1877; re-en. Sec. 534, 1st Div. Rev. Stat. 1879; re-en. Sec. 551, 1st Div. Comp. Stat. 1887; amd. Sec. 200, C. Civ. Proc. 1895; re-en. Sec. 6324, Rev. C. 1907; re-en. Sec. 8877, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 182.

Operation and Effect

Where a petition for the restoration of an incompetent person to capacity has been denied by one department of the district

court, this section forbids an application to another department of the same court for the release of the incompetent on habeas corpus proceedings. State ex rel. Carroll v. District Court, 50 M 428, 431, 147 P 612. See Lutey Bros. v. Jackson, 55 M 556, 559, 179 P 459.

This section cannot have, and evidently was not intended to have, application to any motion or proceeding pending for hearing. State ex rel. Working v. District Court, 50 M 435, 440, 147 P 614.

8878. Violations of preceding section. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending.

History: En. Sec. 458, p. 135, Bannack Stat.; re-en. Sec. 615, p. 159, Cod. Stat. 1871; re-en. Sec. 535, p. 179, L. 1877; re-en. Sec. 535, 1st Div. Rev. Stat. 1879; re-en.

Sec. 552, 1st Div. Comp. Stat. 1887; amd. Sec. 201, C. Civ. Proc. 1895; re-en. Sec. 6325, Rev. C. 1907; re-en. Sec. 8878, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 183.

8879. Proceedings not affected by vacancy in office. No proceeding in any court of justice, in an action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges thereof.

History: En. Sec. 460, p. 135, Bannack Stat.; re-en. Sec. 583, p. 155, Cod. Stat. 1871; re-en. Sec. 508, p. 174, L. 1877; re-en. Sec. 508, 1st Div. Rev. Stat. 1879; re-en.

Sec. 525, 1st Div. Comp. Stat. 1887; amd. Sec. 202, C. Civ. Proc. 1895; re-en. Sec. 6326, Rev. C. 1907; re-en. Sec. 8879, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 184.

8880. Proceedings to be in English language. Every written proceeding in a court of justice in this state must be in the English language, and judicial proceedings must be conducted, preserved, and published in no other.

History: En. Sec. 461, p. 135, Bannack Stat.; re-en. Sec. 584, p. 155, Cod. Stat. 1871; re-en. Sec. 509, p. 174, L. 1877; re-en. Sec. 509, 1st Div. Rev. Stat. 1879; re-en.

Sec. 526, 1st Div. Comp. Stat. 1887; amd. Sec. 203, C. Civ. Proc. 1895; re-en. Sec. 6327, Rev. C. 1907; re-en. Sec. 8880, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 185.

8881. Abbreviations and figures. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

History: En. Sec. 461, p. 135, Bannack Stat.; re-en. Sec. 584, p. 155, Cod. Stat. 1871; re-en. Sec. 509, p. 174, L. 1877; re-en. Sec. 509, 1st Div. Rev. Stat. 1879; re-en.

Sec. 526, 1st Div. Comp. Stat. 1887; amd. Sec. 204, C. Civ. Proc. 1895; re-en. Sec. 6328, Rev. C. 1907; re-en. Sec. 8881, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 186.

8882. Means to carry jurisdiction into effect. When jurisdiction is, by the constitution or this code, or any other statute, conferred on a court or judicial officer, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding

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102 Mont. 77
55 P (2d) 1296

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64 P (2d) 121

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174 P.(2d) 813;
175 P.(2d) 764

be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

History: En. Sec. 205, C. Civ. Proc. 1895; re-en. Sec. 6329, Rev. C. 1907; re-en. Sec. 8882, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 187.

A Decree for Separate Maintenance May Be Enforced by Execution

A decree for separate maintenance recovered by a married woman may be enforced by execution. *Raymond v. Blane-grass*, 36 M 449, 458, 93 P 648.

Aids Probate Proceedings Where There Are No Statutes

Although the jurisdiction of the district court sitting in probate is limited to the exercise of the powers conferred by statute, it nevertheless possesses all the authority incidentally necessary to the effective exercise of the powers expressly conferred. In *re McLure's Estate*, 68 M 556, 569, 220 P 527.

In selecting a homestead for the family of a decedent where none was selected prior to his death, the probate court may, in the absence of a mode of procedure prescribed by the statute, proceed in substantially the manner indicated by section 6971 et seq., R. C. M. 1921, for its selection during the lifetime of a decedent, thereafter following the procedure outlined by sections 10152-10157, R. C. M. 1921. In *re Trepp's Estate*, 71 M 154, 162, 227 P 1005.

In the absence of statute prescribing the kind and manner of giving of notice to persons interested in an estate of a petition of the estate's attorney for allowance of his fees prior to final settlement, the court may, under this section, adopt any suitable mode or method; and where such a petition was filed by an attorney after his dismissal by the administratrix, service of a copy of the petition upon her and her then attorney and posting of a copy thereof giving the time, place and purpose of the hearing thereon in three public places in the county ten days before the hearing, was sufficient notice. In *re Culver's Estate*, 91 M 475, 478, 8 P 2d 662.

Covers the Contest of the Selection or Removal of a County Seat

There being no remedy at law to contest the selection or removal of a county seat, equity will take cognizance of the matter under this section. *Poe v. Sheridan County*, 52 M 279, 290, 157 P 185.

Covers the Exercise of Supervisory Control

This section is broad enough to cover the exercise of the power of supervisory

control by the supreme court, and is ample to authorize its use in its utmost vigor in the absence of legislation upon the subject. *State ex rel. Whiteside v. District Court*, 24 M 539, 564, 63 P 395.

The power of supervisory control is a distinct power, and may be exercised to control the discretion of an inferior court in making an order from which no appeal would lie, and for which the writs appertaining to the appellate jurisdiction furnish no remedy. *State ex rel. Anaconda C. M. Co. v. District Court*, 25 M 504, 522, 65 P 1020.

In General

Whenever jurisdiction is conferred upon a court, all the means necessary to carry the same into effect are expressly provided by this section, and if a court has power to make an order, it has jurisdiction to enforce it. *State ex rel. Eisenhower v. District Court*, 54 M 172, 174, 168 P 522.

Providing Procedure for Enforcing Lien If Statutes Are Inadequate

Where the statutory method of enforcing a materialmen's lien is adequate it is conclusive, but if inadequate, the district court under its general jurisdiction at law and in equity may adopt any suitable method of proceeding for enforcing it. *Continental Supply Co. v. White et al.*, 92 M 254, 268, 12 P 2d 569.

Providing Procedure in Representative Action

While there appears to be no method of procedure prescribed in the Codes for bringing bank creditors sued for in a representative suit into court, this may be done under this section, providing that where a court has jurisdiction of a cause, it may, in such event, adopt any suitable mode of procedure or process. *State v. District Court et al.*, 90 M 213, 222, 300 P 544.

Providing Procedure to Foreclose Lien Where Defendant Dies Before Judgment

Under the rule that where a suitable procedure is not provided by the Codes whereby the district court may carry its general jurisdiction into effect, it may adopt any suitable process or mode of proceeding most conformable to the spirit of the Codes, held, that where, pending action to foreclose a lien, the defendant dies before judgment, the plaintiff may present his claim in accordance with section 10183, R. C. M. 1921, and prosecute the action to judgment, whereupon the same relief may be afforded as if defendant's death had not occurred; or where

the claim has been approved by administrator and judge, he may rest upon that approval as upon a judgment, the duty then devolving upon the administrator to apply the property covered by the lien to the satisfaction of the claim. In re Stevenson, 87 M 486, 498, 289 P 566.

Supply Form for Affidavit for Writ of Attachment

The fact that sections 6902-6904, R. C. M. 1921, do not provide for a form of affidavit for a writ of attachment is of no moment, since under this section, where jurisdiction is conferred on a court, all the means neces-

sary to give it effect are also given, and in the absence of such a provision the court may adopt any suitable process or mode of proceeding in the premises. Daley et al. v. Torrey et al., 71 M 513, 517, 230 P 782.

References

Cited or applied as section 205, Code of Civil Procedure, in In re Liter's Estate, 19 M 474, 480, 48 P 753; State ex rel. Seres v. District Court, 19 M 501, 504, 48 P 1104; State v. Certain Intoxicating Liquors, 71 M 79, 86, 87, 227 P 472; State v. District Court et al., 75 M 122, 126, 242 P 421.

CHAPTER 13

DIFFERENT KINDS OF JURIES DEFINED

- Section 8883. Jury defined.
 8884. Different kinds of juries.
 8885. Grand jury defined.
 8886. Trial jury defined.
 8887. Number of a trial jury.
 8888. Juries in justices' courts.
 8889. Jury of inquest defined.

8883. Jury defined. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or to try a question of fact.

History: En. Sec. 220, C. Civ. Proc. 1895; re-en. Sec. 6330, Rev. C. 1907; re-en. Sec. 8883, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 190.

8883
amended
L. 39 c. 203
sec. 1 p. 503

8884. Different kinds of juries. Juries are of three kinds:

1. Grand juries.
2. Trial juries.
3. Juries of inquest.

History: En. Sec. 221, C. Civ. Proc. 1895; re-en. Sec. 6331, Rev. C. 1907; re-en. Sec. 8884, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 191.

8885. Grand jury defined. A grand jury is a body of men, seven in number, returned in pursuance of law, from the citizens of a county, before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county.

History: En. Sec. 222, C. Civ. Proc. 1895; re-en. Sec. 6332, Rev. C. 1907; re-en. Sec. 8885, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 192.

8885
amended
L. 39 c. 203
sec. 2 p. 509

8886. Trial jury defined. A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact.

History: En. Sec. 223, C. Civ. Proc. 1895; re-en. Sec. 6333, Rev. C. 1907; re-en. Sec. 8886, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 193.

References

Cited or applied as section 6333, Revised Codes, in State v. Hall, 55 M 182, 186, 175 P 267.

8886
amended
L. 39 c. 203
sec. 3 p. 509

8887
amended
L. 39 c. 203
sec. 4 p. 509

8887. Number of a trial jury. A trial jury consists of twelve men; provided, that in civil actions and cases of misdemeanor, it may consist of twelve, or any number less than twelve, upon which the parties may agree in open court.

History: En. Sec. 224, C. Civ. Proc. 1895; re-en. Sec. 6334, Rev. C. 1907; re-en. Sec. 8887, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 194.

8888. Juries in justices' courts. A jury in a justice's court, both in civil cases and misdemeanors, consists of six persons, but the parties may agree to a less number than six.

History: En. Sec. 225, C. Civ. Proc. 1895; re-en. Sec. 6335, Rev. C. 1907; re-en. Sec. 8888, R. C. M. 1921.

8889
amended
L. 39 c. 203
sec. 5 p. 509

8889. Jury of inquest defined. A jury of inquest is a body of men summoned from the citizens of a particular district before the sheriff, coroner, or other ministerial officer, to inquire concerning particular facts.

History: En. Sec. 226, C. Civ. Proc.

References

1895; re-en. Sec. 6336, Rev. C. 1907; re-en. Sec. 8889, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 195.

State ex rel. School Dist. v. Carroll, 87 M 45, 48, 284 P 1008.

CHAPTER 14

QUALIFICATIONS AND EXEMPTIONS OF JURORS

Section 8890. Who competent to act as juror.

8891. Inhabitants of city or town competent jurors.

8892. Who not competent to act as juror.

8893. Who exempt from jury duty.

8894. Who may be excused.

8895. Affidavit of claim to exemption.

8890. Who competent to act as juror. A person is competent to act as a juror if he be:

1. A male citizen of the United States of the age of twenty-one and not more than seventy years, who shall have been a resident of the state one year, and of the county ninety days before being selected and returned.

2. In possession of his natural faculties, and of ordinary intelligence, and not decrepit.

3. Possessed of sufficient knowledge of the English language.

4. Assessed on the last assessment-roll of the county on property belonging to him.

History: Earlier statutes were Sec. 8, p. 506, Cod. Stat. 1871; amd. Sec. 1, p. 70, L. 1873; re-en. Sec. 780, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 57, L. 1881; re-en. Sec. 1304, 5th Div. Comp. Stat. 1887; re-en. Sec. 230, C. Civ. Proc. 1895; re-en. Sec. 6337, Rev. C. 1907; re-en. Sec. 8890, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 198.

References

Cited or applied as section 230, Code of Civil Procedure, in State v. Bowser, 21 M 133, 139, 53 P 179; as section 6337, Revised Codes, in State v. Groom, 49 M 354, 357, 141 P 858; State ex rel. Shea v. Cocking et al., 66 M 169, 176, 213 P 594; State v. Danner, 70 M 517, 520, 226 P 475; State ex rel. School Dist. v. Carroll, 87 M 45, 284 P 1008.

8891. Inhabitants of city or town competent jurors. On the trial of an action in which a city or town is interested, the inhabitants thereof are competent jurors, if otherwise competent and qualified according to law.

History: En. Sec. 5042, Pol. C. 1895; re-en. Sec. 3941, Rev. C. 1907; re-en. Sec. 8891, R. C. M. 1921.

8892. Who not competent to act as juror. A person is not competent to act as juror:

8892
66 P (2d) 1050

1. Who does not possess the qualifications prescribed by section 8890; or,

2. Who has been convicted of malfeasance in office, or any felony or other high crime.

History: En. Sec. 231, C. Civ. Proc. 1895; re-en. Sec. 6338, Rev. C. 1907; re-en. Sec. 8892, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 199.

and exercised that right, but failed to inquire whether he had ever been convicted of a felony, he will be held to have waived any objection thereto even though knowledge of the juror's incompetency did not come to counsel until after the trial. *Stagg v. Stagg*, 96 M 573, 598, 32 P 2d 856.

Waiver of Objection

Where counsel had the opportunity to inquire into the qualifications of a juror,

8893. Who exempt from jury duty. A person is exempt from liability to act as juror if he be:

8893
amended
L. 39 c. 203
sec. 7 p. 510

1. A judicial, civil, or military officer of the United States, or of this state;

8893
ref. to
L. 39 c. 203
sec. 9 p. 511

2. A person holding a county, township, or town office;

3. An attorney-at-law in practice;

4. A minister of the gospel, or a priest of any denomination, or editor, following his profession;

5. A teacher in a university, college, academy, or school;

6. A practicing physician, dentist, or druggist actually engaged in the business of dispensing medicines, or a regularly licensed embalmer or undertaker;

7. An officer, keeper, or attendant of an almshouse, hospital, asylum, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the state prison, penitentiary, or of a county jail;

9. An express agent, mail carrier, superintendent, employee, or operator of a telegraph line doing a general telegraph business in the state;

10. An active member of the national guard of Montana, or an active member of a fire department of any city or town in this state. The number of firemen hereby exempted must not exceed twenty-eight, including officers for each company organized; and such members from each company must be selected from the roll of such company, according to the seniority of membership, and a list containing the names of such persons must be made out by the secretary of each company and filed with the clerk of the board of county commissioners on the first Mondays of December, March, June, and September, and any failure to file the list hereby required is considered a waiver of such exemption;

11. A superintendent on a railroad.

The court must discharge a person from serving as a trial juror, in either of the following cases:

Where it satisfactorily appears that he is not competent; and

Where it satisfactorily appears that he is exempt, and claims the benefit of the exemption.

History: Ap. p. Sec. 9, p. 506, Cod. Stat. 1871; re-en. Sec. 781, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 56, L. 1881; amd. Sec. 1, p. 101, L. 1883; re-en. Sec. 1305, 5th Div. Comp. Stat. 1887; amd. Sec. 232, C. Civ. Proc. 1895; re-en. Sec. 6339, Rev. C. 1907; amd. Sec. 1, Ch. 20, L. 1917; re-en. Sec. 8893, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 200.

Operation and Effect

The action of jury commissioners in omitting from the jury-list the names of

persons, who could claim exemption from jury duty constitutes a mere irregularity and furnishes no ground for challenge to the panel. *State v. Tighe*, 27 M 327, 330, 71 P 3.

References

Cited or applied as section 6339, Revised Codes, before amendment, in *State ex. rel. Powers v. Dale*, 47 M 227, 230, 131 P 670.

8894
amended
L. 39 c. 203
sec. 8 p. 511

8894. Who may be excused. A juror must not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

History: En. Sec. 233, C. Civ. Proc. 1895; re-en. Sec. 6340, Rev. C. 1907; re-en. Sec. 8894, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 201.

Operation and Effect

A district judge has the right to excuse jurors called for service who are incom-

petent for any of the reasons enumerated in section 8890, but under this section, a juror may not be excused for slight or trivial cause or for hardship or inconvenience to his business. *State ex rel. School Dist. v. Carroll*, 87 M 45, 51, 284 P 1008.

8895
amended
L. 39 c. 203
sec. 9 p. 511

8895. Affidavit of claim to exemption. If a person, exempt from liability to act as a juror, as provided in section 8893, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation, or employment; and such affidavit must be delivered by the clerk to the judge of the court where the name of such person is called, and if sufficient in substance, must be received as evidence of his right to exemption and as an excuse for non-attendance in person. The affidavit must then be filed by the clerk.

History: En. Sec. 234, C. Civ. Proc. 1895; re-en. Sec. 6341, Rev. C. 1907; re-en. Sec. 8895, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 202.

References

State ex rel. School Dist. v. Carroll, 87 M 45, 52, 284 P 1008.

CHAPTER 15

SELECTING AND RETURNING JURORS

Section 8896. Jury lists, by whom and when to be made.

8897. Selection of persons qualified to serve as trial jurors.

8898. Lists delivered to clerk.

8899. Duty of clerk—jury boxes.

8900. Same.

8901. Term of service of jurors.

8896. Jury lists, by whom and when to be made. The chairman of the county commissioners, the county treasurer, and the county assessor, of each county, must meet at the county seat of each county at the office of the county clerk on the second Monday of January of each year, for the purpose of making a list of persons to serve as trial jurors for the ensuing year. If they fail to meet on the day specified in this section, they must

8896
194 P.(2d) 235

8896
Amended
S.L. 49, C. 133
Sec. 1, P. 277

meet as soon thereafter as practicable. The first meeting of such officers for the purpose of making such list is within ten days after this code takes effect.

History: Earlier acts were Secs. 1-7, p. 505, Cod. Stat. 1871; re-en. Secs. 773-779, 5th Div. Rev. Stat. 1879; amd. Feb. 23, 1881; re-en. Secs. 1297-1303, 5th Div. Comp. Stat. 1887.

This section en. Sec. 240, C. Civ. Proc. 1895; re-en. Sec. 6342, Rev. C. 1907; re-en. Sec. 8896, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 204.

Operation and Effect

A member of a jury commission, who has rendered the making of the jury-list irregular, cannot take advantage of his own wrong-doing when called on to answer a

criminal charge presented by a grand jury selected from such jury-list. State ex rel. Clark v. District Court, 31 M 428, 435, 78 P 769.

References

Cited or applied as section 240, Code of Civil Procedure, in State v. Landry, 29 M 218, 222, 74 P 418; as section 6342, Revised Codes, in State v. Groom, 49 M 354, 357, 141 P 858; State v. Danner, 70 M 517, 520, 226 P 475; State ex rel. Clark v. District Court, 86 M 509, 510, 284 P 266; State ex rel. School Dist. v. Carroll, 87 M 45, 47, 284 P 1008.

8897. Selection of persons qualified to serve as trial jurors. At the meeting, specified in the last section, the officers present must select, from the last assessment roll of the county, and make a list of the names of all persons qualified to serve as trial jurors, as prescribed in the last chapter.

History: En. Sec. 241, C. Civ. Proc. 1895; re-en. Sec. 6343, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1919; re-en. Sec. 8897, R. C. M. 1921.

Operation and Effect

The presumption that jury-lists were made up according to law prevails until an offer of proof to the contrary is actually

made. State v. Bowser, 21 M 133, 139, 53 P 179.

References

Cited or applied as section 241, Code of Civil Procedure, before amendment, in State v. Tighe, 27 M 327, 330, 71 P 3; State ex rel. Clark v. District Court, 31 M 428, 436, 78 P 769.

8898. Lists delivered to clerk. A list of the names of the persons so selected, showing the place of residence and other proper additions of each of them, so far as those particulars can be conveniently ascertained, must be made out and signed by the officers, or a majority of them. Within five days after the meeting, the list must be delivered by those officers to the clerk of the district court and filed by him in his office.

History: En. Sec. 242, C. Civ. Proc. 1895; re-en. Sec. 6344, Rev. C. 1907; re-en. Sec. 8898, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 208.

Operation and Effect

Held, on application for writ of prohibition, that where a cause was called for trial on February 13, 1930, at which time a jury drawn from the 1929 jury list was present, the 1930 list which should have been filed on January 7, under this section or five days after the jury commissioners met to select a new list, not

having then been filed, the court could properly proceed with the jury in attendance. State ex rel. School Dist. v. Carroll, 87 M 45, 47, 284 P 1008.

References

Cited or applied as section 242, Code of Civil Procedure, in State v. Tighe, 27 M 327, 331, 71 P 3; State ex rel. Clark v. District Court, 31 M 428, 436, 78 P 769; State v. Danner, 70 M 517, 520, 226 P 475; State ex rel. Clark v. District Court, 86 M 509, 511, 284 P 266.

8899. Duty of clerk—jury boxes. Immediately after the list has been delivered to him, the clerk must prepare suitable ballots, by writing the name of each person so selected, as contained in the list, with his place of residence and other additions, on a separate piece of paper. The ballots must

8897
194 P.(2d) 235

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be uniform, as nearly as may be, in appearance, and each ballot must thereafter be inserted in a black capsule, and when all the said ballots have been so inserted, the clerk must deposit them in a box of ample size to permit said capsules to be thoroughly mixed, and which said box shall be kept for that purpose and shall be known as, and plainly marked, "jury box No. 1." Said capsules may be used as often as necessary; provided, however, no capsule shall be used which is in any manner whatsoever defaced or disfigured, or so marked that it may be recognized or distinguished from the other capsules in said jury box No. 1.

History: En. Sec. 243, C. Civ. Proc. 1895; re-en. Sec. 6345, Rev. C. 1907; amd. Sec. 1, Ch. 35, L. 1919; re-en. Sec. 8899, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 209.

References

Cited or applied as section 243, Code of Civil Procedure, before amendment, in *State v. Tighe*, 27 M 327, 331, 71 P 3;

State v. Landry, 29 M 218, 222, 74 P 418; *State ex rel. Clark v. District Court*, 31 M 428, 436, 78 P 769; as section 6345, Revised Codes, before amendment, in *State v. Groom*, 49 M 354, 357, 141 P 858; *Lee et al. v. Hayden*, 63 M 589, 594, 208 P 596; *State ex rel. Clark v. District Court*, 86 M 509, 511, 284 P 266.

8900. Same. Before depositing the ballots, the clerk must destroy each ballot remaining in the box, and remove all contents therefrom.

History: En. Sec. 244, C. Civ. Proc. 1895; re-en. Sec. 6346, Rev. C. 1907; re-en. Sec. 8900, R. C. M. 1921.

References

Cited or applied as section 244, Code of Civil Procedure, in *State v. Landry*, 29 M 218, 222, 74 P 418; *State ex rel. Clark v. District Court*, 31 M 428, 436, 78 P 769.

8901. Term of service of jurors. The persons whose names are so returned are known as regular jurors, and must serve for one (1) year, and until other persons are selected and returned; provided, however, that if jurors are drawn before the selection and return of the new jury list as provided in section 8896 et seq., and thereafter a new jury list is returned, they shall continue to serve as jurors, if the business of the court requires the attendance of a jury, for a period not exceeding thirty (30) days; provided further, however, notwithstanding such limitation of service, a jury composed of such jurors, duly impaneled to try any cause, shall continue to serve in such cause until discharged by the court from any further consideration of such cause, and the fact that a new jury list has been returned shall not affect their status as jurors.

History: En. Sec. 245, C. Civ. Proc. 1895; re-en. Sec. 6347, Rev. C. 1907; re-en. Sec. 8901, R. C. M. 1921; amd. Sec. 1, Ch. 135, L. 1931. Cal. C. Civ. Proc. Sec. 210.

Operation and Effect

A grand jury organized in December, 1903, from the jury-list of that year, and not discharged by the court, could return a valid indictment though the jury-list for 1904 may have been made and filed before the date of the indictment. *State ex rel. Clark v. District Court*, 31 M 428, 436, 78 P 769.

Under this section, the persons selected by the jury commissioners in January of

one year are, after the filing of the list containing their names with the clerk of the court, the regular jurors, the persons liable to be drawn for jury service until a new list is selected in January of the next succeeding year and filed, upon which filing the list of the preceding year becomes *functus officio* and thereafter a panel may no longer be drawn from such list. *State ex rel. Clark v. District Court*, 86 M 509, 511, 284 P 266.

References

Cited or applied as section 245, Code of Civil Procedure, in *State v. Landry*, 29 M 218, 222, 74 P 418.

8901
Amended
S.L. 1931, C. 4
Sec. 1, p. 1

CHAPTER 16

DRAWING AND SUMMONING JURORS FOR COURTS OF RECORD

- Section 8902. Summoning of trial jury.
 8903. Clerk to draw jury.
 8904. Drawing—how conducted.
 8905. Jury box No. 2.
 8906. Jurors—when to be drawn from jury box No. 2.
 8907. Jury box No. 3.
 8908. Deposit of ballots in box No. 3.
 8909. Drawing by two or more judges in same district.
 8910. Sheriff to summon jurors, how.
 8911. Jurors drawn from jury box No. 3, when.
 8912. Summoning jurors to complete a panel.

8902. Summoning of trial jury. Whenever the business of a district court requires the attendance of a trial jury for the trial of civil or criminal cases, and no jury is in attendance, the court may make an order directing a trial jury to be drawn and summoned to attend before said court. Such order must specify the number of jurors to be drawn, and the time at which the jurors are required to attend, which time may be at the same term in which the jurors are drawn, or at the next succeeding term, in the discretion of the court. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance.

History: En. Sec. 260, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 7, L. 1907; Sec. 6348, Rev. C. 1907; re-en. Sec. 8902, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 214.

Operation and Effect

Provisions governing the drawing of a jury panel are mandatory. State v. Landry, 29 M 218, 224, 74 P 418.

Where the trial court, instead of ordering a panel of regular jurors drawn in a number deemed by it sufficient for the term had them drawn under three successive orders as occasion required, defendant was not in position to complain of the procedure followed, he not having been prejudiced thereby, and this section not limiting the number which may be drawn. State v. Vuckovich, 61 M 480, 203 P 491.

A jury panel or array selected for the trial of cases in the district court under this section et seq., is not complete until the jurors are accepted for service and their names are placed in the trial juror box; only then can it be said that the array is impaneled. State ex rel. Clark

v. District Court, 86 M 509, 510, 511, 284 P 266.

The fact that the summons under which jurors were ordered to appear for service as petit jurors, contained a note appended thereto that if they had any reason why they should not serve they should return the summons personally to the judge and present their excuses to him, did not render the summons illegal, it unequivocally commanding the jurors to appear at the courthouse at a definite time; the note, however, disapproved, it having the effect of suggesting to the prospective juror disinclined to serve that he interview the judge in private. State ex rel. School Dist. v. Carroll, 87 M 45, 48, 49, 284 P 1008.

References

Cited or applied as section 260, Code of Civil Procedure, before amendment, in State ex rel. Clark v. District Court, 31 M 428, 436, 78 P 769; as section 6348, Revised Codes, in State v. Groom, 49 M 354, 357, 141 P 858; Lee et al. v. Hayden, 63 M 589, 594, 208 P 596.

8903. Clerk to draw jury. Immediately upon the order mentioned in the preceding section being made, the clerk shall, in the presence of the court, proceed to draw the jurors from jury box No. 1.

History: En. Sec. 261, C. Civ. Proc. 1895; re-en. Sec. 6349, Rev. C. 1907; re-en. Sec. 8903, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 215.

8902
164 P. 2d 158

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235, 264

8902
Amended
S.L. '49, C. 62
Sec. 1, P. 141

8903
amended
L. 37 c. 151
sec. 1 p. 488

8903
85 P.(2d) 853

8903
amended
L. 39 c. 3
sec. 1 p. 2

Operation and Effect

The judge orders the drawing of the jury, and directs the clerk during its progress. State ex. rel. Breen v. District Court, 34 M 107, 111, 85 P 870.

References

Cited or applied as section 261, Code of Civil Procedure, in State v. Landry, 29

M 218, 222, 74 P 418; as section 6349, Revised Codes, in State v. Groom, 49 M 354, 357, 141 P 858; Lee et al. v. Hayden, 63 M 589, 594, 208 P 596; State ex. rel. Clark v. District Court, 86 M 509, 512, 284 P 266; State ex rel. School Dist. v. Carroll, 87 M 45, 48, 284 P 1008.

8904. Drawing—how conducted.

1. The clerk must place said box on a rod so that the same may readily revolve and said box must be revolved a sufficient number of times so as to insure that the capsules in said box have become thoroughly mixed, and thereafter the judge presiding must draw from said box, one at a time, as many of said capsules containing the names of jurors as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary, until the number of jurors required shall be drawn. After the drawing shall be completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of the jurors drawn, and the time when and the place where such jurors are required to appear. Such certificate and list shall be delivered to the sheriff for service.

History: En. Sec. 262, C. Civ. Proc. 1895; re-en. Sec. 6350, Rev. C. 1907; amd. Sec. 2, Ch. 35, L. 1919; re-en. Sec. 8904, R. C. M. 1921; amd. Sec. 1, Ch. 148, L. 1933. Cal. C. Civ. Proc. Sec. 219.

References

Cited or applied as section 262, Code of Civil Procedure, before amendment, in

State v. Tighe, 27 M 327, 331, 71 P 3; State v. Landry, 29 M 218, 224, 74 P 418; as section 6350, Revised Codes, before amendment, in State v. Groom, 49 M 354, 357, 141 P 858; State ex rel. Clark v. District Court, 86 M 509, 512, 284 P 266; State ex rel. School Dist. v. Carroll, 87 M 45, 48, 284 P 1008.

8905. Jury box No. 2. After the adjournment of the term or session at which trial jurors have been returned, as prescribed in the last section, the clerk must deposit the capsules containing the ballots with the names of those who attended and served, in another box kept by him, known as and marked "jury box No. 2." The capsules containing the ballots with the names of those who did not appear and serve, which have not been destroyed as prescribed in the preceding section, must be returned to the box from which they were taken.

History: En. Sec. 263, C. Civ. Proc. 1895; re-en. Sec. 6351, Rev. C. 1907; amd. Sec. 3, Ch. 35, L. 1919; re-en. Sec. 8905, R. C. M. 1921.

8904
amended
L. 37 c. 151
sec. 2 p. 488

8904
85 P.(2d) 858

8904
amended
L. 39 c. 3
sec. 2 p. 3

8905
199 P.(2d) 279

References

Cited or applied as section 263, Code of Civil Procedure, before amendment, in

State v. Landry, 29 M 218, 222, 74 P 418;
Lee et al. v. Hayden, 63 M 589, 594, 208 P 596.

8906. Jurors—when to be drawn from jury box No. 2. If, at the time of drawing trial jurors for a term or session, there is not a sufficient number of capsules containing ballots with the names of jurors thereon remaining in box No. 1, the judge presiding, after drawing all the capsules containing therein ballots with the names of jurors thereon, must draw the necessary number from box No. 2, containing the names of those jurors who have before served, as prescribed in the last section; and must continue to draw from that box until new lists of jurors are provided.

History: En. Sec. 264, C. Civ. Proc. 1895; re-en. Sec. 6352, Rev. C. 1907; amd. Sec. 4, Ch. 35, L. 1919; re-en. Sec. 8906, R. C. M. 1921; amd. Sec. 2, Ch. 148, L. 1933.

References

Cited or applied as section 264, Code of Civil Procedure, before amendment, in State v. Landry, 29 M 218, 222, 74 P 418; Lee et al. v. Hayden, 63 M 589, 594, 208 P 596.

8907. Jury box No. 3. The clerk must keep, in addition to the two boxes specified in the last two sections, a third box, known as and marked "jury box No. 3," in which he must deposit capsules containing duplicate ballots, with the names and the proper additions of all persons selected and returned as trial jurors, who reside in the city or town where a trial term or session of a court of record is held, pursuant to law.

History: En. Sec. 265, C. Civ. Proc. 1895; re-en. Sec. 6353, Rev. C. 1907; amd. Sec. 5, Ch. 35, L. 1919; re-en. Sec. 8907, R. C. M. 1921.

References

Cited or applied as section 265, Code of Civil Procedure, before amendment, in State v. Landry, 29 M 218, 222, 74 P 418; Lee et al. v. Hayden, 63 M 589, 594, 208 P 596.

8908. Deposit of ballots in box No. 3. The ballots contained in the capsules kept in box No. 3 must be destroyed by the clerk, and new ballots must be deposited therein by him, at the same time, and under like circumstances, as prescribed in this chapter, with respect to the destruction of the old ballots, and the depositing of new ballots in the first box.

History: En. Sec. 266, C. Civ. Proc. 1895; re-en. Sec. 6354, Rev. C. 1907; amd. Sec. 6, Ch. 35, L. 1919; re-en. Sec. 8908, R. C. M. 1921.

8909. Drawing by two or more judges in same district. In districts where there are two or more judges, each judge may order jurors drawn and summoned to attend the session or term over which he presides, as provided in this chapter.

History: En. Sec. 267, C. Civ. Proc. 1895; re-en. Sec. 6355, Rev. C. 1907; re-en. Sec. 8909, R. C. M. 1921.

8910. Sheriff to summon jurors, how. The sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the time mentioned in the order, by a written notice by registered mail to that effect addressed to them to the postoffice address named in the jury-list and deposited in the postoffice with the postage thereon prepaid, except in cases where the district judge expressly directs that such service shall be made by giving personal notice, and shall return the list to the court at the opening of the regular session thereof,

8907
ref. to
L. 37 c. 151
sec. 5 p. 490

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or at such session or time as the jurors may be ordered to attend, specifying the names of those who are summoned, and the manner in which each person was notified.

History: En. Sec. 280, C. Civ. Proc. 1895; re-en. Sec. 6356, Rev. C. 1907; amd. Sec. 1, Ch. 9, L. 1911; re-en. Sec. 8910, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 225.

Operation and Effect

This section prescribes the duty of the sheriff, and directs him as to the procedure in summoning a jury panel. *State v. Groom*, 49 M 354, 357, 141 P 858.

References

Cited or applied as section 280, Code of Civil Procedure, before amendment, in *State v. Landry*, 29 M 218, 222, 74 P 418; *Lee et al. v. Hayden*, 63 M 589, 594, 208 P 596; *State ex rel. Clark v. District Court*, 86 M 509, 512, 284 P 266; *State ex rel. School Dist. v. Carroll*, 87 M 45, 49, 284 P 1008.

8911. Jurors drawn from jury box No. 3, when. If a sufficient number of trial jurors, duly drawn and notified, do not attend or cannot be obtained in the opinion of the court, without great delay or expense to form a jury, the court may, in its discretion, direct the clerk to draw from box No. 3, in the presence of the court, the names of as many persons as the court deems sufficient for that purpose.

History: En. Sec. 281, C. Civ. Proc. 1895; re-en. Sec. 6357, Rev. C. 1907; re-en. Sec. 8911, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 226.

Operation and Effect

It is error, in a criminal case, to draw the jury from box No. 3 before the emergency contemplated by this section has arisen. *State v. Landry*, 29 M 218, 223, 74 P 418.

Where the names in jury-box No. 1 had been so depleted that a sufficient number did not remain from which to secure a jury, and where it appeared that a sufficient number could not be procured without great delay or expense, the court, under this section, properly directed the clerk to draw names from jury-box No. 3. *State v. Pippi*, 59 M 116, 119, 195 P 556.

In a criminal prosecution, where the regular panel of jurors had been so far depleted that a sufficient number did not remain from which to obtain a jury, and a sufficient number could not be obtained otherwise without great delay and expense, the court did not err in directing a special venire drawn from jury-box No. 3 to complete the jury. *State v. Showen*, 60 M 474, 478, 199 P 917.

Where at the opening or at any other stage of a trial term the district court finds an insufficient number of jurors

drawn from box No. 1 present, it may in its discretion order the drawing of additional jurors from box No. 3 for service on the regular panel and retain them during the trial term, the contention that at the conclusion of the particular case for which drawn they cease to be lawful jurors and must be discharged being without merit. *Lee et al. v. Hayden*, 63 M 589, 594 et seq., 208 P 596.

District courts may not arbitrarily draw a jury from box No. 3 or excuse jurors and thus bring about conditions under which the exercise of their discretion as to the use of box No. 3 may be invoked. *Hanley v. Great Northern Ry. Co.*, 66 M 267, 272, 213 P 235.

Id. The presumption being that official duty has been regularly performed, the supreme court must, in the absence of a proper record from which it can determine the question whether the trial judge abused his discretion in improperly drawing jurors from jury-box No. 3, presume that he performed his duty in that respect in a proper manner.

References

State v. Vuckovich, 61 M 480, 489, 203 P 491; *State ex rel. Clark v. District Court*, 86 M 509, 512, 284 P 266; *State ex rel. School Dist. v. Carroll*, 87 M 45, 284 P 1008.

8912. Summoning jurors to complete a panel. The sheriff must forthwith notify each person so drawn and make a return as prescribed in section 8910.

History: En. Sec. 282, C. Civ. Proc. 1895; re-en. Sec. 6358, Rev. C. 1907; re-en. Sec. 8912, R. C. M. 1921.

CHAPTER 17

SUMMONING JURORS FOR JUSTICE AND INFERIOR COURTS AND
COURTS OF INQUEST

- Section 8913. Jurors for justices' or police courts.
 8914. How to be summoned.
 8915. Officer's return.
 8916. Juries of inquest—how to be summoned.

8913. Jurors for justices' or police courts. When jurors are required in any of the justices' courts, or in any police or other inferior court, they must, upon the order of the justice, or of the judge thereof, be summoned by the sheriff, constable, marshal, or policeman of the jurisdiction.

History: En. Sec. 290, C. Civ. Proc. 1895; re-en. Sec. 6359, Rev. C. 1907; re-en. Sec. 8913, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 230.

8914. How to be summoned. Such jurors must be summoned from the persons competent to serve as jurors, residents of the township, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

History: En. Sec. 291, C. Civ. Proc. 1895; re-en. Sec. 6360, Rev. C. 1907; re-en. Sec. 8914, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 231.

8915. Officer's return. The officer summoning such jurors shall, at the time fixed in the order for their appearance, return it to the court with a list of the persons summoned indorsed thereon.

History: En. Sec. 292, C. Civ. Proc. 1895; re-en. Sec. 6361, Rev. C. 1907; re-en. Sec. 8915, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 232.

8916. Juries of inquest—how to be summoned. Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any sheriff, constable, or policeman, from the persons competent to serve as jurors, residents of the county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

History: En. Sec. 300, C. Civ. Proc. 1895; re-en. Sec. 6362, Rev. C. 1907; re-en. Sec. 8916, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 235.

References

Cited or applied as section 6362, Revised Codes, in *State ex rel. Quintin v. Edwards*, 38 M 250, 266, 99 P 940.

CHAPTER 18

ENFORCING OBEDIENCE TO SUMMONS

- Section 8917. Attachment and fine.

8917. Attachment and fine. Any juror summoned, who wilfully and without reasonable excuse fails to attend, may be attached and compelled to attend; and the court may impose a fine, not exceeding fifty dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until, upon an order to show cause, an opportunity has been offered the juror to be heard. The court may for good cause remit, modify, or cause any fine collected to be refunded.

History: En. Sec. 310, C. Civ. Proc. 1895; re-en. Sec. 6363, Rev. C. 1907; re-en. Sec. 8917, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 238.

CHAPTER 19

IMPANELING GRAND AND TRIAL JURIES AND JURIES OF INQUEST

- Section 8918. Grand jury—when and how to be impaneled.
 8919. How constituted.
 8920. Manner of impaneling prescribed in Penal Code.
 8921. Drawing and summoning in districts having more than one judge.
 8922. Clerk to call list of jurors summoned.
 8923. Manner of impaneling—how prescribed.
 8924. Inspection of capsules.
 8925. Proceedings in forming jury.
 8926. Manner of impaneling.
 8927. Manner of impaneling.
 8927.1. Alternate jurors—authorization for—selection—duties.

8918. Grand jury—when and how to be impaneled. Whenever in the opinion of the district judge a grand jury is necessary, he must make an order directing a grand jury to be drawn and summoned to attend before the court. The order must specify the number of such jurors to be drawn, which must not be less than ten nor more than fifteen. The names of such jurors must be drawn from jury box No. 1, mentioned in section 8899, and the list of names certified and summoned, as provided for drawing and summoning trial jurors, and the names of any persons drawn who may not be impaneled upon the grand jury must be again placed in said jury box No. 1.

History: En. Sec. 320, C. Civ. Proc. 1895; re-en. Sec. 6364, Rev. C. 1907; re-en. Sec. 8918, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 241.

8919. How constituted. When, of the persons summoned as grand jurors competent and not excused, seven are present, they constitute the grand jury. If more than seven of such persons are present, the clerk must write their names on separate ballots, and place said ballots in black capsules, which said capsules shall be deposited in a box large enough to hold all of said capsules without crowding, and which said box shall be so arranged that the clerk drawing said capsules from said box shall be unable to observe or see the capsule he is about to draw, and draw out seven of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than seven of such persons are present, the court may order a sufficient number to be forthwith drawn from either box and summoned to attend the court. And whenever, of the persons to complete a grand jury, more attend than are required, the requisite number must be obtained by writing the names of those so summoned and not excused on ballots, which said ballots shall be placed in black capsules, and thereafter deposited in a box, and then drawn as above provided.

History: En. Sec. 321, C. Civ. Proc. 1895; re-en. Sec. 6365, Rev. C. 1907; amd. Sec. 7, Ch. 35, L. 1919; re-en. Sec. 8919, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 242.

8920. Manner of impaneling prescribed in Penal Code. Thereafter such proceedings must be had in impaneling the grand jury as are prescribed in sections 11806 to 11824 of the Penal Code.

History: En. Sec. 322, C. Civ. Proc. 1895; re-en. Sec. 6366, Rev. C. 1907; re-en. Sec. 8920, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 243.

8921. Drawing and summoning in districts having more than one judge. In districts where there are two or more judges, each judge may order a grand jury to be drawn and summoned to attend the session or term over which he presides, as provided in this chapter, but no more than one grand jury must ever be in attendance upon any district court at the same time.

History: En. Sec. 323, C. Civ. Proc. 1895; re-en. Sec. 6367, Rev. C. 1907; re-en. Sec. 8921, R. C. M. 1921.

References

Cited or applied as section 6367, Revised Codes, in *State ex rel. Little v. District Court*, 49 M 158, 161, 141 P 151.

8922. Clerk to call list of jurors summoned. At the opening of court on the day trial jurors have been summoned to appear, the clerk shall call the names of those summoned, and the court may then hear the excuses of jurors summoned. The clerk shall then write the names of the jurors present and not excused upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and place said slips in black capsules, and there, in the presence of the court, deposit the capsules containing said slips or ballots in a box large enough to hold all of said capsules without crowding, and which said box shall be so arranged that the clerk drawing said capsules from said box shall be unable to observe or see the capsules he is about to draw, and which said box must be kept sealed or locked until ordered by the court to be opened.

History: En. Sec. 330, C. Civ. Proc. 1895; re-en. Sec. 6368, Rev. C. 1907; amd. Sec. 8, Ch. 35, L. 1919; re-en. Sec. 8922, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 246.

References

State ex rel. *Clark v. District Court*, 86 M 509, 512, 284 P 266; State ex rel. *School Dist. v. Carroll*, 87 M 45, 48, 284 P 1008.

8923. Manner of impaneling—how prescribed. Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impaneling the trial jury as are prescribed in sections 9334 to 9348 of this code. If the action be a criminal one, the jury shall be impaneled as prescribed in the Penal Code.

History: En. Sec. 331, C. Civ. Proc. 1895; re-en. Sec. 6369, Rev. C. 1907; re-en. Sec. 8923, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 247.

8924. Inspection of capsules. It shall be the duty of the judge in whose department the jurors are serving, at least once every two weeks during said jury term, to inspect all capsules containing ballots for the purpose of ascertaining whether such capsules are marked or defaced, or have any mark of identification thereon, and when any marked or defaced capsules are found, the judge shall order said capsule or capsules to be replaced by others free from any mark or defacement.

History: En. Sec. 9, Ch. 35, L. 1919; re-en. Sec. 8924, R. C. M. 1921.

8925. Proceedings in forming jury. At the time appointed for a jury trial in justices', police, or other inferior courts, the list of jurors summoned, which shall be twelve, or double the number agreed upon before the trial by the parties, must be called, and the names of those attending

and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

History: En. Sec. 340, C. Civ. Proc. 1895; re-en. Sec. 6370, Rev. C. 1907; re-en. Sec. 8925, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 250.

8926. Manner of impaneling. Thereafter, if the action is a criminal one, the jury must be impaneled as provided in the Penal Code; if a civil one, as provided in sections 9334 to 9348 of this code.

History: En. Sec. 341, C. Civ. Proc. 1895; re-en. Sec. 6371, Rev. C. 1907; re-en. Sec. 8926, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 251.

8927. Manner of impaneling. The manner of impaneling juries of inquest is prescribed in the provisions of the different codes relating to such inquests.

History: En. Sec. 350, C. Civ. Proc. 1895; re-en. Sec. 6372, Rev. C. 1907; re-en. Sec. 8927, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 254.

8927.1. Alternate jurors—authorization for—selection—duties. Whenever, in the opinion of a judge of a district court about to try a defendant against whom has been filed any indictment or information for a felony, or a civil court case, the trial of which is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or two additional jurors, in its discretion, to be known as "alternate jurors."

Such jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges; provided, that the prosecution, or plaintiff, and the defendant shall each be entitled to one peremptory challenge to such alternate jurors.

Such alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and must attend at all times upon the trial of the cause in company with the other jurors; and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in custody during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors; and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury.

If, before the final submission of the case, a juror becomes ill, so as to be unable to perform his duty, the court may order him to be discharged in that event, or in case a juror should die, the name of an alternate may be drawn, and he shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

History: En. Sec. 1, Ch. 5, L. 1935.

CHAPTER 20

STENOGRAPHERS

- Section 8928. Appointment of stenographers.
8929. Duties of stenographers.
8930. Same.
8931. To furnish copies to parties, etc.
8932. Amount to be paid by each party in civil action.
8933. Salary and expenses of stenographer—apportionment.
8934. Stenographer pro tempore.
8935. Stenographer's report prima facie evidence.

8928. Appointment of stenographers. The judge of a district court may appoint a stenographer for such court, who is an officer of the court, and holds his office during the pleasure of the judge appointing him, and he must subscribe the constitutional oath of office, and file the same with the clerk of the court. In districts where there are two or more judges, each judge may appoint a stenographer.

History: Earlier acts were Secs. 1-3, pp. 393, 394, L. 1877; re-en. Secs. 1176-1178, 5th Div. Rev. Stat. 1879; amd. Secs. 1977-1981, 5th Div. Comp. Stat. 1887.
This section en. Sec. 370, C. Civ. Proc. 1895; re-en. Sec. 6373, Rev. C. 1907; re-en. Sec. 8928, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 269.

References

Cited or applied as section 370, Code of Civil Procedure, in Montana O. P. Co. v. Boston & M. C. C. & S. M. Co., 27 M 288, 325, 70 P 1114; York v. Steward, 30 M 367, 368, 76 P 756.

8929. Duties of stenographers. Each stenographer must, under the direction of the judge, attend all sittings of the court, take full stenographic notes of the testimony, and of all proceedings given or had thereat, except when the judge dispenses with his services in a particular cause, or with respect to a portion of the proceedings therein. The stenographer must file with the clerk forthwith the original stenographic notes taken upon a trial or hearing required to be taken by this section.

History: En. Sec. 371, C. Civ. Proc. 1895; re-en. Sec. 6374, Rev. C. 1907; re-en. Sec. 8929, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 269.

References

Cited or applied as section 371, Code of Civil Procedure, in State ex rel. Kranich v. Supple, 22 M 184, 186, 56 P 20; State v. Fisher, 23 M 540, 552, 59 P 919.

8930. Same. All objections made, the rulings, decisions, and opinions of the court, and the exceptions taken during the trial or hearing, must be written out at length or printed in type by the stenographer, and filed with the clerk forthwith after the close of the trial or hearing, and thereafter such exceptions may be settled in a bill of exceptions, as provided in section 9390 of this code.

History: En. Sec. 372, C. Civ. Proc. 1895; re-en. Sec. 6375, Rev. C. 1907; re-en. Sec. 8930, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 269.

Operation and Effect

This section requires the stenographer, in addition to writing out the ruling and exception, to write out the question, answer, or other part of the evidence to which the objection and ruling apply, so as to identify them, without other compensa-

tion than his salary. State ex rel. Kranich v. Supple, 22 M 184, 187, 56 P 20.

Id. The stenographer is not required to furnish a complete transcript of the testimony, or any substantial part thereof, without payment of his fees.

Id. Mandamus lies to compel the stenographer to write out and file a list of the objections, rulings, and exceptions occurring on the trial, where the order of the trial court is insufficient.

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An exception to an adverse ruling by the district court is a matter of right, not one of grace or discretion on the part of the court, and, when taken, the court stenographer must enter it, any opinion of the trial court to the contrary notwithstanding. *State v. Postal Telegraph Cable Co.*, 53 M 104, 108, 161 P 953.

References

Cited or applied as section 372, Code of Civil Procedure, in *State ex rel. Dempsey v. District Court*, 24 M 566, 567, 63 P 389; *State ex rel. Donovan v. Ledwidge*, 27 M 197, 200, 70 P 511.

8931. To furnish copies to parties, etc. Each stenographer specified in this chapter must likewise, upon request, furnish, with all reasonable diligence, to the defendant in a criminal cause, or a party or his attorney in a civil cause, in which he has attended the trial or hearing, a copy, written out at length or in narrative form, from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment by the person requiring the same, the sum of five cents per folio for the copy written out at length, and seven and one-half cents per folio for the copy written out in narrative form. If the county attorney or attorney-general or judge requires such copy in a criminal cause, the stenographer is entitled to his fees therefor; but he must furnish it, and upon furnishing it, he shall receive a certificate of the sum to which he is so entitled, which is a county charge, and must be paid by the county treasurer upon the certificate like other county charges. If the judge requires such a copy in a civil case to assist him in rendering a decision, the stenographer must furnish the same without charge therefor. If it appears to the judge that a defendant in a criminal case is unable to pay for such copy, the same shall be furnished him and paid for by the county.

History: En. Sec. 373, C. Civ. Proc. 1895; re-en. Sec. 6376, Rev. C. 1907; re-en. Sec. 8931, R. C. M. 1921.

Operation and Effect

Where the stenographer failed to furnish a poor defendant with a copy of the transcript when ordered to do so under this section, the supreme court will not compel obedience thereto by mandamus. *State ex rel. Dempsey v. District Court*, 24 M 566, 567, 63 P 389.

Fees paid court stenographers for transcribing testimony from their notes are chargeable as part of the costs. *State ex rel. King v. District Court*, 25 M 1, 3, 63 P 402.

The appropriate remedy to compel the court stenographer to furnish the transcript in a civil cause is a writ of mandate, rather than an order to the stenographer by the trial court. *State ex rel.*

Donovan v. District Court, 27 M 197, 201, 70 P 511.

The stenographer may not require the state, or its attorney-general, to pay the amount of his fees in advance. *State ex rel. Donovan v. Ledwidge*, 27 M 197, 203, 70 P 511.

Where the principal part of a transcript was made up of copies of evidence obtained from the stenographer, and but a small portion prepared by the clerk of the district court, a charge of ten cents per folio for the whole number of folios contained in the transcript was excessive. *Montana etc. Co. v. Boston etc. Min. Co.*, 33 M 400, 403, 84 P 706.

References

Cited or applied as section 373, Code of Civil Procedure, in *State ex rel. Kranich v. Supple*, 22 M 184, 186, 56 P 20; *Montana O. P. Co. v. Boston M. C. C. & S. M. Co.*, 27 M 288, 325, 70 P 1114.

8932. Amount to be paid by each party in civil action. In every issue of fact in civil actions tried before the court or jury, before the trial commences, there must be paid into the hands of the clerk of the court, by each party to the suit, the sum of three dollars, which sum must be paid by said clerk into the treasury of the county where the cause is tried, to be applied upon the payment of the salary of the stenographer, and the prevailing party may have the amount so paid by him taxed in his bill of costs as proper disbursements.

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History: En. Sec. 1979, 5th Div. Comp. Stat. 1887; re-en. Sec. 374, C. Civ. Proc. 1895; re-en. Sec. 6377, Rev. C. 1907; re-en. Sec. 8932, R. C. M. 1921.

Operation and Effect

The fees for stenographers must be paid to official stenographers appointed by the court under authority of section 8928. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 325, 70 P 1114.

The fees paid stenographers for per diem refer to the sum required by this section to be paid by each party at the beginning of the trial. *Montana etc. Co. v. Boston etc. Min. Co.*, 33 M 400, 402, 84 P 706.

References

Cited or applied as section 374, Code of Civil Procedure, in *State ex rel. Kranich v. Supple*, 22 M 184, 186, 56 P 20.

8933. Salary and expenses of stenographer—apportionment. Every stenographer appointed under the provisions of this chapter receives an annual salary of three thousand dollars, and no other compensation except as provided in section 8931, payable in monthly installments out of the general funds of the counties comprising the district for which he is appointed, according and in proportion to the number of civil and criminal actions entered and commenced in the district courts of such counties respectively in the preceding year; and it shall be the duty of the judge of such district, on the first day of January of each year, or as soon after as may be, to apportion the amount of such salary to be paid by each county in his district on the basis aforesaid. The stenographer is allowed, in addition to the salary and fees above provided, in judicial districts comprising more than one county, his actual and necessary expenses of transportation and living when he goes on official business to a county of his judicial district other than the county in which he resides, from the time he leaves his place of residence until he returns thereto, said expenses to be apportioned and payable in the same way as the salary.

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History: En. Sec. 375, C. Civ. Proc. 1895; re-en. Sec. 6378, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1909; re-en. Sec. 8933, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1927. *Cal. C. Civ. Proc. Secs. 271 and 274.*

References

Cited or applied as section 375, Code of Civil Procedure, before amendment, in *State ex rel. Kranich v. Supple*, 22 M 184, 186, 56 P 20.

8934. Stenographer pro tempore. The stenographer of any district court must attend to the duties of his office in person, except when excused for good and sufficient reason by order of the court, which order must be entered upon the minutes of the court. Employment in his professional capacity elsewhere is not a good and sufficient reason for such excuse. When the stenographer of any court has been excused in the manner provided in this section, the court may appoint a stenographer pro tempore, who must take the same oath and perform the same duties and receive the same compensation during the time of his employment as the regular stenographer.

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History: En. Sec. 376, C. Civ. Proc. 1895; re-en. Sec. 6379, Rev. C. 1907; re-en. Sec. 8934, R. C. M. 1921.

8935. Stenographer's report prima facie evidence. The report of the stenographer, or stenographer pro tempore, of any court, duly appointed and sworn, when written out in long handwriting, or printed in type, and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie a correct statement of such testimony and proceedings.

History: En. Sec. 377, C. Civ. Proc. 1895; re-en. Sec. 6380, Rev. C. 1907; re-en. Sec. 8935, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 273.

Operation and Effect

The certificate of the stenographer that the transcript contains all the evidence cannot supply the certificate of the judge to that effect, or an omission of the bill of exceptions itself to show that it does. State v. Shepphard, 23 M 323, 327, 58

P 868. See Conklin v. Cullen, 25 M 214, 216, 64 P 502.

In making up statements or bills of exceptions, litigants may use the notes of any person which furnish a correct narrative of the proceedings. York v. Steward, 30 M 367, 368, 76 P 756.

References

Cited or applied as section 377, Code of Civil Procedure, in State v. Shepphard, 23 M 323, 327, 58 P 868.

CHAPTER 21

QUALIFICATIONS, ADMISSION, LICENSE, AND DISBARMENT OF ATTORNEYS

- Section 8936. Who may be admitted as attorneys.
- 8937. Qualifications, examination, and admission.
- 8938. Certificate of admission and license.
- 8939. Oath.
- 8940. Admission of attorneys from other states.
- 8941. Roll of attorneys.
- 8942. Supreme court may establish rules.
- 8943. Penalty for practicing without license.
- 8944. Who deemed to be practicing law.
- 8945. Annual license tax of attorneys.
- 8946. Attorneys' license tax fund.
- 8947. Penalty for practicing without certificate.
- 8948. Attorneys' examining board, appointment and powers of.
- 8949. Compensation and expenses of members of board.
- 8950. Fees on application for admission to bar.
- 8951. Complaints against attorney—how instituted and prosecuted.
- 8952. Same—complaints to attorney-general or district judge.
- 8953. Appointment of attorney as special investigator.
- 8954. Supreme court to make rules—powers of referees.
- 8955. Witnesses on behalf of complainant, fees and mileage of.
- 8956. Expenses of attorney-general—how paid.
- 8957. Other expenses—how paid.
- 8958. Allowance of attorneys' fees to unlicensed persons forbidden.
- 8959. Collection of license tax from delinquent attorneys.
- 8960. Transfer of unexpended license tax fund.
- 8961. Disbarment of attorneys—clauses—jurisdiction.
- 8962. Conviction of crime.
- 8963. Proceedings for removal or suspension.
- 8964. Accusation.
- 8965. Verification.
- 8966. Citation.
- 8967. Appearance.
- 8968. Objections to accusation.
- 8969. Demurrer or denial.
- 8970. Answer.
- 8971. Trial.
- 8972. Referee to take depositions.
- 8973. Judgment.

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8936. Who may be admitted as attorneys. Any citizen or person, resident of this state, who has bona fide declared his or her intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the courts of this state. All persons are attorneys of the supreme court who are entitled to practice in the supreme court when this code takes effect.

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History: Earlier acts relating to admission and powers of attorneys were Secs. 1-15, pp. 370-373, Bannack Stat.; re-en. Secs. 1-15, pp. 375-378, Cod. Stat. 1871; re-en. Secs. 40-54, 5th Div. Rev. Stat. 1879; re-en. Secs. 102-116, 5th Div. Comp. Stat. 1887.

This section en. Sec. 390, C. Civ. Proc. 1895; re-en. Sec. 6381, Rev. C. 1907; re-en. Sec. 8936, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 275.

References

In re McCue, 80 M 537, 558, 261 P 341.

8937. Qualifications, examination, and admission. Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and a certificate of one or more reputable counselors-at-law that he has been engaged in the study of law for two successive years prior to the making of such application, and undergo a strict examination as to his qualifications by any one or more of the justices of the supreme court. The form and manner of the examination shall be as the justices may, from time to time, determine; provided, however, that a diploma from the department of law of the university of Montana at Missoula, or evidence of having completed the course in law of three years of said department, shall entitle the holder to a license to practice law in all the courts of this state, subject to the right of the chief justice of the supreme court of the state to order an examination as in ordinary cases of applicants without such diploma or evidence.

History: En. Sec. 391, C. Civ. Proc. 1895; re-en. Sec. 6382, Rev. C. 1907; amd. Sec. 1, Ch. 18, L. 1915; re-en. Sec. 8937, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 276.

8938. Certificate of admission and license. If upon examination he is found qualified, the supreme court must admit him as an attorney and counselor in all the courts of this state, and must direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license.

History: En. Sec. 392, Civ. C. Proc. 1895; re-en. Sec. 6383, Rev. C. 1907; re-en. Sec. 8938, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 277.

8939. Oath. Every person on his admission must take an oath to support the constitution of the United States and the constitution of the state of Montana, and to faithfully discharge the duties of an attorney and counselor-at-law with fidelity to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license and a duplicate filed with the clerk.

History: En. Sec. 393, C. Civ. Proc. 1895; re-en. Sec. 6384, Rev. C. 1907; re-en. Sec. 8939, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 278.

References

Cited or applied as section 6384, Revised Codes, in State ex rel. Ryan v. Board of Aldermen, 45 M 188, 193, 122 P 569; State v. Board of Prison Commrs. et al., 84 M 14, 23, 273 P 1044.

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8940. Admission of attorneys from other states. Every citizen of the United States, or person resident of this state, who has bona fide declared his or her intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest courts of another state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in the courts of this state, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the

applicant as to his or her qualifications; provided, however, that any person who is a non-resident of the state of Montana, and who has been admitted and is at the time authorized to practice law in the highest courts of another state, or of a foreign country, may, upon motion of any attorney admitted to practice in the courts of this state, be permitted by the court to appear as attorney in any action or proceeding in such court, and shall, when so permitted, be entitled to the same rights and privileges and be subject to the same duties and obligations, with respect to such actions or proceedings, as an attorney duly admitted to practice in the courts of this state.

History: En. Sec. 394, C. Civ. Proc. 1895; re-en. Sec. 6385, Rev. C. 1907; amd. Sec. 1, Ch. 13, L. 1911; re-en. Sec. 8940, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 279.

Operation and Effect

It is ground for the disbarment of an attorney when applying for admission to present with his application a letter of recommendation to which he had forged the name of a local firm. In re Woodward, 27 M 355, 71 P 161.

A district judge is without authority to grant anyone the privilege of appearing in his court to represent a client, unless such person is duly admitted to practice law, or a non-resident attorney, and in the latter case only for the purpose of conducting a particular cause, and upon motion of a member of the bar of Montana. In re White, 54 M 476, 478, 171 P 759.

An attempted appearance for a foreign

heir by an attorney residing in another state who had not been licensed to practice in this state either generally or specially, by means of a letter to the district court stating that he appeared in behalf of the heir and that notice in the proceeding be served upon him, amounted to no appearance and did not estop the heir from attacking the decree for want of notice. State v. District Court et al., 62 M 60, 64, 203 P 860.

While under this section, courts may permit a non-resident attorney who has been admitted to practice in his own state, to appear on a cause on motion of a duly admitted attorney in this state, they may not allow a fee for his services to his client if successful. Vaill v. Northern Pacific Ry. Co., 66 M 301, 304, 213 P 446.

References

In re McCue, 80 M 537, 558, 261 P 341.

8941. Roll of attorneys. The clerk of the supreme court must keep a roll of the attorneys and counselors admitted to practice, which must be signed by the person admitted before he receives his license.

History: En. Sec. 395, C. Civ. Proc. 1895; re-en. Sec. 6386, Rev. C. 1907; re-en. Sec. 8941, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 280.

8942. Supreme court may establish rules. The supreme court may establish rules for the admission of attorneys and counselors not inconsistent with this chapter.

History: En. Sec. 396, C. Civ. Proc. 1895; re-en. Sec. 6387, Rev. C. 1907; re-en. Sec. 8942, R. C. M. 1921.

8943. Penalty for practicing without license. If any person practice law in any court, except a justice's court or a police court, without having received a license as attorney and counselor, he is guilty of a contempt of court.

History: En. Sec. 397, C. Civ. Proc. 1895; re-en. Sec. 6388, Rev. C. 1907; re-en. Sec. 8943, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 281.

Operation and Effect

A person who advises clients in legal matters pending or to be brought before a court of record, or prepares pleadings or proceedings for use in a court of record, or

appears before a court of record, either directly or by a partner or proxy, is practicing law in a court of record; and, if he has no license to do so, he is guilty of contempt of court. In re Bailey, 50 M 365, 367, 146 P 1101.

Under section 8940, a non-resident attorney, who has been admitted to practice in the highest courts of the state of his residence, may, on motion of a member of

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the bar of this state, be permitted by a judge before whom a trial is pending to appear and conduct that particular case. In re White, 54 M 476, 478, 171 P 759.

Id. Since a district judge has no authority to permit one to practice law without having been admitted to the bar, such person cannot justify his violation of the law in this regard by alleging such permission as his excuse.

One who, though not admitted by the supreme court to practice in the courts of the state, holds himself out as an at-

torney at law by conducting legal correspondence on letter-heads on which was printed his name followed by "Attorney at Law," by signing himself as such, by advertising himself by the use of a professional card in newspapers and telephone directory, and by a sign on his office building as an attorney, by taking and perfecting appeals from the justice to the district court, and appearing in the appellate court in connection with such appeals, is practicing without a license and guilty of contempt of court, under this section. In re Phillips, 64 M 492, 210 P 89.

8944. Who deemed to be practicing law. Any person who shall hold himself out, or advertise as an attorney or counselor-at-law, or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court, or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney-at-law in the practice of his profession for the purposes of this act, shall be deemed practicing law.

History: En. Sec. 1, Ch. 90, L. 1917; re-en. Sec. 8944, R. C. M. 1921.

Operation and Effect

One who appears as an attorney of record in a cause pending in the district court, files papers in behalf of a party thereto, advertises himself as an attorney in newspapers, on letter-heads used by him

in his correspondence, or by a sign displayed in front of his office, practices law in a court of record. In re Bailey, 50 M 365, 366, 146 P 1101; In re White, 54 M 476, 478, 171 P 759.

References

In re Phillips, 64 M 492, 210 P 89.

8945. Annual license tax of attorneys. Every attorney or counselor-at-law, admitted by the supreme court of the state to practice his profession within the state, shall be required to pay a license tax of five dollars per annum from and after the first day of April, A. D. 1917, which tax shall be payable to and collected by the clerk of the supreme court on or before the first day of April of each year.

Upon the payment of such tax the said clerk shall issue and deliver a certificate to the person paying the same, certifying to the payment of said license tax, and stating the period covered by said payment. No license tax shall be imposed upon attorneys by a municipality or any other subdivision of the state.

History: En. Sec. 2, Ch. 90, L. 1917; re-en. Sec. 8945, R. C. M. 1921.

8946. Attorneys' license tax fund. All moneys so collected during any month shall, on or before the first day of the succeeding month, be delivered to and deposited with the state treasurer by the clerk of the supreme court, and the state treasurer shall place and hold the same in a special fund to be known as "attorneys' license tax fund," and shall be paid out and disbursed as hereinafter provided.

History: En. Sec. 3, Ch. 90, L. 1917; re-en. Sec. 8946, R. C. M. 1921.

8947. Penalty for practicing without certificate. No attorney shall practice or be permitted to practice his profession in any of the courts of record in this state until he shall have paid such license tax for the current

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fiscal year and procured a certificate, as hereinabove provided; and any attorney violating this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars.

History: En. Sec. 4, Ch. 90, L. 1917; re-en. Sec. 8947, R. C. M. 1921.

8948. Attorneys' examining board, appointment and powers of. The supreme court is hereby authorized and empowered to appoint five members of the bar of this state, in good standing, as an examining board to conduct and assist in conducting the examination of applicants for admission to the bar. The court may release, dismiss, or remove any member of said board, and appoint other members in his or their stead at any time. A majority of said board shall constitute a quorum, and have the power to conduct examinations. The board shall perform such duties and render such assistance in the examinations of applicants as may be prescribed by the said court, and shall be governed and controlled by such rules and regulations as the said court may prescribe. It shall be optional with the supreme court to appoint said board, or to require the assistance of said board when appointed.

History: En. Sec. 5, Ch. 90, L. 1917; re-en. Sec. 8948, R. C. M. 1921.

8949. Compensation and expenses of members of board. The members of said board shall be entitled to their necessary traveling expenses in attending meetings of said board and in conducting such examinations, and also, when away from their homes or places of residence, their necessary lodging and hotel expenses, and shall be paid such compensation, per diem, for services performed by them as members of said board, as may be fixed and determined by the supreme court. Such expenses and compensation shall be paid out of the attorneys' license tax fund by the state treasurer, upon warrants duly drawn by the state auditor therefor.

History: En. Sec. 6, Ch. 90, L. 1917; re-en. Sec. 8949, R. C. M. 1921.

8950. Fees on application for admission to bar. Every applicant for admission to the bar, by examination or otherwise, must pay to the clerk of the supreme court, at the time he files his application for examination or his petition for admission, the sum of twenty-five dollars. Should the applicant fail in the examination taken by him, he may take another examination before the said board at any time within one year thereafter without further payment. No other fee shall be exacted for admission of any applicant, if admitted within one year after the payment of the fee of twenty-five dollars hereinabove designated. All money collected from fees herein provided for shall be deposited with the state treasurer by the clerk of the supreme court, and placed in said attorneys' license tax fund, and shall be paid out and disbursed only as herein provided.

History: En. Sec. 7, Ch. 90, L. 1917; re-en. Sec. 8950, R. C. M. 1921.

8951. Complaints against attorney—how instituted and prosecuted. Whenever any verified complaint is filed in the office of the clerk of the supreme court, charging any attorney or counselor-at-law with having violated his oath as an attorney or counselor, or with having otherwise been guilty of conduct authorizing or justifying his suspension from

practice or disbarment, it shall be the duty of the attorney-general to represent such complaint in such action or proceeding, and to prosecute the same. He shall first investigate the charges made and determine whether or not a trial thereof should be had, and report the results of his investigation to the justices of the supreme court, and if, in his judgment, or in the judgment of the justices of the supreme court, a trial should be had, the clerk of the supreme court shall, upon the direction of the attorney-general or any justice of the supreme court, issue a summons in the form of a summons in a civil action, setting forth, in brief, the charges contained in the complaint, and requiring said attorney to appear and answer said complaint within such time as the court may designate.

History: En. Sec. 8, Ch. 90, L. 1917;
re-en. Sec. 8951, R. C. M. 1921.

References

In re Young, 77 M 332, 337, 250 P 957;
In re McCue, 80 M 537, 261 P 341.

8952. Same—complaints to attorney-general or district judge. Whenever any verified complaint is made in writing to the attorney-general that any attorney has violated his oath or otherwise been guilty of professional misconduct, or other conduct authorizing or justifying his suspension from practice or his disbarment, it shall be the duty of the attorney-general to investigate the charges so made, and if, from such investigation, he shall determine that a complaint should be filed in the supreme court of such charges and a trial thereof had, he shall file in the office of the clerk of the supreme court a complaint against such attorney, setting forth in concise language the acts or conduct charged or complained of; whereupon, the clerk of said court shall issue a summons for the appearance and answer of the party complained of, as provided in the last preceding section; that said summons and the summons as provided for in the preceding section shall be served in the same manner as provided for the service of summons in civil actions. In making such investigations the attorney-general, or the special deputy or counsel appointed to act in such matter, shall have power to subpoena witnesses and require the production of books, documents, and other instruments, and to administer oaths. Whenever a complaint is made in writing to any judge of a district court or to the supreme court against any attorney, charging him with misconduct or other acts as in this act specified, the same shall be immediately forwarded to the attorney-general, with the certificate of the clerk of such court, setting forth the time of the filing of said complaint in said court, and the name and residence of the complainant, and the residence and postoffice address of the accused, and it shall be the duty of the attorney-general thereupon to investigate such charges in the manner provided in this act.

History: En. Sec. 9, Ch. 90, L. 1917;
re-en. Sec. 8952, R. C. M. 1921.

References

In re McCue, 80 M 537, 261 P 341.

8953. Appointment of attorney as special investigator. The attorney-general or the supreme court may, when deemed necessary, appoint some attorney as special counsel or deputy to investigate any such charges, and to prosecute any disbarment proceedings instituted. The attorney

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so appointed shall be entitled to receive his necessary expenses therein and a reasonable compensation for his services, to be fixed by the supreme court.

History: En. Sec. 10, Ch. 90, L. 1917;
re-en. Sec. 8953, R. C. M. 1921.

References
In re Young, 77 M 332, 336, 250 P 957.

8954. Supreme court to make rules—powers of referees. The supreme court may make rules regulating pleadings, practice, and procedure in such action or proceeding, and in the absence of such rules the law relating to pleadings, practice, and procedure in civil actions, so far as applicable, shall control, and the court may order a reference as authorized by sections 9374 to 9385 of this code, and in the event of a reference the referee, or referees, shall have the powers provided in such sections, and shall receive such compensation as shall be fixed and allowed by the supreme court.

History: En. Sec. 11, Ch. 90, L. 1917;
re-en. Sec. 8954, R. C. M. 1921.

References
In re McCue, 80 M 537, 541, 261 P 341.

8955. Witnesses on behalf of complainant, fees and mileage of. Witnesses on behalf of the complainant in any such action or proceeding shall be entitled to the fees and mileage provided by law for witnesses in civil actions in the district court, and such fees and mileage and other costs necessarily incurred in the prosecution of any such action or proceeding shall be paid by the state treasurer out of the attorneys' license tax fund, upon warrants duly drawn by the state auditor.

History: En. Sec. 12, Ch. 90, L. 1917; re-en. Sec. 8955, R. C. M. 1921.

8956. Expenses of attorney-general—how paid. Any expenses necessarily incurred by the attorney-general in making an investigation as herein provided, or in the prosecution of any such action or proceeding, shall be paid out of the attorneys' license tax fund.

History: En. Sec. 13, Ch. 90, L. 1917; re-en. Sec. 8956, R. C. M. 1921.

8957. Other expenses—how paid. All expenses incurred and compensations earned and allowed under the provisions of this act, hereinabove set forth, shall be paid out of the attorneys' license tax fund by the state treasurer, upon the presentation of warrants duly drawn upon the said fund by the state auditor. It shall be the duty of the state auditor, upon the presentation to him by the clerk of the supreme court of a certified copy of any order of said court allowing any of such expenses or compensation, or upon a certificate by the clerk of the supreme court that such expenses have been incurred and such compensation allowed, together with itemized statements thereof, duly verified by the claimants thereof, and approved by at least one justice of the supreme court, to draw his warrant or warrants for the amounts therein named upon said attorneys' license fund, payable to the parties entitled thereto.

History: En. Sec. 14, Ch. 90, L. 1917; re-en. Sec. 8957, R. C. M. 1921.

8958. Allowance of attorneys' fees to unlicensed persons forbidden. It shall be unlawful for any court within this state to allow attorneys' fees in any action or proceeding before said court in which attorneys'

fees are allowed by law to either party to such action or proceeding, when such party is represented by anyone other than a duly admitted or licensed attorney-at-law.

History: En. Sec. 15, Ch. 90, L. 1917; re-en. Sec. 8958, R. C. M. 1921.

Operation and Effect

Held under this section that an attorneys' fee is not allowable in any action or proceeding in which attorneys' fees are allowed by law, unless the attorney has

been duly admitted and licensed to practice in Montana, and that, though the words of the section are "duly admitted or licensed," the word "or" must be read "and," any other construction rendering the provision meaningless. *Vaill v. Northern Pacific Ry. Co.*, 66 M 301, 304, 213 P 446.

8959. Collection of license tax from delinquent attorneys. If any practicing attorney or counselor-at-law shall fail, neglect, or refuse to pay to the clerk of the supreme court the license tax imposed by this act, for a period of thirty days after the same is due and payable, it shall be the duty of the clerk of the supreme court to take such action for the collection of the same as is required of the county treasurer in cases of non-payment of other licenses, as provided by section 2414 of the Political Code, and the provisions of said section and of section 2416 of said code shall control in said proceedings, so far as the same are applicable thereto.

History: En. Sec. 16, Ch. 90, L. 1917; re-en. Sec. 8959, R. C. M. 1921.

8960. Transfer of unexpended license tax fund. On the 31st day of March of each year it shall be the duty of the state treasurer to transfer from the attorneys' license tax fund all unexpended moneys remaining in said fund to the state law library fund. The moneys so transferred to the law library fund, together with any other moneys in said fund, shall be available for and may be expended in the purchase of books, pamphlets, maps, and such other literature as may be purchased for the state law library, and for furniture, equipment and appliances for the use and betterment of said library, and in meeting and paying the ordinary current expenses of said state law library as may be incurred under the direction of the board of trustees thereof. Upon the presentation by the state law librarian of vouchers for said expenditures, duly verified by him, or by the claimants of the amounts due, and approved by at least one of the justices of the supreme court, and by the state board of examiners, it shall be the duty of the state auditor to draw his warrant or warrants upon said law library fund for the amounts named in said vouchers, and it shall be the duty of the state treasurer to pay said warrants when presented out of the money in said law library fund.

History: En. Sec. 17, Ch. 90, L. 1917; re-en. Sec. 8960, R. C. M. 1921; amd. Sec. 1, Ch. 9, L. 1931.

8961. Disbarment of attorneys—causes—jurisdiction. The supreme court of the state shall have exclusive jurisdiction to remove or suspend attorneys and counselors-at-law, and an attorney and counselor may be removed or suspended for any of the following causes, arising after his admission to practice.

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.

2. Wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his

profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor.

3. Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding.

4. Lending his name to be used as attorney and counsel by another person who is not an attorney and counselor.

5. Being guilty of deceit, malpractice, crime, or misdemeanor, involving moral turpitude; provided, however, that the provisions of this section shall not abate any proceedings now pending, but the same may be proceeded with until the final determination in the court wherein such action is pending.

History: En. Sec. 402, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 36, L. 1903; re-en. Sec. 6393, Rev. C. 1907; re-en. Sec. 8961, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 287.

Conviction of a Felony or Misdemeanor Involving Moral Turpitude

Under subdivision 1 of this section, whenever it is brought to its attention that an attorney of the bar of this state has been convicted of a felony or misdemeanor involving moral turpitude in a state or federal court, the supreme court will on its own motion and on the record of conviction alone strike his name from the roll of attorneys. In *re Peters*, 73 M 284, 286, 235 P 772.

Id. Since, generally, the record of conviction of an attorney itself shows whether the crime or misdemeanor of which he was convicted involved moral turpitude, the only question before the supreme court in a disbarment proceeding based upon subdivision 1 of this section is whether he was convicted, not whether he was actually guilty.

Deceit and Malpractice Involving Moral Turpitude

Where an attorney acted for both parties in a divorce proceeding, without acquainting the court with all the facts connected with the case, he was guilty of deceit and malpractice involving moral turpitude. In *re Carleton*, 33 M 431, 440, 84 P 788.

Id. The conduct of an attorney who entered into a contract with his client, in a divorce proceeding, whereby he was to receive, in addition to the attorney's fee that might be allowed him by the court, a portion of all moneys received by his client as alimony, and who failed to call such agreement to the court's attention, prior to the making of the order allowing counsel fees, is reprehensible, and in violation of his duty as a member of the bar, in that he was guilty of deceit and malpractice involving moral turpitude.

Where an attorney, who, after securing an order of court to that effect, withdrew the sum of \$414.90 deposited by a client with a clerk of court as a tender, after

final disposition of the action by the supreme court adverse to his client, and who thereafter, in reply to inquiries by the client, repeatedly stated that the money was still in the hands of the clerk, where it should remain until the end of the litigation so as to keep the tender good, notwithstanding the funds had long been misappropriated by him, and who, under pretense that he was still conducting the litigation in her behalf, obtained the additional sum of \$65 at various times as court fees and expenses, he was guilty of conduct warranting his disbarment. In *re Thresher*, 33 M 441, 446, 84 P 876. See also In *re Lunke*, 56 M 226, 182 P 126, involving fraud by an attorney upon his client in connection with the withdrawal by the former of \$2,000 deposited by the latter as cash bail and the appropriation of the same to his own use.

The crime of forgery involves moral turpitude within the meaning of subdivision 1 of this section. In *re Sutton*, 50 M 88, 91, 145 P 6.

Where an attorney-at-law testifies, in an action which, by reason of the defense interposed, involves the legality of a marriage, that one of the parties to such marriage was, at the time thereof, insane, such testimony being given for the purpose and with the intent of deceiving the court and inducing the presiding judge to believe that such party was incapable of entering into a marriage contract, such conduct of the attorney justifies his disbarment under subdivision 5 of this section. In *re O'Keefe*, 55 M 200, 204, 175 P 593.

Effect of Having Charges Preferred by Private Persons

Where an accusation preferred by a private person in a disbarment proceeding is for a cause named in subdivision 5 of this section, an objection that such accusation is preferred by a person not authorized by law to inform the court of the matters therein charged is without merit. In *re Wellcome*, 23 M 140, 142, 58 P 45.

Moral Turpitude Defined

Moral turpitude, within the meaning of this section, authorizing the disbarment of an attorney on conviction of a crime or misdemeanor involving moral turpitude, is everything done contrary to justice, honesty or good morals. In re Peters, 73 M 284, 286, 235 P 772.

Nature of Action

A proceeding in disbarment is in no sense a criminal investigation. In re Wellcome, 23 M 213, 227, 58 P 47; In re Thresher, 33 M 441, 445, 84 P 876.

Sufficiency of Evidence to Sustain

Sufficient facts not stated to render respondent liable to disbarment under subdivision 5 of this section. In re Weed, 26 M 241, 248, 67 P 308.

Evidence in a disbarment proceeding reviewed and held sufficient to warrant the referee's findings that the accused had made a false entry upon a blank bank-deposit slip on which by inadvertence the signature of a bank officer had been placed in carbon, and on which on presentation to the bank he had obtained credit for the amount of such entry, thus defrauding the bank of that amount. In re Young, 77 M 332, 337, 250 P 957.

Supreme Court Has Exclusive Jurisdiction

The supreme court has exclusive jurisdiction, in a disbarment proceeding, to hear the evidence and determine the truth of charges of crimes and misdemeanors involving moral turpitude, whether committed within this jurisdiction or not, and whether within or without the sphere of official duty. In re Thresher, 33 M 441, 444, 84 P 876.

As against the assertion that the supreme court should not retain jurisdiction of a disbarment proceeding where the accused attorney is charged with felonies committed without the sphere of his duties as such, held, under this section, that where the court, after an investigation by the attorney general and report made to it by him sufficient to move its discre-

tion, has decided to act, its exercise of that discretion does not present a jurisdictional question. In re Young, 77 M 332, 337, 250 P 957.

Vices Must Affect Personal or Professional Integrity

Since complaints against attorneys may be prosecuted only for causes specified by this section, where specific charges under that section are made and none of them present the question of general moral delinquency other than such as may be included under subdivision 5, "being guilty of deceit, malpractice, crime or misdemeanor involving moral turpitude," the court is confined to the specifications made against him, upon which he was tried, and cannot punish him for vices affecting to some extent his moral character, but not his personal or professional integrity. In re McCue, 80 M 537, 540 et seq., 261 P 341.

Violation of Oath

Under subdivision 2 of this section, providing that an attorney may be disbarred for "violation of the oath taken by him, or of his duties as such attorney," an attorney may be punished for a wilful omission to remit money collected by him as such, even though he did not practice deceit and frankly admits his delinquency. In re McCue, 80 M 537, 540 et seq., 261 P 341.

When Court Will Not Hear Charges in Advance of Criminal Prosecution

Where the accused is charged with bribery and conspiracy, the court will refuse to inquire into the truth of the charges, unless reasons be furnished by the accusation, or by a showing in support of it, why jurisdiction should be entertained in advance of a criminal prosecution and conviction. In re Wellcome, 23 M 140, 145, 58 P 45.

References

Cited or applied as section 402, Code of Civil Procedure, before amendment, in In re Bloor, 21 M 49, 50, 52 P 779; In re Weed, 26 M 507, 516, 68 P 1115; State ex rel. Anderson v. Fousek, 91 M 448, 455, 8 P 2d 791.

8962. Conviction of crime. In case of the conviction of an attorney and counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction.

History: En. Sec. 417, C. Civ. Proc. 1895; re-en. Sec. 6409, Rev. C. 1907; re-en. Sec. 8962, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 288.

Operation and Effect

It is not necessary to file any complaint, or to issue or serve any citation, in a proceeding for the disbarment of an attorney,

where he has been convicted of a felony, or a misdemeanor involving moral turpitude, where the record of conviction has been duly certified to the supreme court. In re Bloor, 21 M 49, 52 P 779.

References

Cited or applied as section 6409, Revised Codes, in In re Sutton, 50 M 88, 89, 145 P 6; In re Thresher, 54 M 474, 475, 170 P 1163.

8963. Proceedings for removal or suspension. The proceedings to remove or suspend an attorney and counselor, under the first subdivision of section 8961, must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second, third, or fourth subdivision of section 8961 may be taken by the court for the matters within its knowledge, or may be taken upon the information of another.

History: En. Sec. 418, C. Civ. Proc. 1895; re-en. Sec. 6410, Rev. C. 1907; re-en. Sec. 8963, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 289.

Operation and Effect

Where an attorney has been convicted of a felony, or a misdemeanor involving moral turpitude, the supreme court is left without discretion in the matter of his removal or suspension, but must proceed under this section on receipt of a certified copy of the record of conviction, which is deemed to be conclusive evidence. In re Bloor, 21 M 49, 50, 52 P 779; In re Wellcome, 23 M 140, 143, 58 P 45.

Upon lodgment with the clerk of the supreme court of a certified copy of the record of an attorney's conviction for a

felony, that court, under this section, if it appear of record that the judgment of conviction is final, either by reason of his acquiescence in it or made so by affirmation on appeal, must, without notice or citation, enter judgment that his name be stricken from the roll of attorneys. In re Sutton, 50 M 88, 91, 145 P 6.

The name of an attorney convicted of a felony will be stricken from the roll of attorneys, without formal charge or notice to him, upon lodgment of a certified copy of the record of conviction, after the judgment has become final, either by reason of failure to appeal or for some other cause. In re Thresher, 54 M 474, 475, 170 P 1163.

References

In re Peters, 73 M 284, 287, 235 P 772.

8964. Accusation. If the proceedings are upon the information of another, the accusation must be in writing.

History: En. Sec. 419, C. Civ. Proc. 1895; re-en. Sec. 6411, Rev. C. 1907; re-en. Sec. 8964, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 290.

8965. Verification. The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true.

History: En. Sec. 420, C. Civ. Proc. 1895; re-en. Sec. 6412, Rev. C. 1907; re-en. Sec. 8965, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 291.

Operation and Effect

Charges in an accusation against an attorney, in disbarment proceedings, which are indefinite, vague, and uncertain, will, on motion, be stricken out. In re Wellcome, 23 M 140, 143, 58 P 45.

An accusation in disbarment proceedings wherein some of the charges are verified only on information and belief, and others are positively sworn to, is partially valid, and will stand against an objection aimed at the entire accusation. In re Wellcome, 23 M 213, 228, 58 P 47.

Charges verified upon information and belief will not be considered. In re Weed, 26 M 241, 250, 67 P 308.

8966. Citation. Upon receiving the accusation, the court must make an order requiring the accused to appear and answer it at a specified time, and cause a copy of the order and of the accusation to be served upon the accused at least five days before the day appointed in the order.

History: En. Sec. 421, C. Civ. Proc. 1895; re-en. Sec. 6413, Rev. C. 1907; re-en. Sec. 8966, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 292.

8967. Appearance. The accused must appear at the time appointed in the order, and answer the accusations, unless, for sufficient cause, the court assign another day for that purpose. If he do not appear, the court may proceed and determine the accusation in his absence.

History: En. Sec. 422, C. Civ. Proc. 1895; re-en. Sec. 6414, Rev. C. 1907; re-en. Sec. 8967, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 293.

8968. Objections to accusation. The accused may answer to the accusation either by objecting to its sufficiency or denying it.

History: En. Sec. 423, C. Civ. Proc. 1895; re-en. Sec. 6415, Rev. C. 1907; re-en. Sec. 8968, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 294.

References

Cited or applied as section 423, Code of Civil Procedure, in *In re Wellcome*, 23 M 140, 141, 58 P 45; *In re Weed*, 26 M 241, 244, 67 P 308.

8969. Demurrer or denial. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

History: En. Sec. 424, C. Civ. Proc. 1895; re-en. Sec. 6416, Rev. C. 1907; re-en. Sec. 8969, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 295.

8970. Answer. If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court.

History: En. Sec. 425, C. Civ. Proc. 1895; re-en. Sec. 6417, Rev. C. 1907; re-en. Sec. 8970, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 296.

8971. Trial. If the accused plead guilty, or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the matters charged, the court must, at such time as it may appoint, try the accusation.

History: En. Sec. 426, C. Civ. Proc. 1895; re-en. Sec. 6418, Rev. C. 1907; re-en. Sec. 8971, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 297.

Operation and Effect

Where an attorney admits his guilt of professional misconduct, the supreme court must, under this section and section 8973, either disbar him permanently or suspend him for a limited period, according to the gravity of the offense. *In re Burke*, 55 M 303, 304, 176 P 421.

8972. Referee to take depositions. The court may, in its discretion, order a reference to a committee or referee to take depositions in the matter.

History: En. Sec. 427, C. Civ. Proc. 1895; re-en. Sec. 6419, Rev. C. 1907; re-en. Sec. 8972, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 298.

8973. Judgment. Upon conviction, in cases arising under the first subdivision of section 8961, the judgment of the court must be that the name of the party be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state; and upon conviction in cases under the other subdivisions of that section, the judgment of the court

may be according to the gravity of the offense charged: deprivation of the right to practice as attorney or counselor in the courts of this state permanently, or for a limited period.

History: En. Sec. 428, C. Civ. Proc. 1895; re-en. Sec. 6420, Rev. C. 1907; re-en. Sec. 8973, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 299.

References

Cited or applied as section 428, Code of Civil Procedure, in *In re Bloor*, 21 M 49, 50, 52 P 779; *In re Wellecome*, 23 M 140, 142, 58 P 45; as section 6420, Revised Codes, *In re Sutton*, 50 M 88, 95, 145 P 6; *In re Burke*, 55 M 303, 304, 176 P 421.

CHAPTER 22

GENERAL PROVISIONS RELATING TO THE POWERS, DUTIES, LIABILITIES AND COMPENSATION OF ATTORNEYS

- Section 8974. Authority.
 8975. Change of attorney.
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 8984. Partner of public prosecutors not to defend, etc.
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 8986. Partners not to appear on opposite sides.
 8987. Penalty for violation of two preceding sections.
 8988. Party may appear in person or by attorney.
 8989. Attorney may defend in person when prosecuted.
 8990. Attorney may see prisoner.
 8991. Attorney not to become surety on bond.
 8992. Clerks, etc., not to practice.
 8993. Lien for compensation.
 8994. Attorney may be compelled to show his authority.

8974. Authority. An attorney and counselor has authority:

1. To bind his client in any steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise.

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed; and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

3. The death of a party to an action or proceeding does not revoke the authority of his attorney of record in said action or proceeding, but the authority of the attorney is continued in all respects the same and with like effect as it was prior to the death of such party, until such attorney shall withdraw his appearance in said action or proceeding, or some other attorney shall be substituted for him, or his authority shall be otherwise terminated, and entry thereof made to appear in the record of such action or proceeding.

History: En. Sec. 398, C. Civ. Proc. 1895; re-en. Sec. 6389, Rev. C. 1907; Sec. 1, Ch. 35, L. 1915; re-en. Sec. 8974, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 283.

No Authority to Compromise

An attorney, as such, has no authority to compromise a controversy of his client, no matter what may be the difficulties involved, nor however advantageous the result may be to the client. A general retainer in a case does not imply such authority, and, if a compromise of the controversy be made, it must be made under special authority delegated for that purpose. Otherwise, and in the absence of a ratification by the client, the compromise agreement, as well as any judgment entered in pursuance of it, is void at the option of the client. *Harris v. Root*, 28 M 159, 167, 72 P 429.

Not Empowered to Accept Anything But Money in Settlement

The agent has no implied authority to accept payment in anything but money; hence an attorney, who is but the agent of his client, though authorized, under this section, to accept money in discharge of the client's claim, cannot by his retention of a draft payable to the client and to which a release was attached to be signed by him personally, bind him to an agreement of settlement. *Barbarich v. Chicago etc. Ry. Co. et al.*, 92 M 1, 15, 9 P 2d 797.

Notice to Attorney Is Notice to Client

Notice to the attorney of defendant in a divorce action of the setting of the cause for trial was notice to her, and therefore a new trial asked for on the ground that she herself did not have notice was properly refused. *Davenport v. Davenport*, 69 M 405, 410, 222 P 422.

Not to Affect the Enforcement of Oral Executed Stipulation

This section was not designed to prevent the enforcement by the courts of executed oral agreements or stipulations admitted by the party or his attorney against whom they are alleged, although neither reduced to writing nor made in open court. *Beach v. Spokane Ranch & Water Co.*, 21 M 184, 185, 53 P 493; *Bush v. Baker*, 46 M 535, 546, 129 P 550.

A rule of the district court that agreements between attorneys relating to causes pending, will be disregarded by the court, unless made in open court and entered in the minutes or reduced to writing, subscribed by the party, or his attorney, against whom they are urged, has no application to an executed oral agreement or stipulation admittedly entered into by an

attorney; such agreement binds the attorney, though he is inclined to repudiate it, where the client did not interfere nor dissent. *Bush v. Baker*, 46 M 535, 546, 129 P 550.

Requirements of Stipulation to be Effective

An order of the district court cannot be based upon a stipulation between the attorneys in the case, where the stipulation is denied by one of the attorneys, and it was neither made in writing nor made in open court and entered in the minutes. *Beach v. Spokane Ranch & Water Co.*, 21 M 184, 185, 53 P 493.

Little reliance is placed by courts upon oral agreements between counsel as to an extension of time within which an answer to a complaint might be filed as ground for setting aside a default; stipulations of that nature should be in writing and filed or made in open court and entered in the minutes (this section, and section 9099). *St. Paul Fire & Marine Ins. Co. v. Freeman*, 80 M 266, 274, 260 P 124.

Stipulation as to Date of Trial Binding on Client

An attorney has authority to enter a stipulation for the setting of a cause for trial, and his client is bound thereby. *Davenport v. Davenport*, 69 M 405, 410, 222 P 422.

Under the rule that if an attorney acts within the scope of his employment, express or implied, the client is bound, held that it is within the implied power of an attorney regularly employed in a criminal case to consent to the setting or continuance of the cause for trial, the provision of this section that an attorney has authority to bind his client "by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise," neither enlarging nor abridging the authority of the attorney as it existed under the common law rule, but only prescribing a rule for its exercise. *State v. Turlok*, 76 M 549, 564, 248 P 169.

References

Cited or applied as section 6389, Revised Codes, before amendment, in *Washoe Copper Co. v. Hickey*, 46 M 363, 366, 128 P 584; *Bullard v. Zimmerman et al.*, 88 M 271, 279, 292 P 730; *Mitchell v. Banking Corp. of Montana*, 94 M 183, 187, 22 P 2d 155.

8975. Change of attorney. The attorney in an action or special proceeding may be changed at any time before or after judgment, or final determination, as follows:

1: Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes.

2: Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

History: En. Sec. 399, C. Civ. Proc. 1895; re-en. Sec. 6390, Rev. C. 1907; re-en. Sec. 8975, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 284.

Operation and Effect

The guardian of an incompetent was absolutely entitled to have a different attor-

ney substituted to represent him, for the firm that had represented the incompetent prior to the appointment of the guardian, notwithstanding the fees due such firm had not been paid. *State ex rel. Davis v. District Court*, 30 M 8, 11, 75 P 516.

8976. Notice of change. When an attorney is changed, as provided in the last section, written notice of the change and the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney.

History: En. Sec. 400, C. Civ. Proc. 1895; re-en. Sec. 6391, Rev. C. 1907; re-en. Sec. 8976, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 285.

8977. Death or removal of attorney. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or appear in person.

History: En. Sec. 401, C. Civ. Proc. 1895; re-en. Sec. 6392, Rev. C. 1907; re-en. Sec. 8977, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 286.

8978. Punishment for deceit. An attorney or counselor, who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or a party, forfeits to the party injured by his deceit or collusion treble damages. He is also guilty of a misdemeanor.

History: En. Sec. 403, C. Civ. Proc. 1895; re-en. Sec. 6395, Rev. C. 1907; re-en. Sec. 8978, R. C. M. 1921. Cal. Pen. C. Sec. 160.

8979. Punishment for wilful delay. An attorney and counselor who wilfully delays his client's cause, with a view to his own gain, or wilfully receives money, or an allowance for or on account of money, which he has not laid out or become answerable for, forfeits to the party injured treble damages.

History: En. Sec. 404, C. Civ. Proc. 1895; re-en. Sec. 6396, Rev. C. 1907; re-en. Sec. 8979, R. C. M. 1921. Cal. Pen. C. Sec. 160.

8980. Attorney prohibited from acquiring claims for purpose of bringing action thereon. An attorney and counselor must not, directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

History: En. Sec. 405, C. Civ. Proc. 1895; re-en. Sec. 6397, Rev. C. 1907; re-en. Sec. 8980, R. C. M. 1921. Cal. Pen. C. Sec. 161.

Operation and Effect

This section does not include the shares of the capital stock of a corporation. *Forrester v. Boston & M. C. C. & S. M. Co.*, 21 M 544, 565, 570, 55 P 229, 353.

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Under this section, an attorney is prohibited from buying any note, debt or other thing in action for the purpose of bringing suit thereon, and where his intent is established, he cannot recover. *Strever v. Sinclier et al.*, 66 M 258, 265, 213 P 253.

References

Cited or applied as section 405, Code of Civil Procedure, in *Forrester v. Boston & M. C. C. & S. M. Co.*, 21 M 544, 570, 55 P 229, 353; *Haley v. Hollenback*, 53 M 494, 499, 156 P 459; *Coleman v. Sisson*, 71 M 435, 442, 230 P 582; *In re Maury et al.*, 97 M 316, 321, 34 P 2d 380.

8981. Certain other transactions prohibited—penalty for violation of two preceding sections. An attorney and counselor must not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon. But this section does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received. An attorney and counselor who violates either of the last two sections is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

History: En. Sec. 406, C. Civ. Proc. 1895; re-en. Sec. 6398, Rev. C. 1907; re-en. Sec. 8981, R. C. M. 1921.

References

Cited or applied as section 6398, Revised Codes, in *Haley v. Hollenback*, 53 M 494, 499, 165 P 459; *Coleman v. Sisson*, 71 M 435, 442, 230 P 582; *In re Maury et al.*, 97 M 316, 321, 34 P 2d 380.

8982. Limitation upon three preceding sections. The last three sections do not prohibit the receipt by an attorney or counselor of a bond, promissory note, bill of exchange, book debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying or receiving a bill of exchange, draft, or other thing in action, for the purpose of remittance, and without intent to violate either of those sections.

History: En. Sec. 407, C. Civ. Proc. 1895; re-en. Sec. 6399, Rev. C. 1907; re-en. Sec. 8982, R. C. M. 1921.

8983. Same rule when party prosecutes in person. The last four sections apply to a person prosecuting an action in person, who does an act which an attorney and counselor is therein forbidden to do.

History: En. Sec. 408, C. Civ. Proc. 1895; re-en. Sec. 6400, Rev. C. 1907; re-en. Sec. 8983, R. C. M. 1921.

8984. Partner of public prosecutors not to defend, etc. An attorney and counselor must not, directly or indirectly, advise concerning, aid, or take any part in the defense of an action or special proceeding, civil or criminal, brought, carried on, aided, advocated, or prosecuted, as attorney-general, county attorney, or other public prosecutor, by a person with whom he is interested or connected, either directly or indirectly, as a law partner; or take or receive, directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretense, understanding, or agreement whatever,

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express or implied, having relation thereto, or to the prosecution or defense thereof.

History: En. Sec. 409, C. Civ. Proc. 1895; re-en. Sec. 6401, Rev. C. 1907; re-en. Sec. 8984, R. C. M. 1921. Cal. Pen. C. Sec. 162.

8985. Former public prosecutors not to defend, etc. An attorney and counselor, who has brought, carried on, aided, advocated, or prosecuted, or has been in anywise connected with an action or special proceeding, civil or criminal, as attorney-general, county attorney, or other public prosecutor, must not, at any time thereafter, directly or indirectly, advise concerning, aid, or take any part in the defense thereof; or take or receive, either directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretense, understanding, or agreement, either express or implied, having relation thereto, or to the prosecution or defense thereof.

History: En. Sec. 410, C. Civ. Proc. 1895; re-en. Sec. 6402, Rev. C. 1907; re-en. Sec. 8985, R. C. M. 1921. Cal. Pen. C. Sec. 162.

References

Cited or applied as section 6402, Revised Codes, in *In re Bunston*, 52 M 83, 87, 155 P 1109.

8986. Partners not to appear on opposite sides. Whenever a law partnership, or any member thereof, accepts employment to prosecute or defend any action, civil or criminal, or to advise in relation thereto, no member of said partnership is permitted, then or afterward, to act as attorney or counselor on the side opposite to that upon which such original employment was had. But this section does not prevent a person, who has been employed as attorney and counselor in an action or proceeding before becoming a member of a partnership, from appearing and acting therein until its completion.

History: En. Sec. 411, C. Civ. Proc. 1895; re-en. Sec. 6403, Rev. C. 1907; re-en. Sec. 8986, R. C. M. 1921.

8987. Penalty for violation of two preceding sections. An attorney and counselor who violates either of the last two sections is guilty of a misdemeanor, and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

History: En. Sec. 412, C. Civ. Proc. 1895; re-en. Sec. 6404, Rev. C. 1907; re-en. Sec. 8987, R. C. M. 1921.

8988. Party may appear in person or by attorney. A party to a civil action, who is of full age, may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs. Each provision of this chapter, relating to the conduct of an action, wherein the attorney for the party is mentioned, includes a party prosecuting or defending in person, unless otherwise specially prescribed therein, or unless that construction is manifestly repugnant to the context. If a party has an attorney in the action, he cannot appear or act in person where an attorney may appear or act, either by special provisions of law or by the course and practice of the court.

History: En. Sec. 413, C. Civ. Proc. 1895; re-en. Sec. 6405, Rev. C. 1907; re-en. Sec. 8988, R. C. M. 1921.

8989. Attorney may defend in person when prosecuted. This chapter does not prohibit an attorney or counselor from defending himself in person, if prosecuted either civilly or criminally.

History: En. Sec. 414, C. Civ. Proc. 1895; re-en. Sec. 6406, Rev. C. 1907; re-en. Sec. 8989, R. C. M. 1921. Cal. Pen. C. Sec. 163.

8990. Attorney may see prisoner. All public officers, sheriffs, coroners, jailers, constables, or other officers or persons, having in custody any person committed, imprisoned, or restrained of his liberty, for any alleged cause whatever, must admit any practicing attorney and counselor-at-law in this state, whom such person restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody. Any officer violating this provision shall forfeit and pay one hundred dollars to the person aggrieved, to be recovered by action of debt in any court of competent jurisdiction.

History: En. Sec. 13, p. 373, Bannack Stat.; re-en. Sec. 13, p. 378, Cod. Stat. 1871; re-en. Sec. 52, 5th Div. Rev. Stat. 1879; re-en. Sec. 114, 5th Div. Comp. Stat. 1887; re-en. Sec. 415, C. Civ. Proc. 1895; re-en. Sec. 6407, Rev. C. 1907; re-en. Sec. 8990, R. C. M. 1921.

Operation and Effect

Held, on application for writ of mandate, that an attorney for a prisoner confined in the state penitentiary against whom an untried criminal charge was pending in the district court, had the right under this section to demand that he be accorded a reasonable opportunity to consult with his client in absolute privacy, and that the contention that an action of debt to recover the penalty of \$100 from an officer violating the provision of the section affords the exclusive remedy open to the prisoner has no merit. *State v. Board of Prison Commrs. et al.*, 84 M 14, 17, 273 P 1044.

This section, requiring any person having in custody a person committed to jail or other place of custody to permit such person to consult any attorney he desires "alone and in private," held sufficiently broad to include the warden of the state prison and inmates thereof. *State v. District Court et al.*, 85 M 215, 223, 278 P 122.

8991. Attorney not to become surety on bond. No attorney and counselor-at-law shall become security in any bond or recognizance of any sheriff, constable, or coroner, or in any bond or recognizance for the appearance of any person or persons charged with any public offense, or upon any bond, undertaking, or recognizance authorized by any statute to be taken for the payment of any sum of money into court in default of the principal, without the consent of the judge of the district court first had, approving said security.

History: En. Sec. 14, p. 373, Bannack Stat.; re-en. Sec. 14, p. 378, Cod. Stat. 1871; re-en. Sec. 53, 5th Div. Rev. Stat. 1879; re-en. Sec. 115, 5th Div. Comp. Stat. 1887; re-en. Sec. 416, C. Civ. Proc. 1895;

Id. Pursuant to the provisions of this section, the district court in a proceeding in mandamus ordered the warden of the state prison to permit an attorney to consult with a prisoner in absolute privacy. The warden ordered that consultation be permitted through a small window fitted in the wall with a half-inch wire mesh on each side of the wall, no one being within ear-shot but a guard standing outside a glass door where he could see the attorney but could not hear what was being said. The attorney, insisting that the interview would not be in absolute privacy, instituted contempt proceedings and the defendant was found guilty and a fine imposed. Held, on application for writ of supervisory control that the arrangement made by the warden under the circumstances of the case sufficiently complied with the order of the court and that the judgment of contempt was not supported by the evidence.

Id. The right granted by this section to an attorney to consult with a prisoner depends upon legitimate business to be transacted, not upon a mere desire to visit the prisoner, and the reasonableness of the arrangement made for the interview in each case depends largely upon the nature and extent of the business to be transacted.

re-en. Sec. 6408, Rev. C. 1907; re-en. Sec. 8991, R. C. M. 1921.

References

State ex rel. Helena Adjust. Co. v. District Court, 92 M 587.

8992. Clerks, etc., not to practice. The clerk, deputy clerk, sheriff, under-sheriff, deputy sheriff, or coroner must not, during his continuance in office, practice as attorney and counselor in any court.

History: En. Sec. 429, C. Civ. Proc. 1895; re-en. Sec. 6421, Rev. C. 1907; re-en. Sec. 8992, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 171.

8993. Lien for compensation. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

History: En. Sec. 430, C. Civ. Proc. 1895; re-en. Sec. 6422, Rev. C. 1907; re-en. Sec. 8993, R. C. M. 1921.

Action in Equity to Foreclose Lien

An action brought to foreclose an attorney's lien is an equitable proceeding, and every person interested in the subject-matter of the controversy is a proper party thereto. *Coombe v. Knox*, 28 M 202, 205, 72 P 641.

Id. An action for the foreclosure of an attorney's lien is in every sense analogous to the foreclosure of a mechanic's lien or mortgage.

The complaint in a suit to foreclose an attorney's lien, on property upon which a prior mortgage was outstanding, need not allege that tender of payment of the mortgage lien had been made to the mortgagee, since such tender is not a condition precedent to the bringing of the suit. *Gilchrist v. Hore*, 34 M 443, 445, 87 P 443.

Amount of Fee Need Not Be Definite

It is not essential to the existence of the lien that the amount of the attorney fee should be definitely fixed. In an action brought for the enforcement of the lien, the amount due must be alleged in the complaint, either by stating a fixed sum or by averring the reasonable value of the services rendered. *Coombe v. Knox*, 28 M 202, 205, 72 P 641.

Attorney Need Not Give Notice

This section, giving an attorney a lien upon his client's cause of action, is itself notice to the world of the lien, and hence the attorney is not required to give notice. *Walsh v. Hoskins*, 53 M 198, 206, 162 P 960.

Contingent Fees Permissible

In this state attorneys are free, except in so far as they are prohibited by statute, to enter into such contracts with their clients for compensation as they choose; a

contract for a contingent compensation is not prohibited and is valid, though such a contract may require the services of the attorney in finding the necessary witnesses. *Haley v. Hollenback*, 53 M 494, 499, 165 P 459.

Contract for Fees

While under this section and section 9786, an attorney may contract with his client freely as to his compensation before the fiduciary relation commences, as respects such a contract made after the relation began he has the burden of showing that the contract was fair and reasonable and entered into freely by the client, and that the latter fully knew and understood its provisions; in the absence of such allegations the complaint is insufficient. *Coleman v. Sisson*, 71 M 435, 442, 230 P 582.

Generally speaking, the right of an attorney to collect payment for his services depends upon the fact of his employment; hence where there was no contract of employment of an attorney in behalf of an estate, who on the contrary was employed by one of several devisees to defend a contest of the will under which he claimed, the devisee, and not the estate, was liable for the attorney's fee. In *re Baxter's Estate*, 94 M 257, 267, 22 P 2d 182.

Effect of This Section

The effect of this section and of section 9786 is to abolish the common-law doctrine of champerty and maintenance in this state, except in so far as it is retained in modified form in sections 8980 and 8981, and neither of those sections mentions a contract contingent upon the success of the litigant. *Haley v. Hollenback*, 53 M 494, 499, 165 P 459; In *re Maury et al.*, 97 M 316, 321, 34 P 2d 380.

Extent of Lien

Under the common law, an attorney's lien on a judgment secured for his client

is ended when, by the taking over of property or otherwise, the judgment is satisfied; but under this section the lien extends to "the proceeds" of the judgment in the hands of whomsoever they may come. The mere fact that the judgment debtor's property was bought in under execution by plaintiff, and thus became the proceeds of the judgment obtained by him for his client, and took the place thereof, did not constitute a waiver of the lien. *English v. Jenks*, 54 M 295, 299, 169 P 727.

Nature of Lien

The lien granted by the statute operates as an equitable assignment of so much of the judgment as will satisfy the lien, and, for the purpose of securing payment, subrogates the attorney to the right of his client to that extent. Any security, therefore, which the client has for the payment of his judgment, may be availed of for the benefit of the attorney. *Coombe v. Knox*, 28 M 202, 205, 72 P 641.

Though, as between attorney and client, the latter controls the course of litigation, including its settlement, the parties making the settlement, as well as their assignees, are chargeable with notice of the former's statutory lien. *Walsh v. Hoskins*, 53 M 198, 209, 162 P 960.

Not Affected by Settlement

Since an attorney's lien cannot be affected by any settlement between the parties before or after judgment, a finding in an action by an attorney on such a lien, that defendant had no intention to defeat the lien by making final payment under a contract of sale in a bank other than the one fixed therein, was immaterial, as was also an allegation in the complaint

that they had such intention. *Walsh v. Hoskins*, 53 M 198, 207, 162 P 960.

While the client controls the course of litigation, including compromises and settlements, if a settlement is made by the client it is subject to the attorney's claim for fees, and the parties making the settlement are bound to take notice of such claim (this section); and while the obligation to pay attorney's fees in case enforced collection of a promissory note becomes necessary is imposed upon the maker in favor of the holder of the note and not in favor of the attorney, payment of the principal sum exclusive of the attorney's fee during the pendency of an action to enforce payment does not discharge the note in full. *National Park Bk. of N. Y. v. American B. Co.*, 79 M 542, 548, 257 P 436.

Parties to Action to Foreclose

An attorney seeking to enforce his lien may bring an independent action against his client or the adverse party, or both. *Coombe v. Knox*, 28 M 202, 205, 72 P 641.

When Lien May be Asserted

An attorney may, independently of his client, assert his lien prior to judgment or settlement, since the statute declares that the lien attaches in favor of counsel for plaintiff from the commencement of the action. *Walsh v. Hoskins*, 53 M 198, 208, 162 P 960.

References

Downey et al. v. Northern Pacific Ry. Co., 72 M 166, 181, 232 P 531; *Walker v. Hill*, 90 M 111, 121, 300 P 260; *Barbarich v. Chicago etc. Ry. Co. et al.*, 92 M 1, 15, 9 P 2d 797; *Costello v. Shields*, 99 M 335, 43 P 2d 879.

8994. Attorney may be compelled to show his authority. The court or judge, on motion of either party, may require the attorney of the adverse party to produce and prove the authority under which he appears, and may stay all proceedings until such is shown, and may at any time summarily relieve a party from the consequences of the acts of an unauthorized attorney.

History: En. Sec. 431, C. Civ. Proc. 1895; re-en. Sec. 6423, Rev. C. 1907; re-en. Sec. 8994, R. C. M. 1921.

Insufficiency of Proof of Authority in Attorney to Prosecute Appeal

Showing made by an attorney on an order requiring him to show by what authority he, as one of five statutory trustees of a dissolved corporation, was prosecuting an appeal to the supreme court from an order appointing a receiver for the corporation without the consent of his four cotrustees, to the effect that he had for many years represented the trust in legal matters with their consent, and

that he had so represented them in the action resulting in the appeal, held insufficient in the absence of proof that they had authorized him to take the appeal. *Union Bank etc. Co. v. Penwell et al.*, 99 M 255, 264, 42 P 2d 457.

Lack of Authority in Attorney to Act—Dismissal of Appeal

Where it is shown that an attorney has no authority to represent the party for whom he assumes to act in taking an appeal, he will not be permitted to act further and the appeal will be dismissed. *Union Bank etc. Co. v. Penwell et al.*, 99 M 255, 263, 42 P 2d 457.

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46 P (2d) 715

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Motion Requiring Attorney to Show Authority—Sufficiency

A motion for an order requiring an attorney to show by what authority he appears in a cause, authorized by this section, need not be supported by oath or affidavit; if made in good faith and supported by a showing of reasonable cause otherwise than by affidavit, the motion will be sufficient. *Union Bank etc. Co. v. Penwell et al.*, 99 M 255, 262, 42 P 2d 457.

Id. Under the above rule, held, that where an attorney who was one of five statutory trustees of a dissolved corporation, assumed to prosecute an appeal to the supreme court from an order appointing a receiver for the corporation made with the consent of the other four trustees, a motion of the bank at the instance of which the appointment was made and which was the party respondent on appeal, asking that the attorney prosecuting the appeal be required to show by whose authority he was acting, supported by a letter from each of the cotrustees to the effect that they had never authorized the appeal, presented a sufficient showing to justify the issuance of the order prayed for.

Operation and Effect

The court may, on motion of either party made in good faith and upon a showing supported by affidavit or otherwise, require the attorney of the adverse party to produce and prove the authority under which he appears, and if it be shown that the attorney has no such authority, dismiss the action. *Missoula Belt Line Ry. Co. v. Smith et al.*, 58 M 432, 441, 193 P 529.

Where defendant had entered a plea of guilty to the charge of illegal transporta-

tion of intoxicating liquor, and later authorized his attorney to withdraw that plea and enter one of guilty on condition that the district judge would agree to the imposition of a certain fine with the jail sentence suspended, and the attorney entered an unconditional plea, of guilty, he exceeded his authority and the court, under this section, erred in refusing to set aside the judgment pronounced on the latter plea. *State v. Dow*, 71 M 291, 301, 229 P 402.

Presumption that Attorney Has Authority to Appear Not Conclusive

The presumption that a regularly admitted attorney appearing for a party in a cause is authorized to so appear is not conclusive; the opposite party having reasonable cause to doubt the attorney's authority may apply to the court requiring him to show his authority, the burden of proving lack thereof by positive evidence resting upon the attacking party, whereupon, such burden being sustained, the burden shifts to the attorney to show his authority. *Union Bank etc. Co. v. Penwell et al.*, 99 M 255, 263, 42 P 2d 457.

When Waived

The motion requiring the attorney for the adverse party to produce his authority must be made at the earliest practicable time, otherwise the right may be deemed to have been waived. *Missoula Belt Line Ry. Co. v. Smith*, 58 M 432, 442, 193 P 529.

Where a defendant does not challenge in the trial court the authority of an attorney of his adversary to appear for him, in accordance with the provisions of this section, his right to question it later is waived. *In re Miller's Estate*, 71 M 330, 338, 229 P 851.

CHAPTER 23

JUDICIAL REMEDIES—ACTIONS AND SPECIAL PROCEEDINGS

- Section 8995. Judicial remedies defined.
 8996. Division of judicial remedies.
 8997. Action defined.
 8998. Special proceeding defined.
 8999. Division of actions.
 9000. Civil actions—out of what they arise.
 9001. Obligation defined.
 9002. Division of injuries.
 9003. Injuries to property.
 9004. Injuries to the person.
 9005. Civil action—by whom prosecuted.
 9006. Criminal actions.
 9007. Civil and criminal remedies not merged.

8995. Judicial remedies defined. Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for the purpose by the constitution and statutes of this state.

History: En. Sec. 3469, C. Civ. Proc. 1895; re-en. Sec. 8077, Rev. C. 1907; re-en. Sec. 8995, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 20.

References

Cited or applied as section 3469, Code of Civil Procedure, in *Butte & B. Co. v. Mon-*

tana O. P. Co., 24 M 125, 131, 60 P 1039; *State ex rel. Carleton v. District Court*, 33 M 138, 149, 82 P 789; *McKenzie v. Doran*, 39 M 593, 594, 104 P 677; *State v. District Court*, 61 M 558, 566, 202 P 756.

8996. Division of judicial remedies. These remedies are divided into two classes:

1. Actions; and,
2. Special proceedings.

History: En. Sec. 3470, C. Civ. Proc. 1895; re-en. Sec. 8078, Rev. C. 1907; re-en. Sec. 8996, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 21.

References

Cited or applied as section 3470, Code of Civil Procedure, in *Butte & B. Co. v. Montana O. P. Co.*, 24 M 125, 131, 60 P 1039; *State ex rel. Healy v. District Court*, 26 M 224, 226, 67 P 114, 68 P 470; *State ex*

rel. Heinze v. District Court, 28 M 227, 233, 72 P 613; *State ex rel. Carleton v. District Court*, 33 M 138, 149, 82 P 789, 8 *District Court*, 33 M 138, 149, 82 P 789; as section 8078, Revised Codes, in *State ex rel. Gattan v. District Court*, 39 M 134, 136, 101 P 961; as section 3470, Code of Civil Procedure, in *McKenzie v. Doran*, 39 M 593, 594, 104 P 677; *State v. District Court*, 61 M 558, 571, 202 P 756; *State v. Rouleau et al.*, 68 M 529, 543, 219 P 1096.

8997. Action defined. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

History: En. Sec. 3471, C. Civ. Proc. 1895; re-en. Sec. 8079, Rev. C. 1907; re-en. Sec. 8997, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 22.

Operation and Effect

A disbarment proceeding not being an action, it must be classified as a special proceeding, for the reason that every remedy sought or administered under the codes is classified as by action or special proceeding. In *re Wellcome*, 23 M 259, 260, 58 P 711.

One whose interests have not been or are not about to be, prejudicially affected by the operation of a statute may not attack

the constitutionality of the statute in a court of justice. *Holt v. Custer County et al.*, 75 M 328, 330, 243 P 811.

References

Cited or applied as section 3471, Code of Civil Procedure, in *State ex rel. Carleton v. District Court*, 33 M 138, 142, 82 P 789; as section 8079, Revised Codes, in *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 186, 99 P 298; *State ex rel. Gattan v. District Court*, 39 M 134, 136, 101 P 961; *State v. Lewis*, 67 M 447, 451, 216 P 337; *State v. Rouleau et al.*, 68 M 529, 543, 219 P 1096.

8998. Special proceeding defined. Every other remedy is a special proceeding.

History: En. Sec. 3472, C. Civ. Proc. 1895; re-en. Sec. 8080, Rev. C. 1907; re-en. Sec. 8998, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 23.

References

Cited or applied as section 3472, Code of Civil Procedure, in *State ex rel. Healy v. District Court*, 26 M 224, 226, 67 P 114,

68 P 470; *State ex rel. Heinze v. District Court*, 28 M 227, 233, 72 P 613; *State ex rel. Carleton v. District Court*, 33 M 138, 142, 82 P 789; as section 8080, Revised Codes, in *State ex rel. Gattan v. District Court*, 39 M 134, 136, 101 P 961; *State v. Rouleau et al.*, 68 M 529, 543, 219 P 1096; *State v. Northern Pac. Ry. Co.*, 88 M 529, 550, 295 P 257.

8999. Division of actions. Actions are of two kinds:

1. Civil; and,
2. Criminal.

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History: En. Sec. 3473, C. Civ. Proc. 1895; re-en. Sec. 8081, Rev. C. 1907; re-en. Sec. 8999, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 24.

References

Cited or applied as section 3473, Code of Civil Procedure, in *McKenzie v. Doran*, 39 M 593, 594, 104 P 677; *State v. Rouleau et al.*, 68 M 529, 543, 219 P 1096.

9000. Civil actions—out of what they arise. A civil action arises out of:

1. An obligation.
2. An injury.

History: En. Sec. 3474, C. Civ. Proc. 1895; re-en. Sec. 8082, Rev. C. 1907; re-en. Sec. 9000, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 25.

References

Cited or applied as section 3474, Code of Civil Procedure, in *McKenzie v. Doran*, 39 M 593, 594, 104 P 677.

9001. Obligation defined. An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

1. Contract; or,
2. Operation of law.

History: En. Sec. 3475, C. Civ. Proc. 1895; re-en. Sec. 8083, Rev. C. 1907; re-en. Sec. 9001, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 26.

9002. Division of injuries. An injury is of two kinds:

1. To the person; and
2. To property.

History: En. Sec. 3476, C. Civ. Proc. 1895; re-en. Sec. 8084, Rev. C. 1907; re-en. Sec. 9002, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 27.

References

Cited or applied as section 3476, Code of Civil Procedure, in *McKenzie v. Doran*, 39 M 593, 594, 104 P 677.

9003. Injuries to property. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it.

History: En. Sec. 3477, C. Civ. Proc. 1895; re-en. Sec. 8085, Rev. C. 1907; re-en. Sec. 9003, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 28.

References

Cited or applied as section 3477, Code of Civil Procedure, in *McKenzie v. Doran*, 39 M 593, 595, 104 P 677.

9004. Injuries to the person. Every other injury is an injury to the person.

History: En. Sec. 3478, C. Civ. Proc. 1895; re-en. Sec. 8086, Rev. C. 1907; re-en. Sec. 9004, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 29.

References

Cited or applied as section 3478, Code of Civil Procedure, in *McKenzie v. Doran*, 39 M 593, 595, 104 P 677.

9005. Civil action—by whom prosecuted. A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong.

History: En. Sec. 3479, C. Civ. Proc. 1895; re-en. Sec. 8087, Rev. C. 1907; re-en. Sec. 9005, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 30.

References

Cited or applied as section 3479, Code of Civil Procedure, in *State ex rel. Carleton v. District Court*, 33 M 138, 142, 82 P 789; *State ex rel. Stewart v. District Court*, 77 M 361, 372, 251 P 137.

9006. Criminal actions. The Penal Code defines and provides for the prosecution of a criminal action.

History: En. Sec. 3480, C. Civ. Proc. 1895; re-en. Sec. 8088, Rev. C. 1907; re-en. Sec. 9006, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 31.

References

Cited or applied as section 3480, Code of Civil Procedure, in *State ex rel. Jackson v. Kennie*, 24 M 45, 51, 60 P 589; *State ex rel. Carleton v. District Court*, 33 M 138, 142, 82 P 789.

9007. Civil and criminal remedies not merged. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

History: En. Sec. 3481, C. Civ. Proc. 1895; re-en. Sec. 8089, Rev. C. 1907; re-en. Sec. 9007, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 32.

References

State ex rel. Stewart v. District Court, 77 M 361, 372, 251 P 137.

CHAPTER 24

FORM OF CIVIL ACTION

Section 9008. One form of civil actions only.

9009. Parties to actions—how designated.

9010. Special issues not made by pleadings—how tried.

9008. One form of civil actions only. There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

History: En. Sec. 1, p. 43, Bannack Stat.; amd. Sec. 1, p. 135, L. 1867; amd. Sec. 1, p. 28, Cod. Stat. 1871; re-en. Sec. 1, p. 40, L. 1877; re-en. Sec. 1, 1st Div. Rev. Stat. 1879; re-en. Sec. 1, 1st Div. Comp. Stat. 1887; amd. Sec. 460, C. Civ. Proc. 1895; re-en. Sec. 6425, Rev. C. 1907; re-en. Sec. 9008, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 307.

Effect of the Abolishing of forms of Action

While the courts of this state recognize the principles applicable to the different actions, particular forms of which are required in common-law jurisdictions, they do not recognize those distinct forms, since the statute has abolished them. This rule was recognized and applied in the following cases: *Goodrich Lumber Co. v. Davie*, 13 M 76, 82, 32 P 282; *Aldritt v. Pantan*, 17 M 187, 188, 42 P 767; *Glass v. Basin & Bay State Min. Co.*, 31 M 21, 28, 77 P 302; *Western Plumbing Co. v. Fried*, 33 M 7, 10, 81 P 394; *Donovan v. McDevitt*, 36 M 61, 65, 92 P 49; *Raymond v. Blancgrass*, 36 M 449, 457, 93 P 648; *Logan v. Billings & Northern R. Co.*, 40 M 467, 470, 107 P 415; *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 262, 136 P 968.

The old distinctions between actions at law and suits in equity have been abolished, and the court, having jurisdiction of the parties, can afford such relief as the facts of the case may justify. *Merchants'*

Nat. Bank v. Great Falls Opera House Co., 23 M 33, 40, 57 P 445, 45 L. R. A. 285.

Under this section there is but one form of civil action for the enforcement or protection of private rights or the redress or prevention of private wrongs, and upon a cause of action or defense stated, the court will proceed to try the cause as one at law or in equity, upon the issues presented, and grant such relief as the circumstances demand. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 305, 70 P 1114.

Though the code has abolished all forms of action, and provides that there shall be but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs, yet the distinctions between the different causes of action still obtain—the reasons underlying them are still the same—and the plaintiff may not recover beyond the case stated by him in his complaint. *Glass v. Basin & Bay State Min. Co.*, 31 M 21, 28, 77 P 302; *Butala v. Union Electric Co. et al.*, 70 M 580, 584, 226 P 899; *Kramlich v. Tullock*, 84 M 601, 277 P 411.

The form in which an action is brought is immaterial, for if upon any view of the case made plaintiff is entitled to relief, the pleading will be sustained and the character of the action determined from the nature of the grievance rather than from the form of the declaration. *Samuell v. Moore Mercantile Co. et al.*, 62 M 232, 236, 204 P 376.

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Id. While the common-law forms of action have been abolished so far as name and form of action, but not substance, are concerned, reference to the forms and principles of the common law are of aid in determining the rights of litigants.

The provision of this section that there is but one form of civil action for the enforcing of private rights or redressing private wrongs refers only to form and not to substance, and does not abolish the distinction between causes of action at law and those in equity. *State v. District Court et al.*, 90 M 213, 219, 300 P 544.

Not Applicable to Actions Like Quo Warranto

A statute which provides that there shall be "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," does not apply to informations in the nature of quo warranto,

which are solely employed to enforce or protect public rights, and redress or prevent public wrongs. *Territory v. Virginia Road Co.*, 2 M 96, 106.

References

Cited or applied as section 1, p. 135, Session Laws of 1867, in *Kleinschmidt v. Dunphy*, 1 M 118, 125; as section 1, First Division Compiled Statutes 1887, in *Leopold v. Silverman*, 7 M 266, 284, 16 P 580; *Haupt v. Burton*, 21 M 572, 574, 55 P 110; as section 460, Code of Civil Procedure, in *Gilchrist v. Hore*, 34 M 443, 446, 87 P 443; as section 6425, Revised Codes, in *Kelley v. John R. Daily Co.*, 56 M 63, 74, 181 P 326; In re *Spriggs' Estate*, 68 M 92, 95, 216 P 1108; *State v. District Court et al.*, 83 M 400, 407 et seq., 272 P 525; *Alley v. Peeso*, 88 M 1, 12, 290 P 238; *State et al. v. Anderson et al.*, 92 M 313, 317, 13 P 2d 228.

9009. Parties to actions—how designated. In such action the party complaining is known as the plaintiff, and the adverse party as the defendant.

History: En. Sec. 2, p. 43, Bannack Stat.; re-en. Sec. 2, p. 136, L. 1867; re-en. Sec. 2, p. 28, Cod. Stat. 1871; re-en. Sec. 2, p. 40, L. 1877; re-en. Sec. 2, 1st Div. Rev. Stat. 1879; re-en. Sec. 2, 1st Div.

Comp. Stat. 1887; re-en. Sec. 461, C. Civ. Proc. 1895; re-en. Sec. 6426, Rev. C. 1907; re-en. Sec. 9009, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 308.

9010. Special issues not made by pleadings—how tried. A question of fact not put in issue by the pleadings may be tried by a jury or court, upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

History: En. Sec. 3, p. 43, Bannack Stat.; re-en. Sec. 3, p. 136, L. 1867; re-en. Sec. 3, p. 28, Cod. Stat. 1871; re-en. Sec. 3, p. 40, L. 1877; re-en. Sec. 3, 1st Div. Rev. Stat. 1879; re-en. Sec. 3, 1st Div.

Comp. Stat. 1887; re-en. Sec. 462, C. Civ. Proc. 1895; re-en. Sec. 6427, Rev. C. 1907; re-en. Sec. 9010, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 309.

CHAPTER 25

TIME OF COMMENCING ACTIONS GENERALLY

Section 9011. Commencement of civil actions.

9011. Commencement of civil actions. Civil actions can only be commenced within the periods prescribed in sections 9012 to 9066 of this code, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

History: En. Sec. 1, p. 466, Bannack Stat.; re-en. Sec. 1, p. 515, Cod. Stat. 1871; re-en. Sec. 28, p. 45, L. 1877; re-en. Sec. 28, 1st Div. Rev. Stat. 1879; re-en. Sec. 28, 1st Div. Comp. Stat. 1887; re-en. Sec. 470, C. Civ. Proc. 1895; re-en. Sec. 6428, Rev. C. 1907; re-en. Sec. 9011, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 312.

References

Cited or applied as section 6428, Revised Codes, in *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 184, 99 P 298; *Davis v. Estate of Davis*, 56 M 500, 505, 185 P 559; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 92, 10 P 2d 1061.

CHAPTER 26

LIMITATION OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY

- Section 9012. When the state will not sue.
 9013. When actions cannot be brought by grantee from the state.
 9014. When actions by the state or its grantees are to be brought within ten years.
 9015. Seizin within ten years—when necessary in actions for real property—action for dower.
 9016. Such seizin, when necessary in action or defense arising out of title to or rents of real property.
 9017. Entry on real estate.
 9018. Possession—when presumed—occupation deemed under legal title, unless adverse.
 9019. Occupation under written instrument or judgment—when deemed adverse.
 9020. What constitutes adverse possession under written instrument or judgment.
 9021. Premises actually occupied under the claim of title deemed to be held adversely.
 9022. What constitutes adverse possession under claim of title not written.
 9023. Relation of landlord and tenant as affecting adverse possession.
 9024. Payment of taxes necessary to prove adverse possession.
 9025. Right of possession not affected by descent cast.
 9026. Certain disabilities excluded from time to commence actions.

9012. When the state will not sue. The state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the state to the same, unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,
2. The state, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

History: En. Sec. 480, C. Civ. Proc. 1895; re-en. Sec. 6429, Rev. C. 1907; re-en. Sec. 9012, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 315.

Operation and Effect

Speaking generally, the statutes of limitations of Montana have application to

the state. *Newton v. Weiler*, 87 M 164, 170, 286 P 133.

References

Cited or applied as section 480, Code of Civil Procedure, in *State v. Quantie*, 37 M 32, 55, 94 P 491.

9013. When actions cannot be brought by grantee from the state. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state, unless the same might have been commenced by the state as herein specified, in case such patent had not been issued or grant made.

History: En. Sec. 481, C. Civ. Proc. 1895; re-en. Sec. 6430, Rev. C. 1907; re-en. Sec. 9013, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 316.

9014. When actions by the state or its grantees are to be brought within ten years. When letters patent or grants of real property, issued or made by the state, are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the state or by any subsequent patentee or grantee of the property, his heirs or assigns, within ten years after such determination, but not after that period.

History: En. Sec. 482, C. Civ. Proc. 1895; re-en. Sec. 6431, Rev. C. 1907; re-en. Sec. 9014, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 317.

9015. Seizin within ten years—when necessary in actions for real property—action for dower. No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten years after the death of her husband.

History: Ap. p. Sec. 29, p. 45, L. 1877; re-en. Sec. 29, 1st Div. Rev. Stat. 1879; re-en. Sec. 29, 1st Div. Comp. Stat. 1887; amd. Sec. 483, C. Civ. Proc. 1895; re-en. Sec. 6432, Rev. C. 1907; re-en. Sec. 9015, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 318.

Operation and Effect

A public highway may be established by prescription, without color of title, by proof of travel over it by the public, as a public highway, for the statutory period. *State v. Auchard*, 22 M 14, 16, 55 P 361; *Montana O. P. Co. v. Butte & B. C. M. Co.*, 25 M 427, 431, 65 P 420; *Pope v. Alexander*, 36 M 82, 89, 92 P 203, 565; *Lockey v. City of Bozeman*, 42 M 387, 396, 113 P 286. See *Barnard Realty Co. v. City of Butte*, 48 M 102, 112, 136 P 1064.

Under this section and section 9018, a prescriptive right can be built upon public use of land for street purposes, jurisdiction having been acquired by the city authorities and maintained for a period of ten years. *Stettheimer et al. v. City of Butte*, 60 M 111, 114, 116, 298 P 455.

Where the predecessor of the owner of a ditch right had acquired title to the right-of-way therefor over the public domain by grant from the United States, it will be presumed in the absence of evidence to the contrary, under section 9018, in an action to enjoin its use by another, that the owner had been possessed thereof within the time required by law and that the occupation by the other party had been in subordination to the legal title, as against the contention that the right was barred by this section in that neither plaintiff nor his predecessor had been in possession or seized of the ditch within ten years next preceding the commencement of the action. *Rodda v. Best et al.*, 68 M 205, 212, 217 P 669.

In an action to quiet title to a tract of land in which the defense was adverse possession, the defendant had the burden of establishing by a preponderance of evidence that the plaintiff was not possessed of the land for a period of ten years or that the defendant had held it adversely for that length of time. *Bearmouth Placer Co. v. Passerell et al.*, 73 M 306, 308, 236 P 673.

Under this section and the following, where it appeared in an action to quiet title that plaintiff had not been seized or in possession of the land in question for a period of ten years prior to the commencement of the action, his right to maintain it was barred. *Thompson v. Chicago etc. R. R. Co. et al.*, 78 M 170, 173, 180, 253 P 313.

The period of limitation for an action in ejectment, with claim for mesne profits—the value and use of the property during the period of its wrongful withholding—is ten years, under this section and 9028. *Kurth et al. v. Le Jeune*, 83 M 100, 104, 269 P 408.

This and the following sections, in substance provide that an action to recover real property may not be maintained unless the party or his ancestor was possessed of it within ten years before the commencement of the action. In a suit to quiet title commenced in 1927 in which defendants, as heirs of their ancestor, alleged ownership in themselves by cross-complaint, plaintiff bank pleaded the bar of the above statutes by reason of its adverse possession of the property since 1915 under a sheriff's certificate of sale, at which time defendants' ancestor was living; he died shortly thereafter. The court found in favor of plaintiff on the issue of adverse possession. Held, that the cause of action of defendants, having accrued during the lifetime of their ancestor, and plaintiff having been in the open, notorious and unmolested possession from 1915 to the commencement of the action, defendants' cause of action was barred under the above sections, the fact that defendants were laboring under the disability of minority at the time of the accrual of the action not excusing them from bringing suit within ten years from such accrual, the provisions of section 9026, in that behalf being inapplicable. *Commercial Bank & Trust Co. v. Jordan*, 85 M 375, 387, 278 P 832.

References

Cited or applied as section 483, Code of Civil Procedure, in *In re Tuohy's Estate*, 33 M 230, 246, 83 P 486; *Delmoe v. Long*, 35 M 139, 157, 88 P 778; *State v. Quantie*, 37 M 32, 56, 94 P 491; as section 6432, Revised Codes, in *Lockey v. City of Boze-*

man, 42 M 387, 396, 113 P 286; Horsky v. McKennan, 53 M 60, 63, 162 P 376; Northern Pac. Ry. Co. v. Smith, 62 M 108, 203 P 503; Violet et al. v. Martin, 62 M 335, 205 P 221; Hays v. De Atley et al., 65 M 558, 562, 212 P 296; Glantz v. Gabel, 66 M 134, 212 P 858; Mouat v. Minneapolis M.

& S. Co. et al., 68 M 253, 217 P 342; Boehler v. Boyer et al., 72 M 472, 477, 234 P 1086; Hynes v. Silver Prince Mining Co., 86 M 10, 12, 281 P 548; Miner v. Cook et al., 87 M 501, 504, 288 P 1016; Ferguson v. Standley, 89 M 489, 499, 300 P 245.

9016. Such seizin, when necessary in action or defense arising out of title to or rents of real property. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within ten years before the commencement of the act in respect to which such action is prosecuted or defense made.

History: Ap. p. Sec. 30, p. 45, L. 1877; re-en. Sec. 30, 1st Div. Rev. Stat. 1879; re-en. Sec. 30, 1st Div. Comp. Stat. 1887; amd. Sec. 484, C. Civ. Proc. 1895; re-en. Sec. 6433, Rev. C. 1907; re-en. Sec. 9016, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 319.

References

Cited or applied as section 484, Code of Civil Procedure, in Watson v. Colusa-Parrot M. & S. Co., 31 M 513, 524, 79 P 14; In re Tuohy's Estate, 33 M 230, 246, 83 P 486; Delmoe v. Long, 35 M 139, 157, 88 P

778; Pope v. Alexander, 36 M 82, 85, 92 P 203; Hays v. De Atley et al., 65 M 558, 562, 212 P 296; Rodda v. Best et al., 68 M 205, 212, 217 P 669; Mouat v. Minneapolis M. & S. Co. et al., 68 M 253, 217 P 342; Bearmouth Placer Co. v. Passerell et al., 73 M 306, 308, 236 P 673; Thompson v. Chicago etc. R. R. Co. et al., 78 M 170, 173, 253 P 313; Commercial Bank & Trust Co. v. Jordan, 85 M 375, 387, 278 P 832; Hynes v. Silver Prince Mining Co., 86 M 10, 12, 281 P 548.

9017. Entry on real estate. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within ten years from the time when the right to make it descended or accrued.

History: Ap. p. Sec. 3, p. 466, Bannack Stat.; re-en. Sec. 3, p. 515, Cod. Stat. 1871; amd. Sec. 31, p. 46, L. 1877; re-en. Sec. 31, 1st Div. Rev. Stat. 1879; re-en. Sec. 31, 1st Div. Comp. Stat. 1887; amd. Sec. 485, C. Civ. Proc. 1895; re-en. Sec.

6434, Rev. C. 1907; re-en. Sec. 9017, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 320.

References

Rodda v. Best et al., 68 M 205, 212, 217 P 669.

9018. Possession—when presumed—occupation deemed under legal title, unless adverse. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for ten years before the commencement of the action.

History: En. Sec. 4, p. 466, Bannack Stat.; re-en. Sec. 4, p. 515, Cod. Stat. 1871; amd. Sec. 32, p. 46, L. 1877; re-en. Sec. 32, 1st Div. Rev. Stat. 1879; re-en. Sec. 32, 1st Div. Comp. Stat. 1887; amd. Sec. 486, C. Civ. Proc. 1895; re-en. Sec. 6435, Rev. C. 1907; re-en. Sec. 9018, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 321.

Occupation Deemed Subordinate to Legal Title

Under this section, the occupation of property by one not the owner is deemed to have been under and in subordination to the legal title. Blackfoot Land Development Co. v. Burks, 60 M 544, 551, 199 P 685.

9016
74 P (2d) 452,
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..... Mont.

9016
103 P. (2d) 139

9016
145 P.(2d) 828

9016
177 P.(2d) 859,
860

9016
175 P.(2d) 194,
195
(dissent)

9016
189 P. (2d) 671
193 P.(2d)
382, 384

9017
175 P.(2d) 195
(dissent)

9018
74 P (2d) 454
..... Mont.

9018
126 P.(2d) 327

9018
208 P.(2d) 478

Operation and Effect

Plaintiff in an action in ejectment having shown legal title in himself, it will be presumed that defendant held possession of the disputed ground in subordination to such legal title. *Lamme v. Dodson*, 4 M 560, 587, 2 P 298; *Peters v. Stephens*, 11 M 115, 120, 27 P 403; *Rude v. Marshall*, 54 M 27, 29, 166 P 298.

This section appears to recognize the doctrine that adverse use by the public for the period named in the statute of limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period, unless an attempt has been made by the proper authorities to erect a highway, when the extent of the title will be measured by the claim exhibited by the proceedings. A highway by prescription does not exist unless the proof establishes that the general public has used the way, without substantial interruption, for the time fixed by the statutes of limitation applicable to lands. *State v. Auchard*, 22 M 14, 16, 55 P 361.

Proof of the establishment of a highway by prescription overcomes the presumption which would otherwise prevail, namely, that the use by the public for a long period of years has been in subordination to the legal title. *Lockey v. City of Bozeman*, 42 M 387, 396, 113 P 286.

The law presumes that a thing once proved to exist continues as long as is usual with things of that nature, and this presumption controls an occupant of land who, as defendant in an action for possession brought by the record owner, admits that the plaintiff obtained title by deed fifteen years before; in such an action, it is proper to deny a motion for a nonsuit made at the close of plaintiff's case. *Colins v. Thode*, 54 M 405, 411, 170 P 940.

Where possession of land is held under a deed it is presumed that the grantee entered into possession under it, claiming title only to the land described therein,

and that his possession was restricted to the premises granted. *Northern Pacific Ry. Co. v. Cash*, 67 M 585, 596, 216 P 782.

Where the predecessor of the owner of a ditch right had acquired title to the right-of-way therefor over the public domain by grant from the United States, it will be presumed in the absence of evidence to the contrary, under this section, in an action to enjoin its use by another, that the owner had been possessed thereof within the time required by law and that the occupation by the other party had been in subordination to the legal title, as against the contention that the right was barred by section 9015, in that neither plaintiff nor his predecessor had been in possession or seized of the ditch within ten years next preceding the commencement of the action. *Rodda v. Best et al.*, 68 M 205, 216, 217 P 669.

Where plaintiff in attempting affirmatively to prove his possession of lands in dispute in his action in ejectment, in which defendant asserted title by adverse possession, testified that he was last in possession more than ten years prior to the commencement of the action, and then not by reason of ownership but by sufferance of the owner thereof, he by proof to the contrary overcame the presumption that he was in possession "within the time required by law" (this section) and destroyed his vital allegation that he was ejected by defendant, and judgment of nonsuit was proper. *Miner v. Cook et al.*, 87 M 500, 503, 288 P 1016.

References

Cited or applied as section 486, Code of Civil Procedure, in *Horst v. Shea*, 23 M 390, 394, 59 P 364; *State v. Quantie*, 37 M 32, 56, 94 P 491; *Stettheimer et al. v. City of Butte*, 60 M 111, 114, 116, 198 P 455; *Bearmouth Placer Co. v. Passerell et al.*, 73 M 306, 308, 236 P 673; *Stetson v. Youngquist et al.*, 76 M 600, 606, 248 P 196; *Ferguson v. Standley*, 89 M 489, 499, 300 P 245.

9019. Occupation under written instrument or judgment—when deemed adverse. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for ten years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

History: En. Sec. 33, p. 46, L. 1877; re-en. Sec. 33, 1st Div. Rev. Stat. 1879; re-en. Sec. 33, 1st Div. Comp. Stat. 1887; amd. Sec. 487, C. Civ. Proc. 1895; re-en. Sec. 6436, Rev. C. 1907; re-en. Sec. 9019, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 322.

Claim of Title

One holding land under a written instrument, a statute, or a judgment or decree of court, which appears to convey to or confirm title in him, but does not do so in fact, holds under "color of title." *Morrison v. Linn*, 50 M 396, 401, 147 P 166.

Id. This section and the next succeeding section treat of adverse possession under "color of title," as that phrase should be used.

Id. As used to characterize adverse possession, "claim of title" means nothing more than the claim asserted by the disseisor of his intention to appropriate and use the land in question as his own, to the exclusion of the rights of all persons, and that, too, irrespective of any semblance of color, or right, or title, as the foundation of his claim.

The term "claim of title" used in this section, relative to adverse possession, in providing that where the occupant of land entered into possession "under claim of title," etc., held to mean "color of title" which is title in appearance but not in reality, and color of title may be shown by any instrument purporting to convey the land or the right to its possession, provided claim is made thereunder in good faith. *Fitschen Bros. Com. Co. v. Noyes' Estate*, 76 M 175, 195, 246 P 773.

A sheriff's certificate of sale constitutes a "claim of title" (within the meaning of this section), to real property under which title by adverse possession may be established. *Commercial Bank & Trust Co. v. Jordan*, 85 M 375, 387, 278 P 832.

Operation in General

While the adverse claimant under color of title for the statutory period obtains title to the entire tract described in his muniment, if it has been subjected to proper use, the one who relies upon claim of title secures only so much as he actually possesses. There cannot be constructive possession under mere claim of title, and this is the doctrine of the decided cases and the meaning of this section and the three following sections. *Morrison v. Linn*, 50 M 396, 403, 147 P 166.

Where, in an action of ejectment, the defense is adverse possession, based on a tax deed not formal enough to convey full title by its own force, the validity of which possession is claimed to have been acquiesced in by the plaintiff, and the latter offers proof that this tax deed was taken for him by the grantees therein and under his instructions, there is a conflict in the evidence, and the jury should determine the question of adverse possession. *Horsky v. McKennan*, 53 M 50, 63, 162 P 376.

References

Cited or applied as section 487, Code of Civil Procedure, in *Pope v. Alexander*, 36 M 82, 85, 92 P 203; *Ferguson v. Standley*, 89 M 489, 500, 300 P 245.

9020. What constitutes adverse possession under written instrument or judgment. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant.
4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

History: En. Sec. 5, p. 466, Bannack Stat.; re-en. Sec. 5, p. 516, Cod. Stat. 1871; amd. Sec. 34, p. 46, L. 1877; re-en. Sec. 34, 1st Div. Rev. Stat. 1879; re-en. Sec. 34,

1st Div. Comp. Stat. 1887; amd. Sec. 488, C. Civ. Proc. 1895; re-en. Sec. 6437, Rev. C. 1907; re-en. Sec. 9020, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 323.

9020
73 P (2d) 208,
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9020
Subs. 3
73 P (2d) 208
..... Mont.

9020
189 P.(2d) 672

9020, subd. 3
208 P.(2d) 476

References

Cited or applied as section 34, First Division Revised Statutes 1879, in *Lockey v. Horsky*, 4 M 457, 463, 2 P 19; as section 6437, Revised Codes, in *Morrison v. Linn*,

50 M 396, 402, 147 P 166; *Mouat v. Minneapolis M. & S. Co. et al.*, 68 M 253, 217 P 342; *Fitschen Bros. Com. Co. v. Noyes' Estate*, 76 M 175, 195, 246 P 773; *Ferguson v. Standley*, 89 M 489, 500, 300 P 245.

9021. Premises actually occupied under the claim of title deemed to be held adversely. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

History: En. Sec. 6, p. 467, *Bannack Stat.*; re-en. Sec. 6, p. 516, *Cod. Stat.* 1871; re-en. Sec. 35, p. 46, *L.* 1877; re-en. Sec. 35, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 35, 1st Div. *Comp. Stat.* 1887; *amd. Sec.* 489, *C. Civ. Proc.* 1895; re-en. Sec. 6438, *Rev. C.* 1907; re-en. Sec. 9021, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 324.

Operation and Effect

While it is indispensable to defeat the holder of the legal title that the disseizor shall maintain his adverse possession throughout the entire statutory period,

under either color of title or claim of title, it is not necessary that his initial entry into possession should be made under any pretense of right or title. *Morrison v. Linn*, 50 M 396, 403, 147 P 166.

References

Cited or applied as section 35, First Division Revised Statutes 1879, in *Lockey v. Horsky*, 4 M 457, 463, 2 P 19; as section 489, *Code of Civil Procedure*, in *Pope v. Alexander*, 36 M 82, 85, 92 P 203; *Ferguson v. Standley*, 89 M 489, 500, 300 P 245.

9022. What constitutes adverse possession under claim of title not written. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure;
2. Where it has been usually cultivated or improved.

History: En. Sec. 7, p. 467, *Bannack Stat.*; re-en. Sec. 7, p. 516, *Cod. Stat.* 1871; *amd. Sec.* 36, p. 47, *L.* 1877; re-en. Sec. 36, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 34, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 490, *C. Civ. Proc.* 1895; re-en. Sec. 6439, *Rev. C.* 1907; re-en. Sec. 9022, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 325.

References

Cited or applied as section 490, *Code of Civil Procedure*, in *Pope v. Alexander*, 36 M 82, 85, 92 P 203; as section 6439, *Revised Codes*, in *Morrison v. Linn*, 50 M 396, 403, 147 P 166.

9023. Relation of landlord and tenant as affecting adverse possession. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy, or, where there has been no written lease, until the expiration of ten years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods prescribed in this section.

History: En. Sec. 37, p. 47, *L.* 1877; re-en. Sec. 37, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 37, 1st Div. *Comp. Stat.* 1887; *amd. Sec.* 491, *C. Civ. Proc.* 1895; re-en. Sec. 6440, *Rev. C.* 1907; re-en. Sec. 9023, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 326.

Operation and Effect

Where it is shown that the relation of landlord and tenant has been terminated by redelivery of possession of a water right, it is error to give this section as an instruction for the reason that it applies

only when the tenant is holding possession of property obtained under a lease. *Talbot v. Butte City Water Co.*, 29 M 17, 73 P 1111.

References

Cited or applied as section 37, First Division Compiled Statutes 1887, in *Parrott v. Hungelburger*, 9 M 526, 24 P 14.

9024. Occupancy and payment of taxes necessary to prove adverse possession. In no case shall adverse possession be considered established under the provision of any section or sections of this code unless it shall be shown that the land has been occupied and claimed for a period of ten years continuously, and the party or persons, their predecessors and grantors, have, during such period, paid all the taxes, state, county, or municipal, which have been legally levied and assessed upon said land.

History: En. Sec. 1, Ch. 3, L. 1917; re-en. Sec. 9024, R. C. M. 1921.

Not Applicable to Easements

An easement for a ditch appurtenant to land is not subject to taxation independently of the land; hence the provision of this section that adverse possession shall not be considered established unless the claimant has for the full statutory period of ten years paid the taxes upon the property claimed adversely, has no application where the subject of the adverse possession alleged is a right-of-way for a ditch. *Stetson v. Youngquist et al.*, 76 M 600, 608, 248 P 196.

The provision of this section that one claiming title to land by prescription must have paid taxes thereon during the ten-year period, has no application to the acquisition of such a title to an easement, an easement being merely appurtenant to the dominant estate and not taxable separate and apart from it. *Ferguson v. Standley*, 89 M 489, 499, 300 P 245.

Not Applicable to Water Right Established by Prescription

While a water right partakes of the nature of real estate, it is not such in any sense, and when considered alone and for the purpose of taxation it is personal property; therefore this section, which deals with real property and makes payment of taxes a prerequisite to the establishment of a claim of adverse possession to such property, has no application where title by prescription to a water right, independently of the land to which it was appurtenant, is asserted. *Verwolf v. Low Line Irr. Co. et al.*, 70 M 570, 578 et seq., 227 P 68.

Not Retroactive

This section, declaring that adverse possession of real property shall not be

deemed established unless it shall have been occupied and claimed for a period of ten years continuously and the party claiming such possession has paid all taxes levied and assessed upon it, held prospective and not retroactive in its operation. *Verwolf v. Low Line Irr. Co. et al.*, 70 M 570, 578 et seq., 227 P 68.

Taxes Must Be Paid for Continuous Period of 10 Years

Under this section, in no case of alleged adverse possession shall such possession be considered as established unless the claimant, his predecessor and grantor shall have paid all taxes on the property for a period of ten years continuously; hence where an adverse claimant had not paid or offered to pay any taxes, the court properly found against him. *Bearmouth Placer Co. v. Passerell et al.*, 73 M 306, 308 et seq., 236 P 673; *Anderson v. Mace et al.*, 99 M 421, 34 P 2d 771.

Taxes Paid by Claimant But Property Assessed to Owner—Effect on Right of Claimant

The fact that real property, title to which was claimed by adverse possession, had been at all times assessed to the record owner, the taxes, however, being paid by the adverse claimant during the entire ten-year period, did not affect the right of the latter, in view of section 2002, declaring that a mistake in the name of the owner does not render the assessment invalid, and section 2036, to the effect that no assessment or collection of taxes is illegal on account of informality. *Anderson v. Mace et al.*, 99 M 421, 45 P 2d 771.

References

Blackfoot Land Development Co. v. Burks, 60 M 544, 551, 199 P 685.

9025. Right of possession not affected by descent cast. The right of a person to the possession of real property is not impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

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74 P (2d) 452,
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81 P.(2d) 355
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129 P.(2d) 622

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189 P.(2d)
672, 674, 675
193 P.(2d)
382, 384, 385

9024
207 P.(2d) 564
208 P.(2d) 486

9025
73 P (2d) 206
..... Mont.

History: En. Sec. 38, p. 48, L. 1877; re-en. Sec. 492, C. Civ. Proc. 1895; re-en. Sec. 38, 1st Div. Rev. Stat. 1879; Sec. 6441, Rev. C. 1907; re-en. Sec. 9025, re-en. Sec. 38, 1st Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 327.

9026. Certain disabilities excluded from time to commence actions.

If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or for dower, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, is at the time such title first descends or accrues, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term of less than for life.

The time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of ten years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced or entry, or defense made, after that period.

History: Ap. p. Sec. 39, p. 48, L. 1877; re-en. Sec. 39, 1st Div. Rev. Stat. 1879; re-en. Sec. 39, 1st Div. Comp. Stat. 1887; amd. Sec. 493, C. Civ. Proc. 1895; re-en. Sec. 6442, Rev. C. 1907; re-en. Sec. 9026, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 328.

Operation and Effect

Where the statute of limitations has commenced to run against a claim, its operation is not suspended by the subse-

quent death of one in whose favor the cause of action accrued, because of the minority of his heirs; in such a case the statute will continue to run notwithstanding such minority, and they are bound to sue before the expiration of the statutory period just as much as decedent would have been had he lived. Commercial Bank & Trust Co. v. Jordan, 85 M 375, 387, 278 P 832.

CHAPTER 27

LIMITATION OF OTHER ACTIONS

Section 9027. Periods of limitation prescribed.

9028. Within ten years.

9029. Within eight years.

9030. Within five years.

9031. Within three years.

9032. Within two years.

9033. Two-year limitation.

9034. One-year limitation.

9035. Within six months.

9036. Period for commencement of actions by members of police department to recover salaries.

9037. Actions for unpaid salaries of members of police department limited to services actually performed, etc.

9040. Actions to restrain bond issues, time for bringing.

9041. Actions for relief not hereinbefore provided for.

9042. Where cause of action accrues on mutual account.

9043. Actions by the state subject to the limitations of this chapter.

9044. Action to redeem mortgage.

9045. Same—when some of mortgagors not entitled to redeem.

9046. Actions against bankers and banking corporations.

9027. Periods of limitation prescribed. The periods prescribed for the commencement of actions, other than for the recovery of real property, are as follows:

History: En. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 335.

Earlier statutes of limitation were so different from existing laws that comparison only can be made. The following are the earlier acts: Sec. 1-12, pp. 466-468, Bannack Stat.; Secs. 1-10, pp. 515-517, Cod. Stat. 1871; Secs. 41-49, pp. 48-50, L. 1877; Secs. 41-49, 1st Div. Rev. Stat. 1879; amd.

Secs. 1, 2, p. 8, L. 1881; Secs. 41-49, Comp. Stat. 1887.

References

Cited or applied as section 6443, Revised Codes, in Northern Pacific Ry. Co. v. Crowell, 245 Fed. 668, 672; Gates v. Powell, 77 M 554, 557, 252 P 377; Ray et al. v. Divers et al., 81 M 552, 558, 264 P 673; Swift & Co. v. Weston, 88 M 40, 63, 289 P 1035.

9028. Within ten years. Within ten years:

1. An action upon a judgment or decree of any court of record of the United States, or of any state within the United States.

2. An action for mesne profits of real property.

History: En. Sec. 1, p. 172, L. 1889; amd. Sec. 511, C. Civ. Proc. 1895; re-en. Sec. 6444, Rev. C. 1907; re-en. Sec. 9028, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 336.

Operation and Effect

A similar statute held to apply to judgments rendered by the courts of this state. Haupt v. Burton, 21 M 572, 576, 55 P 110; Lindsay Great Falls Co. v. McKinney M. Co., 79 M 136, 143, 255 P 25.

A judgment is a cause of action on which suit may be brought within ten years of its rendition, under this section, the remedy by execution being cumulative merely and not impairing the common-law right of action upon the judgment as a debt of record. Lindsay Great Falls Co.

v. McKinney M. Co., 79 M 136, 143, 255 P 25.

The period of limitation for an action in ejectment, with claim for mesne profits—the value and use of the property during the period of its wrongful withholding—is ten years, under section 9015, and this section. Kurth et al. v. Le Jeune, 83 M 100, 104, 269 P 408.

Our Montana statute (this section) gives a right of action on a judgment within ten years; whereas, the lien of a judgment is expressly limited to six years (9410). Swift & Co. v. Weston, 88 M 40, 46, 289 P 1035.

References

Marlowe v. Missoula Gas Co. et al., 68 M 372, 378, 219 P 1111; Thompson et al. v. Flynn, 95 M 484, 492, 27 P 2d 505.

9028
77 P (2d) 1045
.....Mont.
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92 P.(2d) 767
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Subsec. 1
136 P.(2d) 765

9029. Within eight years. Within eight years:

An action upon any contract, obligation, or liability, founded upon an instrument in writing.

History: En. Sec. 1, p. 172, L. 1889; re-en. Sec. 512, C. Civ. Proc. 1895; re-en. Sec. 6445, Rev. C. 1907; re-en. Sec. 9029, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 337.

Action in Declaration of Trust

An action to enforce a liability evidenced by a declaration of trust, in which a complaint was filed within eight years after a certain payment under the declaration became due, was commenced in time. Goodell v. Sanford, 31 M 163, 176, 77 P 522.

A Party May Waive Benefits of This Section

A party may waive the benefit of the statute of limitations before or after the expiration of the prescribed limit, not only by either of the acts mentioned in section 9063, but also by express agreement based upon a consideration, though made contemporaneously with, and as a part of, the principal agreement or obligation out of

which the action has arisen. Parchen v. Chessman, 49 M 326, 335, 142 P 631.

Id. A stipulation embodied in a promissory note, to the effect that the maker expressly waives all rights and benefits conferred by the statute of limitations, is not void as against public policy, and by it he binds himself not to plead the statute, if not for all time, for at least a reasonable time, namely, until the expiration of an additional period of eight years after the period prescribed by this section.

Effect of a Payment of Interest on a Note on the Running of the Statute

If an indorser makes payment of interest on an overdue note, the holder's right to maintain suit on the instrument is not barred under this section, if commenced within eight years after such payment. Morgan v. Huffman, 76 M 396, 398, 401, 247 P 326.

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101 Mont. 69
52 P (2d) 887
101 Mont. 120
53 P (2d) 118
102 Mont. 552
59 P (2d) 66 -
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70 P (2d) 291
.....Mont.....
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66 P (2d) 798
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79 P.(2d) 660
.....Mont.....
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86 P.(2d) 411
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97 P.(2d) 586,
588
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108 P.(2d) 603
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112 P.(2d) 1076
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136 P.(2d) 765
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162 P. 2d
220, 221
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180 P. (2) 249
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Ref. to
S.L. '49, C. 44
Sec. 1, P. 110

Effect of Payment in Part on Past Due Note by One Joint Obligor

Partial payment of a past-due note by one joint obligor does not extend the time within which an action on it may be brought, as against the co-obligor who neither authorized nor ratified such payment. *Turner v. Powell et al.*, 85 M 241, 243, 278 P 512.

Founded Upon Instrument in Writing

Where the transfer of personal property was evidenced by a bill of sale, to which the purchaser, upon reselling the goods, added an indorsement guaranteeing delivery, but not expressly warranting title, the language of section 7608 may not be read into the indorsement, and thereby a written contract created, so as to make the statutory limitation of eight years applicable to a suit for a breach of warranty of title to the property sold. *Pineus v. Muntzer*, 34 M 498, 501, 87 P 612.

Id. The instrument in writing mentioned in this section is one which, in itself, contains a contract to do the particular thing for the non-performance of which the action is brought, and not one which by implication may be said to be in writing.

The liability of a surety on the official bond of a county treasurer is not founded on an "instrument in writing" in the sense in which that term is used in this section. *Gallatin County v. United States F. & G. Co.*, 50 M 55, 61, 144 P 1085.

Not Applicable to a Treasurer Who Has Defalcated

This section is not applicable to an action against a city treasurer who fails to turn over interest on public moneys received by him. *City of Butte v. Goodwin*, 47 M 155, 165, 134 P 670.

Statute Must Be Plead

By failing to plead the statute of limitations in a foreclosure proceeding, the defense is waived. *Turner v. Powell et al.*, 85 M 241, 243, 278 P 512; *Humbird et al. v. Arnet et al.*, 99 M 499, 44 P 2d 756.

References

Cited or applied as section 512, Code of Civil Procedure, in *Wilson v. Pickering*, 28 M 435, 439, 72 P 821; *Glass v. Basin & Bay State Min. Co.*, 34 M 88, 92, 85 P 746; as section 6445, Revised Codes, in *American Min. Co. v. Basin & Bay State Min. Co.*, 39 M 476, 481, 104 P 525; as section 512, Code of Civil Procedure, in *Schaeffer v. Miller*, 41 M 417, 419, 109 P 970; as section 6445, Revised Codes, in *Davis v. Estate of Davis*, 56 M 500, 505, 185 P 559; in *re Stinger Estate*, 61 M 173, 201 P 693; *Stoudt v. Hanson*, 62 M 422, 424, 205 P 253; *Vitt v. Rogers et al.*, 81 M 120, 129, 262 P 164; *Skillen v. Harris*, 85 M 73, 76, 277 P 803; *Jones v. Hall et al.*, 90 M 69, 72, 300 P 232; *Hastings et al. v. Wise et al.*, 91 M 430, 433, 8 P 2d 636; *Leffek v. Luedeman*, 95 M 457, 460, 27 P 2d 511; *Register Life Ins. Co. v. Kenniston*, 99 M 191, 43 P 2d 251.

9030. Within five years. Within five years:

1. An action upon a contract, account, promise, not founded on an instrument in writing.
2. An action to establish a will where the will has been lost, concealed, or destroyed. The cause of action is not deemed to have accrued until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.
3. An action upon a judgment or decree rendered in a court not of record. The cause of action is deemed, in such case, to have accrued when final judgment was rendered.

History: En. Sec. 513, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 157, L. 1901; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6446, Rev. C. 1907; re-en. Sec. 9030, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 339.

Applicable to Action for Money Had and Entered

An action for money had and entered against a county by a school district to recover moneys collected by the former for interest and penalties on redemption of property from tax sale proportionate to the tax due it was one upon "a contract,

account, promise, not founded upon an instrument in writing," within the meaning of subdivision 1 of this section, fixing the period within which such an action must be brought at five years. *School Dist. No. 12 v. Pondera Co.*, 89 M 342, 354, 297 P 498.

Applicable to an Express Trust Agreement

Held, that where the relationship of plaintiff and defendant in the acquisition of securities was that of trustee and cestui que trust, under an express parol agreement to share in the profits, and the

9030
ref. to
L. 41 c. 164
sec. 8 p. 329

9030
subdiv. 1
114 P.(2d) 275

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124 P.(2d) 1007

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Subs. 1
159 P. 2d 886-
890

9030
Subd. 3
177 P.(2d) 859,
860

9030
191 P.(2d)
318, 319
193 P.(2d) 376

former repudiated the relationship in 1912, before the sale of the securities, with the knowledge of the latter, defendant's claim for an interest in the proceeds of the transaction asserted in 1921 was barred under subdivision 1 of this section, providing that an action upon a contract, promise, etc., not founded on an instrument in writing must be brought within five years. *Cook v. MacGinniss*, 72 M 280, 290 et seq., 233 P 129.

Duty of Court Where Bar of Statute Not Raised in Action Against Estate of Deceased Persons

While it is the general rule that the bar of the statute of limitations can be raised only by answer, where it appears to the court in an action against an executor or administrator to recover on a rejected claim that the claim, or a part of it, is barred, it must so hold though the defendant fails to interpose such defense. *Pineus v. Davis*, 95 M 375, 385, 26 P 2d 986.

Effect of Plea to Whole Where Only a Part is Barred by the Statute

Plaintiff lessor brought action to recover rental, payable yearly under an oral lease of land for two years (taken out of the statute of frauds by complete performance by him), for the full term. The demand as to the first year's rental was barred under the statute of limitations (subdivision 1, this section). The defendant pleaded the statute as to the whole cause of action. Held, where a cause of action consists of two or more separate items or demands, and a part only is subject to the defense of the statute of limitations, a plea of the statute directed to the whole

cause of action is bad. *Besse v. McHenry*, 89 M 520, 522 et seq., 300 P 199.

Not Applicable to Actions Based on Stockholders' Liability

While the double liability of stockholders in state banks is contractual in nature, the five-year limitation on contracts not in writing (this section) does not apply in an action on such liability, but, the liability being one created by law, the provision of section 9061, that an action of that nature must be brought within three years after it was created, applies. *Brown v. Roberts et al.*, 78 M 301, 304, 254 P 419.

Not Applicable to an Action Upon an Obligation

An action upon an "obligation" is not within this section; it falls within the following section. *Schaeffer v. Miller*, 41 M 417, 423, 109 P 970. See *City of Butte v. Goodwin*, 47 M 155, 164, 167, 134 P 670.

References

Cited or applied as section 513, Code of Civil Procedure, before amendment, in *Chowen v. Phelps*, 26 M 524, 532, 69 P 54; as amended, in *Watson v. Colusa-Parrot M. & S. Co.*, 31 M 513, 524, 79 P 14; *Glass v. Basin & Bay State Min. Co.*, 34 M 88, 92, 85 P 746; *Palatine Ins. Co. v. Northern Pacific Ry. Co.*, 34 M 268, 272, 85 P 1032; *Woods v. Latta*, 35 M 9, 14, 88 P 402; before amendment, in *American Min. Co. v. Basin & Bay State Min. Co.*, 39 M 476, 481, 104 P 525, 24 L. R. A. (N. S.) 305; *Strong v. Butte C. & B. Cop. Corp.*, 54 M 584, 586, 172 P 1033; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 92, 10 P 2d 1061; *Thompson et al. v. Flynn*, 95 M 484, 492, 27 P 2d 505.

9031. Within three years. Within three years:

1. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but the subdivision does not apply for an action for an escape.

2. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

3. An action upon an obligation or liability, not founded upon an instrument in writing, other than a contract, account, or promise.

History: En. Sec. 514, C. Civ. Proc. 1895; amd. Sec. 2, p. 157, L. 1901; amd. Sec. 2, Ch. 128, L. 1903; re-en. Sec. 6447, Rev. C. 1907; re-en. Sec. 9031, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 339.

Applicable to Action Against Treasurer Who Has Defalcated

A city treasurer who failed to turn over interest received on public funds was

guilty of a breach of his implied promise, as trustee of such funds, to do so, and not a breach of a contract in writing as embodied in his official bond; hence an action to recover such interest, brought more than four years after the conclusion of the treasurer's term of office, was barred under subdivision 3 of the above section. *City of Butte v. Goodwin*, 47 M 155, 166, 134 P 670.

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98 P.(2d) 323

9031
124 P.(2d) 1007

**Applicable to Action for Conversion
Against Sheriff and Surety on His Bond**

An action for conversion against a sheriff and the surety on his official bond, being on a liability incurred "by the doing of an act in his official capacity and by virtue of his office," must be brought within three years under subdivision 1 of this section. *Wingate v. Davis et al.*, 77 M 572, 252 P 307.

**Applicable to Action for Money Which
in Equity Should Be Refunded**

An action against a party for money which he, in equity and good conscience, ought to refund, is one upon an "obligation," and is barred unless commenced within three years from the time the cause of action accrues. *Schaeffer v. Miller*, 41 M 417, 425, 109 P 970.

**Applicable to Action in Assumpsit
Where Tort is Waived**

One whose property has been converted may waive the tort and sue on an implied promise to pay the value of the property converted, and where the tort is waived and an action in assumpsit brought, the statute of limitations applicable is that governing the latter form of action, to-wit, this section, subdivision 3, fixing a limitation of three years for an action based on an obligation not founded upon an instrument in writing. *Stagg v. Stagg*, 90 M 180, 186, 300 P 539.

**Applicable to an Action Against a
Trustee Ex Maleficio**

An action to recover money received by defendant from her husband with knowledge that it belonged to plaintiff and that it had been taken from him by the husband by threats and intimidation, thus constituting her a trustee, ex maleficio, would seem to fall within the provision of subdivision 3 of this section, declaring that an action upon an obligation of liability, not founded upon an instrument in writing, other than a contract, account or promise, must be commenced within three years. *Kerrigan v. O'Meara*, 71 M 1, 5, 227 P 819.

**Failure to Pay Special Improvement
Bonds—Statute of Limitations Begins to
Run When**

In an action for writ of mandate against a city treasurer to compel payment of special improvement bonds containing the statutory provisions with relation to manner of payment, leaving the date uncertain and making payment dependent on call of the treasurer when there are moneys in the fund therefor, the statute of limitations does not begin to run until the bonds are called or until the holder has an immediate cause of action. *State ex rel. Clark v. Bailey*, 99 M 484, 44 P 2d 740.

Obligation Not Founded Upon a Writing

An action by an executor to recover from a beneficiary under a will a succession tax required by the laws of another country which plaintiff had paid was upon an obligation not founded on an instrument in writing, and therefore barred by subdivision 3 of this section because not commenced within three years from the time the tax was paid. *Tietjen v. Heberlin*, 54 M 486, 487, 171 P 928.

References

Cited or applied as section 514, Code of Civil Procedure, before amendment, in *Guiterman v. Wishon*, 21 M 458, 459, 54 P 566; *Bank v. Opera House Co.*, 23 M 1, 7, 57 P 440; *State ex rel. Baker v. District Court*, 24 M 238, 239, 61 P 309; *Sherman v. Nason*, 25 M 283, 284, 64 P 768; *Chowen v. Phelps*, 26 M 524, 531, 69 P 54; as amended, in *Glass v. Basin & Bay State Min. Co.*, 34 M 88, 92, 85 P 746; *Palatine Ins. Co. v. Northern Pacific Ry. Co.*, 34 M 268, 272, 85 P 1032; *Woods v. Latta*, 35 M 9, 14, 88 P 402; as section 6447, Revised Codes, in *Wilson v. Norris*, 43 M 454, 456, 117 P 100; *Peterson v. City of Butte*, 44 M 129, 132, 120 P 231; *Gallatin County v. United States F. & G. Co.*, 50 M 55, 61, 144 P 1085; *Peterson v. City of Butte*, 52 M 13, 14, 155 P 265; *Pierce v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 52 M 110, 117, 156 P 127; *Cook v. MacGinniss*, 72 M 280, 290, 233 P 129; *Steinbrenner v. Elder*, 80 M 395, 398, 260 P 725; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 89, 10 P 2d 1061; *Thompson et al. v. Flynn*, 95 M 484, 492, 27 P 2d 505.

9032. Within two years. Within two years:

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.
2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state.
3. An action for libel, slander, assault, battery, false imprisonment, or seduction.

History: En. Sec. 515, C. Civ. Proc. 1895; re-en. Sec. 6448, Rev. C. 1907; re-en. Sec. 9032, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 340.

Effect of Sundays and Holidays

Under the rule prescribed by section 10707, relative to the computation of time, an action for libel published on February 21, 1907, which was commenced on February 23, 1909, was not barred by this section, where February 21st fell on Sunday and February 22d was also a holiday. Kelly v. Independent Publishing Co., 45 M 127, 132, 122 P 735, 38 L. R. A. (N. S.) 1160.

Not Applicable to an Action for the Cancellation of Record of Oil and Gas Lease

An action for the cancellation of record of an oil and gas lease which had there-

fore been declared forfeited, brought under sections 6902-6904, R. C. M. 1921, held not an action "upon a statute for a penalty or forfeiture" within the meaning of this section prescribing that such an action must be brought within two years, nor one "upon a liability created by statute other than a penalty or forfeiture" for which a like limitation is prescribed by the following section. Abell et al. v. Bishop, 86 M 478, 489, 284 P 525.

References

Cited or applied as section 6448, Revised Codes, in Northern Pacific Ry. Co. v. Crowell, 245 Fed. 668, 672; Butler v. Peters, 62 M 381, 385, 205 P 247; Bahn et al. v. Estate of Fritz et al., 92 M 84, 89, 10 P 2d 1061.

9033. Two-year limitation. Within two years:

1. An action upon a liability created by statute other than a penalty or forfeiture.

2. An action for injury to or for waste or trespass on real or personal property; provided that, when the waste or trespass is committed by reason of underground work upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass.

3. An action for taking, detaining, or injuring any goods or chattels including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

5. An action for killing or injuring stock by a railroad corporation or company.

History: En. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 338.

Subd. 1

Applicable to Action Against County Treasurer for Mismanagement of Moneys

The duty of a county treasurer to receive, keep safely, and account for all moneys of the county, as well as those directed by a court or statute to be deposited with him for safe-keeping, being one imposed by express statutory requirement, an action on the official bond of such an officer is on "a liability created by statute," and is barred in two years by the first subdivision of this section. Galatin County v. United States F. & G. Co., 50 M 55, 64, 144 P 1085.

Applicable to Action Against Notary for Making a False Certificate

An action against a notary public to recover damages for making a false certificate to a mortgage is one "upon a liability created by statute" within the meaning of this section, subdivision 1, and barred if not brought within two years from the date of false making. Steinbrenner v. Elder, 80 M 395, 399, 260 P 725.

Not Applicable to Action for Personal

Injuries

An action under section 7763 for personal injuries, founded upon actionable negligence, is not an action on a "liability created by statute"; hence, such an action is not barred in two years. Beeler v. Butte & London C. D. Co., 41 M 465, 471, 110 P 528.

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Subsec. 2
162 P. 2d
214-216

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92 F.(2d) 593

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Subs. 4
79 P.(2d) 660

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27 F. Supp. 364

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subdiv. 2
80 P.(2d) 1025

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subdiv. 3
80 P.(2d) 1025

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subdiv. 4
80 P.(2d) 498

9033
98 P.(2d) 323

9033
108 P.(2d) 603

9033
Subsec. 4
151 P. 2d 176

9033
Subsec. 4
157 P. 2d 478

9033
161 P. 2d 532

Not Applicable to an Action Against
a City Treasurer Who Has Defalcated

The first subdivision of this section does not apply to an action against a city treasurer to recover interest received by him on deposits of city funds which he failed to turn over to his principal. *City of Butte v. Goodwin*, 47 M 155, 164, 134 P 670.

Not Applicable to Oil and Gas Forfeiture Cases

A statute of limitation, such as this section, prescribing a limitation of two years for an action "upon a liability created by statute," does not extend to an action based upon defendant's alleged negligence in addition to a statutory liability, or to an action in which the element of agreement enters, as where defendant in an action of the nature of the above specifically agreed, as lessee in an oil and gas lease, in case of default on his part to release the lease of record. *Abell et al. v. Bishop*, 86 M 478, 490, 284 P 525.

Subd. 3

In General

In an action in claim and delivery to recover possession of a cow picked up by defendant and later in good faith purchased from one claiming to be but who was not the owner, defendant not having done anything to prevent the true owner from ascertaining the whereabouts of the animal and learning of his right of action, the fact that plaintiff was ignorant of the circumstances which would have enabled him to bring timely suit did not entitle him to sue after the limitation of two years fixed by subdivision 3 of this section had run. *Bennett v. Meeker*, 61 M 307, 309, 202 P 203.

When Action Accrues

Where plaintiff, in a claim and delivery action against his former wife to whom at the time of their separation he had loaned his household furniture, did not know of her claim of ownership until some two years and a half thereafter, when he made demand for it, his right of action did not accrue until refusal of his demand, and the limitation of two years (this section) did not commence to run until then. *Viers v. Webb*, 76 M 38, 41, 43, 245 P 257; *Gates v. Powell*, 77 M 554, 556, 557, 252 P 377.

Subd. 4

Applicable to Action for the Rescission
of Land Contracts Due to Fraud

Under the evidence in an action for the rescission of a land contract, brought about four years and a half after the contract

was made, based on alleged false representations by the vendor as to acreage, the number of acres which were tillable and that no part of the land was covered by the waters of a river which formed the boundary of a portion of the land, held that plaintiffs were estopped by their laches, and that the cause of action was barred by subdivision 4 of this section, limiting the time within which an action for relief on the ground of fraud must be brought to two years after discovery of the facts constituting the fraud. *Lasby et al. v. Burgess*, 88 M 49, 63, 69, 289 P 1028.

Applies to Actions for Fraud or Mistake as Commonly Used

This section, subdivision 4, providing that an action for fraud or mistake must be brought within two years after discovery of the facts, applies only to actions for fraud or mistake within the common acceptance of those terms, and not to an action in claim and delivery, where defendant honestly and in good faith bought an estray from one wrongfully claiming to be the owner of the animal. *Bennett v. Meeker*, 61 M 307, 309, 202 P 203.

Not Applicable to Action on Insurance Contract Even Though Reformation is Asked Because of Mutual Mistake

Where plaintiff's primary purpose in bringing action against defendant fire insurance company was the enforcement of the contract of insurance but, as ancillary thereto, sought the aid of the equity arm of the court for the reformation of the policy in one particular on the ground of mutual mistake, the applicable statute of limitation is that having to do with an action on the contract, and not this section, subdivision 4, declaring a two-year limitation on the right to bring an action for relief on the ground of fraud or mistake. *Thielbar Realities, Inc., v. Insurance Co.*, 91 M 525, 534, 9 P 2d 469.

Plaintiff Must Show Diligence to Detect Fraud

Where at the time an action for fraud is commenced the two-year limitation prescribed by this section, subdivision 4, has expired, but plaintiff proceeds under the proviso that the cause of action shall not be deemed to have accrued until the discovery by him of the facts constituting the fraud, he must show that he used due diligence to detect it, when discovery was made, what it was, how it was made and why it was not made sooner; he will be presumed to have known whatever with reasonable diligence he might have ascertained. *Lasby et al. v. Burgess*, 88 M 49, 63, 69, 289 P 1028.

When Action Accrues

Under subdivision 4 of this section, where an action to set aside a sale of property as in fraud of a judgment against the seller was commenced in the year after the rendition of the judgment, it was not barred by limitations, since the right of action did not accrue until plaintiff's judgment was obtained. *Finch v. Kent*, 24 M 268, 279, 61 P 653.

In order to make applicable the provision of subdivision 4 of this section, that in an action for fraud the cause of action shall not be deemed to have accrued until discovery by plaintiff of the facts constituting the fraud, plaintiff must show, in the absence of a relation of trust or confidence between the parties which imposed upon defendant the duty of making a full disclosure of the facts, some active affirmative concealment of the fraud by defendant, something said or done to continue the deception or to prevent inquiry or discovery, else the running of the statute which limits the time within which the action may be brought to two years is not postponed. *Kerrigan v. O'Meara*, 71 M 1, 5, 227 P 819.

Id. One who relies on the exception to the provision of this section, to the effect that while an action for fraud must be commenced within two years, the cause of action shall not be deemed to have accrued until discovery of the facts constituting the fraud, must show the time and the circumstances of the discovery, to enable the court to determine whether by ordinary diligence it might not have been made before, his simple statement that it was not made until the limitation had run being insufficient.

Quaere: In an action of the nature of this, charging official misconduct, in which in addition, fraud is alleged but not that defendant notary was a party to the mortgage contract or acted in connivance with a party thereto, may subdivision 4 of this section, providing that in an action for fraud, the cause of action shall not be deemed to have accrued until the dis-

covery by the aggrieved party of the facts constituting the fraud, ever be construed to cover an action upon a statutory liability in so far as the statute of limitations is concerned? *Steinbrenner v. Elder*, 80 M 395, 399, 260 P 725.

Under this section, providing a limitation of two years for an action based on fraud, but that the cause of action shall not be deemed to have accrued until discovery by the aggrieved party of the facts constituting the fraud, the limitation begins to run from the time the right of action accrues, but the cause of action is not deemed to have accrued until discovery of the alleged fraud, and where plaintiff relies upon the exception he must prove the facts entitling him to its benefit. *Ray et al. v. Divers et al.*, 81 M 552, 558, 264 P 673.

References

Cited or applied as section 42, First Division Compiled Statutes 1887, in *Yore v. Murphy*, 18 M 342, 45 P 217; as section 524, Code of Civil Procedure, before amendment, in *Watson v. Colusa-Parrot M. & S. Co.*, 31 M 513, 524, 79 P 14; *Palatine Ins. Co. v. Northern Pacific Ry. Co.*, 34 M 268, 272, 85 P 1032; *Woods v. Latta*, 35 M 9, 14, 88 P 402; *Delmoe v. Long*, 35 M 139, 148, 88 P 778; *Ross v. Saylor*, 39 M 559, 566, 104 P 864; as section 6449, Revised Codes, before amendment, in *Wilson v. Norris*, 43 M 454, 456, 117 P 100; *Peterson v. City of Butte*, 44 M 129, 132, 120 P 231; *Peterson v. City of Butte*, 52 M 13, 14, 155 P 265; *Baum v. Northern Pacific Ry. Co.*, 55 M 219, 223, 175 P 872.

Cited or applied as section 6449, Revised Codes, before amendment, in *Smith v. Smith*, 224 Fed. 1, 4, 139 C. C. A. 465; *Terry v. Stephens*, 60 M 82, 84, 198 P 360; *In re Smith's Estate*, 60 M 276, 289, 199 P 696; *Butler v. Peters*, 62 M 381, 385, 205 P 247; *Kurth et al. v. Le Jeune*, 83 M 100, 103, 269 P 408; *School Dist. No. 12 v. Pondera Co.*, 89 M 342, 352, 297 P 498; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 89, 10 P 2d 1061.

9034. One-year limitation. Within one year:

1. An action against a sheriff, or other officer, for the escape of a prisoner, arrested or imprisoned on civil process.
2. An action against a municipal corporation for damages or injuries to property caused by a mob or riot; or by a municipal corporation for the violation of any city or town ordinance.
3. An action against an officer or officer de facto, to recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or

for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

History: En. Sec. 516, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450, Rev. C. 1907; amd. Sec. 2, Ch. 47, L. 1917; re-en. Sec. 9034, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 340.

References

Cited or applied as section 6450, Revised Codes, before amendment, in *Heitman v. Chicago, Milwaukee & St. Paul Ry. Co.*, 45 M 406, 411, 123 P 401; *City of Butte v. Goodwin*, 47 M 155, 165, 134 P 670; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 89, 10 P 2d 1061.

9035. Within six months. Within six months:

1. To recover stock sold for a delinquent assessment.
2. Actions for claims against a county, which have been rejected by the county commissioners, must be commenced within six months after the first rejection thereof by such board.
3. Any action for the restoration to office by any person wrongfully or illegally removed or excluded from office.
4. Any suit for the recovery of salary or other emoluments of office by any person having been wrongfully or illegally removed or excluded from office.

History: En. Sec. 517, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450a, Rev. C. 1907; re-en. Sec. 9035, R. C. M. 1921; amd. Sec. 1, Ch. 27, L. 1933. Cal. C. Civ. Proc. Secs. 341, 342.

Claims Against a County

The refusal of a board of county commissioners to allow a claim is not conclusive even though the claimant does not appeal. *Greeley v. Cascade County*, 22 M 580, 586, 57 P 274; *Albers v. Barnett*, 53 M 71, 80, 161 P 518.

The subject-matter of an action against a county by which it was sought to obtain compensation for land taken for road purposes under an agreement, the consideration for which failed, was not a "claim" against the county within the meaning of this section. *Flynn v. Beaverhead County*, 54 M 309, 314, 170 P 13.

References

Cited or applied as section 6450a, Revised Codes, in *State ex rel. Dolin v. Majors*, 58 M 140, 151, 192 P 618.

9036. Period for commencement of actions by members of police department to recover salaries. Actions to recover salaries by members of the police department of cities must be commenced within six months after the cause of action shall have accrued.

History: En. Sec. 1, Ch. 11, Ex. L. 1919; re-en. Sec. 9036, R. C. M. 1921.

When Action Accrues

When a police officer's cause of action for recovery of two years' back salary did not accrue until it had been judicially determined in a mandamus proceeding that he had been wrongfully ousted, the

limitation of six months prescribed by this section did not commence to run until rendition of judgment in the mandamus proceedings. *Sweeney v. City of Butte*, 64 M 230, 235 et seq., 208 P 943.

References

Sullivan v. City of Butte, 65 M 495, 211 P 301.

9037. Actions for unpaid salaries of members of police department limited to services actually performed, etc. No action can be maintained by members of the police department of cities for unpaid salary, except for service actually rendered, and if suspended or placed on the eligible list, then only for the days the member of the police department reports for duty.

History: En. Sec. 2, Ch. 11, Ex. L. 1919; re-en. Sec. 9037, R. C. M. 1921.

Operation and Effect

The provision of this section, that a police officer can recover salary only for services actually rendered, did not apply where he was unlawfully discharged and, though offering to perform them, was thereafter prevented from so doing, since the city could not take advantage of its own wrong. *Sweeney v. City of Butte*, 64 M 230, 235 et seq., 208 P 943.

Id. Where a police officer was discharged contrary to the provisions of the Metropolitan Police Law, and not suspended or placed on the eligible list, this section, providing that where a member of the police force was suspended or placed on the eligible list he can only recover

salary for the days he reports for duty, has no application.

Held that this section, providing in effect that a policeman wrongfully discharged may not recover back salary except for services actually performed, and one unlawfully suspended or placed on the eligible list can recover only for the days upon which he reported for duty, though broad enough in a literal sense to comprehend pending actions, was not intended, in the absence of express words so declaring, to act retrospectively so as to cut off existing rights, was intended to apply only to policemen so discharged, suspended or relegated to the eligible list after its enactment. *Sullivan v. City of Butte*, 65 M 495, 211 P 301.

9038 and 9039. Repealed—Chapter 27, laws of 1933.

9040. Actions to restrain bond issues, time for bringing. No action can be brought for the purpose of restraining the issuance and sale of bonds by any school district, county, city, or town in the state of Montana, or for the purpose of restraining the levy and collection of taxes for the payment of such bonds, after the expiration of sixty days from the date of the order authorizing the issuance and sale of such bonds, on account of any defect, irregularity, or informality in giving notice, or in holding the election upon the question of such bond issue.

History: En. Sec. 1, Ch. 114, L. 1919; re-en. Sec. 9040, R. C. M. 1921.

Operation and Effect

The provision of this section, that no action can be brought to restrain the issuance of municipal bonds after the expiration of sixty days from the date of the order authorizing their issuance and sale

on account of any defect or irregularity in holding the election, has no application where there was, not a mere defect or irregularity in the proceedings, but an entire absence of any attempt to comply with the statutes controlling such election. *Weber v. City of Helena et al.*, 89 M 109, 115, 297 P 455.

9041. Actions for relief not hereinbefore provided for. An action for relief not hereinbefore provided for must be commenced within five years after the cause of action shall have accrued.

History: En. Sec. 518, C. Civ. Proc. 1895; re-en. Sec. 6451, Rev. C. 1907; re-en. Sec. 9041, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 343.

Applicable to an Action by a Stockholder Questioning a Sale of Assets

A stockholder in a reservoir company, a corporation organized for profit, with power to sell its assets upon a proper vote, who, upon a sale having been made, took no timely steps to assail its legality, nor brought suit until after the lapse of five years, was estopped by his delay from questioning the proceedings leading to the sale, and barred by either this section or section 9033 from prosecuting the action. *Canyon Creek Irr. Dist. v. Martin*, 52 M 339, 344, 159 P 418.

Applicable to Action to Test Grant of Land From U. S.

An action to recover land claimed by plaintiff to have been rightfully entered by him under the public land laws of the United States, but wrongfully patented to the Northern Pacific Railway Company under its land grant, was barred by the provision of this section, because not commenced until fifteen years after patent to the railway company. *Kimes v. Northern Pacific Ry. Co.*, 49 M 573, 575, 144 P 156.

Not Applicable to Actions Concerning Real Estate

This section does not apply to actions concerning real estate. *Burt v. Cook Sheep Co.*, 10 M 571, 584, 27 P 399; *Grogan v. Valley Trading Co.*, 30 M 229, 236, 76 P 211.

9041
65 P (2d) 611¹
9041
101 Mont. 72
52 P (2d) 889

9041
70 P (2d) 291
.....Mont.....

9041
108 P.(2d) 603
9041
136 P.(2d) 765

9041
151 P. 2d 176

9041
177 P.(2d) 859
860

This section does not apply to a suit to have the executors and heirs of the plaintiff's co-owner in a mining claim declared trustees for his benefit. *Delmoe v. Long*, 35 M 139, 156, 88 P 778.

When Action Accrues in Trusts

The statute of limitations applies to suits in equity and actions at law. As between the trustees of an express trust and the cestui que trust, the statute of limitations commences to run from the date of the disavowal of the trust by the trustees, and knowledge of such disavowal by the cestui que trust. The pendency of another suit operates to suspend the statute only as to the particular suit brought, and not as to the cause of action involved. *Mantle v. Speculator Mining Co.*, 27 M 473, 476, 71 P 665.

Specific performance of an oral contract for the sale of real estate may be decreed where possession thereunder, taken by the vendee with the vendor's knowledge or consent, is followed by improvement of the property, even though no part of the purchase price has been paid; in such a case, where the payment and conveyance are to be concurrent acts, and the vendee has been ready to pay, the vendor stands in the same position as if payment had been made, that is to say, he holds the legal title in trust for the vendee; and the statute of limitations does not run against the action for specific performance until the vendor has, in some manner, disavowed his trust. *Wright v. Brooks*, 47 M 99, 108, 130 P 968.

When Applicable to the Issuance of Writs of Mandamus

While the court may in its discretion, notwithstanding the provisions of this section and of section 9066, deny an application for a writ of mandamus where there has been a long delay in making it, in the absence of excuse or explanation, the propriety of issuing it in any particular case will be determined upon the facts of that case; and, if it is apparent that the delay has not resulted in prejudice to the rights of the adverse party, and that the relief sought does not depend upon the determination of doubtful and disputed questions of fact, the writ may go. *State ex rel. Bailey v. Edwards*, 40 M 313, 319, 106 P 703; *State ex rel. Bennetts v. Duncan*, 47 M 447, 451, 133 P 109.

This section contains the only limitation applicable to mandamus proceedings, being a general provision applicable to all actions for which special provision is not otherwise made. Notwithstanding the provision, however, the courts may, in their discretion, deny relief when there has been a long delay in applying for it, in the absence of excuse or explanation. *State ex rel. Bennetts v. Duncan*, 47 M 447, 451, 133 P 109.

References

Cited or applied as section 518, Code of Civil Procedure, in *Watson v. Colusa-Parrot M. & S. Co.*, 31 M 513, 525, 79 P 14; as section 6451, Revised Codes, in *Wilson v. Norris*, 43 M 454, 456, 117 P 100; In re *Smith's Estate*, 60 M 276, 289, 199 P 696; *Cook v. MacGinniss*, 72 M 280, 290, 233 P 129; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 89, 10 P 2d 1061; *Thompson et al. v. Flynn*, 95 M 484, 492, 27 P 2d 505.

9042
159 P. 2d 890

9042. Where cause of action accrues on mutual account. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

History: En. Sec. 48, p. 50, L. 1877; re-en. Sec. 48, 1st Div. Rev. Stat. 1879; re-en. Sec. 48, 1st Div. Comp. Stat. 1887; re-en. Sec. 519, C. Civ. Proc. 1895; re-en. Sec. 6452, Rev. C. 1907; re-en. Sec. 9042, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 344.

References

Cited or applied as section 519, Code of Civil Procedure, in *Guterman v. Wishon*, 21 M 458, 459, 54 P 566.

9043
92 P.(2d) 767,
772

9043. Actions by the state subject to the limitations of this chapter. The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.

History: En. Sec. 49, p. 50, L. 1877; re-en. Sec. 49, 1st Div. Rev. Stat. 1879; re-en. Sec. 49, 1st Div. Comp. Stat. 1887;

re-en. Sec. 520, C. Civ. Proc. 1895; re-en. Sec. 6453, Rev. C. 1907; re-en. Sec. 9043, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 345.

Operation and Effect

This section limits the time for commencing a personal action to collect a tax to two years, and is not in conflict with section 39, article V, of the constitution.

Board of County Commrs. v. Story, 26 M 517, 520, 69 P 56.

Speaking generally, the statutes of limitation of Montana have application to the state. Newton v. Weiler, 87 M 164, 170, 286 P 133.

9044. Action to redeem mortgage. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for ten years after breach of some condition of the mortgage.

History: En. Sec. 521, C. Civ. Proc. 1895; re-en. Sec. 6454, Rev. C. 1907; re-en. Sec. 9044, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 346.

9045. Same—when some of mortgagors not entitled to redeem. If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this chapter, any one of them who is entitled to maintain such an action may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

History: En. Sec. 522, C. Civ. Proc. 1895; re-en. Sec. 6455, Rev. C. 1907; re-en. Sec. 9045, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 347.

9046. Actions against bankers and banking corporations. To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan corporation, association, or society, there are no limitations; provided, however, that any action to obtain, set aside, or question in any manner any stated or settled account, between any bank, banker, trust company, or savings or loan corporation, association, or society, and any depositor or depositors with such bank, banker, trust company, or savings or loan corporation, association, or society, must be commenced within five years from the date of the statement of such account. Any action based upon or arising from the payment of any bank, banker, company, corporation, association, or society, of a forged, raised, or otherwise altered check, order, or promissory note, out of the deposit, money, or property of the plaintiff, shall be brought within three years from the day on which the plaintiff, his agent, assignee, or personal representative shall have been notified of such payment, or on which he or they shall have received such check, order, or note marked "paid."

History: Ap. p. Sec. 523, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 78, L. 1905; re-en. Sec. 6456, Rev. C. 1907; re-en. Sec. 9046, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 348.

Not Applicable to Action Based on Stockholder Liability

An action by a depositor in an insolvent

bank to recover on the statutory liability of its stockholders is not one against a bank and therefore the provisions of this section that in actions against banks, trust companies, etc., there are no limitations, has no application. Brown v. Roberts et al., 78 M 301, 304, 254 P 419.

CHAPTER 28

GENERAL PROVISIONS RELATING TO THE TIME OF COMMENCEMENT OF ACTIONS

- Section 9047. When an action is commenced.
 9048. Exception, where defendant is out of the state.
 9049. Exception as to persons under disabilities.
 9050. Provision where person entitled dies before limitation expires.
 9051. Where person dies out of state.
 9052. Actions concerning personal property accruing between death and issuance of letters of administration.
 9053. Suits by aliens in time of war.
 9054. Provision where judgment has been reversed.
 9055. Provision where action is stayed by injunction.
 9056. Disability must exist when right of action accrued.
 9057. Two or more disabilities.
 9058. When demand necessary.
 9059. In case of submission to arbitration.
 9060. Effect on counterclaim of discontinuance of action.
 9061. Limitations prescribed in actions against directors, etc.
 9062. Acknowledgment and part payment.
 9063. Action against nonresident.
 9064. Existing causes of action not affected.
 9065. Objection that action was not commenced in time—how taken.
 9066. Action includes special proceedings.

9047
24 F.Supp. 585

9047. When an action is commenced. An action is commenced, within the meaning of this chapter, when the complaint is filed.

History: En. Sec. 540, C. Civ. Proc. 1895; re-en. Sec. 6457, Rev. C. 1907; re-en. Sec. 9047, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 350.

Operation and Effect

An action is "commenced," within the meaning of this section, and the operation of the statute of limitations is thereby arrested, by filing a complaint to which a general demurrer is afterward sustained, provided the pleading is sufficiently substantial to allow of its being properly amended so as to fully state the same cause of action attempted to be stated in the first instance. *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 184, 99 P 298; *American Surety Co. v. Kartowitz*, 54 M 92, 95, 166 P 685. See *McAuley v. Casualty Company of America*, 39 M 185, 194, 102 P 586.

An amendment, properly allowed, relates back to the date of the original pleading or process. *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 187, 99 P 298. See *McAuley v. Casualty Company of America*, 39 M 185, 194, 102 P 586.

Where an amended complaint in an action brought under the federal liability act did not state a new cause of action, the contention that the action was barred by the two-year limitation prescribed therein is without merit, the amendment relating back to the date of the commencement of the action unaffected by the intervening lapse of time. *Gillespie v. Great Northern Ry. Co.*, 63 M 598, 608, 208 P 1059.

Id. Where from the filing-mark on the original complaint in an action brought under the federal employers' liability act, it appeared that the action was commenced within the two-year period prescribed, it was sufficient as against the objection that the amended pleading did not affirmatively allege that it was commenced within that time.

References

Cited or applied as section 66, First Division Compiled Statutes 1887, in *Haupt v. Burton*, 21 M 572, 575, 55 P 110; as section 6457, Revised Codes, in *Peterson v. City of Butte*, 44 M 129, 133, 120 P 231.

9048
92 P.(2d) 767

9048. Exception, where defendant is out of the state. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

9048
162 P. 2d
220, 222

History: En. Sec. 13, p. 468, Bannack Stat.; re-en. Sec. 11, p. 517, Cod. Stat. 1871; re-en. Sec. 50, p. 50, L. 1877; re-en. Sec. 50, 1st Div. Rev. Stat. 1879; re-en. Sec. 50, 1st Div. Comp. Stat. 1887; re-en. Sec. 541, Civ. C. 1895; re-en. Sec. 6458, Rev. C. 1907; re-en. Sec. 9048, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 351.

Applies to Action Against Executor, etc.

This section applies to a cause of action against an executor or administrator. *Smith v. Smith*, 224 Fed. 1, 4, 139 C. C. A. 465.

Computation of Period of Limitation

Under this section, where defendant in an action on a promissory note is out of the state at the time the cause of action accrued, the bar of the statute of limitations does not commence to run until after his return, and if he thereafter intermittently leaves and returns to the jurisdiction, the time of his absence must be deducted from the limitation of eight years fixed by section 9029, in order to determine whether the full period has expired, i. e., defendant's presence in the state must aggregate the full statutory period to constitute a bar. *Stoudt v. Hanson*, 62 M 422, 426, 205 P 253.

How Construed

This section is not to be strictly construed, so as to prevent the effective prosecution of a cause of action. *Smith v. Smith*, 210 Fed. 947, 953.

Purpose and Intent

The legislative intent with respect to the statute of limitations is to suspend the statute, whenever the absence of a party defendant from the state prevents the effective prosecution of a cause of action; hence, absence from the state of a debtor's personal representative, after the death of the debtor, suspends the running of limitations. *Smith v. Smith*, 210 Fed. 947, 953.

Sufficiency of Evidence

Evidence held not to sustain the contention that the running of the statute of limitations had been tolled, under this section, by reason of the absence from the state of the party pleading it. *Cook v. MacGinniss*, 72 M 280, 304, 233 P 129.

References

Cited or applied as section 6458, Revised Codes, in *State v. Clemens*, 40 M 567, 570, 107 P 896; In re *Colbert's Estate*, 44 M 259, 268, 119 P 791.

9049. Exception as to persons under disabilities. If a person entitled to bring an action, mentioned in sections 9027 to 9035 or sections 9041 to 9046 of this code, be, at the time the cause of action accrued, either:

1. Within the age of majority; or,
 2. Insane; or,
 3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life;
- the time of such disability is not a part of the time limited in sections 9011 to 9066 of this code for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case, more than one year after the disability ceases.

History: Ap. p. Sec. 14, p. 468, Bannack Stat.; re-en. Sec. 12, p. 517, Cod. Stat. 1871; repealed Sec. 674, p. 215, L. 1877; re-en. Sec. 542, C. Civ. Proc. 1895; re-en. Sec. 6459, Rev. C. 1907; re-en. Sec. 9049, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 352.

9050. Provision where person entitled dies before limitation expires. If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

9049
92 P.(2d) 767

History: En. Sec. 15, p. 468, Bannack Stat.; re-en. Sec. 13, p. 517, Cod. Stat. 1871; repealed Sec. 674, p. 215, L. 1877; re-en. Sec. 543, C. Civ. Proc. 1895; re-en. Sec. 6460, Rev. C. 1907; re-en. Sec. 9050, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 353.

Operation and Effect

The statute of limitations does not cease to run on account of the death of the judgment debtor, except that the time be-

tween his death and the granting of letters of administration is not to be counted as part of the time within which an action on a judgment must be commenced. *Whiteside v. Catching*, 19 M 394, 396, 48 P 747.

References

Cited or applied as section 6460, Revised Codes, in *Davis v. Estate of Davis*, 56 M 500, 505, 185 P 559.

9051. Where person dies out of state. If a person against whom a cause of action exists dies without the state, the time which elapses between his death and the expiration of one year after the issuing, within the state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor against his executor or administrator.

History: En. Sec. 544, C. Civ. Proc. 1895; re-en. Sec. 6461, Rev. C. 1907; re-en. Sec. 9051, R. C. M. 1921.

References

Cited or applied as section 6461, Revised Codes, in *Smith v. Smith*, 224 Fed. 1, 5, 139 C. C. A. 465.

9052. Actions concerning personal property accruing between death and issuance of letters of administration. For the purpose of computing the time within which an action must be commenced in a court of this state, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration, or to recover damages for taking, detaining, or injuring personal property within the same period, the letters are deemed to have been issued within five years after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of majority, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such disability, maintain an action to recover damages by reason thereof, in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

History: En. Sec. 545, C. Civ. Proc. 1895; re-en. Sec. 6462, Rev. C. 1907; re-en. Sec. 9052, R. C. M. 1921.

Note.—For further history of this section, see *Haydon v. Normandin*, 55 M 539, 179 P 460.

Operation and Effect

The purpose of this section was, by force of the presumption therein created, to fix definite points of time from which the statute of limitations would commence to run. *Haydon v. Normandin*, 55 M 539, 544, 179 P 460.

Id. This section operates on the remedy alone; it does not create a new cause of

action in favor of the heir; it does not operate retroactively, but it does affect rights of action which might have been enforced at the time it took effect.

Where a conversion of personal property of a decedent takes place before letters of administration are deemed to have been issued, under this section the statute of limitations commences to run as fixed by that section; but where it takes place after letters are so deemed to have been issued, the statute begins to run from the date of the conversion, from the time the cause of action accrues. *Stagg v. Stagg*, 90 M 180, 185 et seq., 300 P 539.

9053. Suits by aliens in time of war. When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

History: En. Sec. 16, p. 469, Bannack Stat.; re-en. Sec. 14, p. 517, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 546, C. Civ. Proc. 1895; re-en. Sec. 6463, Rev. C. 1907; re-en. Sec. 9053, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 354.

9054. Provision where judgment has been reversed. If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination.

History: Ap. p. Sec. 17, p. 469, Bannack Stat.; re-en. Sec. 15, p. 518, Cod. Stat. 1871; re-en. Sec. 51, p. 50, L. 1877; re-en. Sec. 51, 1st Div. Rev. Stat. 1879; re-en. Sec. 51, 1st Div. Comp. Stat. 1887; amd. Sec. 547, C. Civ. Proc. 1895; re-en. Sec. 6464, Rev. C. 1907; re-en. Sec. 9054, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 355.

Operation and Effect

Where, in a suit for money had and received, a judgment of dismissal on the pleadings had been affirmed on appeal, it was terminated by such affirmance in a manner other than those mentioned in this section, and a second suit on the same cause of action, brought within a year after such termination, was not barred. *Glass v. Basin & Bay State Min. Co.*, 34 M 88, 95, 85 P 746.

The language employed in this section may perhaps be construed as a legislative recognition of the principle that an action is commenced by filing what purports to be a complaint, whether it states facts sufficient to constitute a cause of action or not. *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 185, 99 P 298.

Where an action is dismissed without prejudice, and, on the same day, a new action is brought, which results in a judgment of nonsuit, on motion of the defendant, and, within one year from such judgment of nonsuit, a third action is brought for the same cause, it is within time, and a denial of the defendant's motion to dismiss the action on the ground that it is barred by any statute of limitations is proper. *Wilson v. Norris*, 43 M 454, 457, 117 P 100.

One who, within one year after an action is dismissed without prejudice, commences a new action, brings himself within

the privilege accorded by this section. *Peterson v. City of Butte*, 44 M 129, 136, 120 P 231.

The provision of this section, under which a plaintiff may, after the period of the statute of limitations has run in an action, commence a new one for the same cause as that alleged in the first, if the first was terminated in any other manner than by voluntary discontinuance, applies to every case wherein there has been a failure to reach a determination of the merits without plaintiff's fault and the period of limitations becomes complete during the pendency of the action. *Tietjen v. Heberlin*, 54 M 486, 488, 171 P 928.

Id. A plaintiff who seeks to avail himself of the benefit of the provisions of this section, and bring a new action for the same cause once sued upon by him, but which suit was discontinued and against which the statute of limitations has run, must show affirmatively that the discontinuance of the prior action was not voluntary on his part, the fact that it was dismissed "without prejudice" being without significance.

Held, that this section, extending the time fixed by the general statutes of limitations for the commencement of the ordinary actions for specified reasons, has no application to a cause of action for which a special limitation period is prescribed, i. e., one where the time within which suit must be brought is a condition attached to the right to sue. *King v. Mayor of City of Butte*, 71 M 309, 314, 230 P 62.

References

Cited or applied as section 6464, Revised Codes, in *State ex rel. American S. & R. Co. v. District Court*, 46 M 384, 390, 128 P 583.

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9055. Provision where action is stayed by injunction. When the commencement of an action is stayed by injunction, or other order of the court or judge, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

History: En. Sec. 18, p. 469, Bannack Stat.; re-en. Sec. 16, p. 518, Cod. Stat. 1871; re-en. Sec. 52, p. 50, L. 1877; re-en. Sec. 52, 1st Div. Rev. Stat. 1879; re-en. Sec. 52, 1st Div. Comp. Stat. 1887; amd. Sec. 548, C. Civ. Proc. 1895; re-en. Sec. 6465, Rev. C. 1907; re-en. Sec. 9055, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 356.

References

Cited or applied as section 16, page 518, Codified Statutes 1871, in Toombs v. Hornbuckle, 3 M 193, 13 Morr. Min. Rep. 430.

9056. Disability must exist when right of action accrued. No person can avail himself of a disability, unless it existed when his right of action or entry accrued.

History: En. Sec. 19, p. 469, Bannack Stat.; re-en. Sec. 17, p. 518, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 549, C. Civ. Proc. 1895; re-en. Sec. 6466, Rev. C. 1907; re-en. Sec. 9056, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 357.

References

Cited or applied as section 17, page 518, Codified Statutes 1871, in Toombs v. Hornbuckle, 3 M 193, 13 Morr. Min. Rep. 430.

9057. Two or more disabilities. When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until they are removed.

History: En. Sec. 20, p. 469, Bannack Stat.; re-en. Sec. 18, p. 518, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877

re-en. Sec. 550, C. Civ. Proc. 1895; re-en. Sec. 6467, Rev. C. 1907; re-en. Sec. 9057, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 358.

9058. When demand necessary. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time when the right to make the demand is complete, except in one of the following cases:

1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

2. Where there was a deposit of money, not to be paid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

History: En. Sec. 551, C. Civ. Proc. 1895; re-en. Sec. 6468, Rev. C. 1907; re-en. Sec. 9058, R. C. M. 1921.

Operation and Effect

The statute of limitations does not run against the bailor's right to recover the bailed chattel, so long as the bailment lasts, and has not been put to an end by the bailee refusing to return the property on demand, or otherwise denying the trust and claiming the chattel as his own. This is the rule as to trustees generally, and it

applies, also, to bailees. These principles of law have been embodied in this section. Woods v. Latta, 35 M 9, 21, 88 P 402.

Under this section the limitation of two years against an action to recover personal property by a bailor against his bailee does not commence to run until the latter refuses to return it on demand. Gates v. Powell, 77 M 554, 252 P 377.

Where two brothers maintaining separate places of business entered into an agreement of partnership with relation to

particular transactions in the purchase and sale of precious stones, etc., occasionally taking place, each transaction was complete in itself, and the statute of limitations commenced to run with reference to each thereof from the time the surviving partner (suing the estate of his deceased brother) knows the facts justifying de-

mand on his part for his share of the profits on any one of the transactions relied upon in his action. *Pincus v. Davis*, 95 M 375, 387, 26 P 2d 986.

References

State v. Rosman et al., 84 M 207, 217, 274 P 850.

9059. In case of submission to arbitration. Where the persons, who might be adverse parties in an action, have entered into a written agreement to submit to arbitration, or to refer the cause of action, or a controversy in which it might be available, or have entered into a written submission thereof to arbitrators, and before an award or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto, or by the act of the person against whom the action might have been brought, or the execution thereof, or the remedy upon an award or other determination thereunder, is stayed by injunction or other order procured by him from a competent court or judge, the time which has elapsed between the entering into the written submission or agreement and the revocation thereof, or the expiration of the stay, is not a part of the time limited for the commencement of the action.

History: En. Sec. 552, C. Civ. Proc. 1895; re-en. Sec. 6469, Rev. C. 1907; re-en. Sec. 9059, R. C. M. 1921.

9060. Effect on counterclaim of discontinuance of action. Where a defendant in an action has interposed an answer, in support of which he would be entitled to rely at the trial upon a defense or counterclaim then existing in his favor, the remedy upon which, at the time of the commencement of the action, was not barred by the provisions of sections 9011 to 9066 of this code, and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death, the time which intervened, between the commencement and the termination of the action, is not a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense, or to interpose the same defense in another action brought by the same plaintiff, or a person deriving title from or under him.

History: En. Sec. 553, C. Civ. Proc. 1895; re-en. Sec. 6470, Rev. C. 1907; re-en. Sec. 9060, R. C. M. 1921.

9061. Limitations prescribed in actions against directors, etc. Sections 9011 to 9066 of this code do not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability was created.

History: En. Sec. 554, C. Civ. Proc. 1895; re-en. Sec. 6471, Rev. C. 1907; re-en. Sec. 9061, R. C. M. 1921. *Cal. C. Civ. Proc.* Sec. 359.

Limitation Not a Statute of Limitations But is Essence of Right

This section, providing that an action against bank stockholders to recover on

their statutory liability must be brought within three years is not a statute of limitations, but is of the essence of the right itself and one who seeks to enforce a right must show affirmatively that his action is timely. (Opinion on rehearing.) *State v. District Court et al.*, 90 M 213, 218, 226, 300 P 544.

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Operation and Effect

Held, that since Chapter 140, Laws of 1909, making it the duty of corporations to file an annual report of their financial condition under the penalty of the directors being held liable for the debts of the corporations, was repealed by Chapter 189, Laws of 1919 (Sec. 6003, R. C. M. 1921), without a saving clause, directors sued in 1923 on their statutory liability under section 6003 for failure to file a report for 1921 were precluded from setting up the omission of their company to file a report for 1918 under the repealed act as the foundation for a plea that the action against them was barred by this section, providing that an action to recover the penalty in question must be brought within three years. *First Nat. Bank v. Barto et al*, 72 M 487, 440, 233 P 963.

When Applicable

In an action brought in the federal district court of a foreign state to enforce directors' liability for failure of a corporation to file the required annual report, the three-year limitation prescribed by this section governs. *Northern Pacific Ry. Co. v. Crowell*, 245 Fed. 668, 672.

This section applies to liabilities incurred before its passage under a different statute and goes with them as a qualification when they are sued upon in other states. *Davis v. Mills*, 194 U. S. 451, 48 L. Ed. 1067, 24 Sup. Ct. 692.

Construing this section, held that an action against a director to enforce his statutory liability for failure of his corporation to file its annual statement must be brought within three years after the liability was created by law, and not within three years after the aggrieved party discovered the fact with relation thereto. *Williams v. Hilger et al*, 77 M 399, 401 et seq., 251 P 524.

While the double liability of stockholders in state banks is contractual in nature, the five-year limitation on contracts not in writing (Sec. 9030, R. C. M. 1921) does not apply in an action on such liability,

but, the liability being one created by law, the provision of this section, that an action of that nature must be brought within three years after it was created, applies. *Brown v. Roberts et al*, 78 M 301, 304 et seq., 254 P 419.

When Liability is Created so as to Start Running of the Statute

Under this section, an action by a depositor in an insolvent bank to enforce the stockholders' liability must be commenced within three years after the liability was created by law, without reference as to when plaintiff made discovery of the facts in the case. *Brown v. Roberts et al*, 78 M 301, 304 et seq., 254 P 419.

Id. Quaere: When is the double statutory liability of a stockholder in a state bank "created" within the meaning of this section, fixing a limitation of three years; was it created at the time the creditor made the deposit in question, or at the time the corporation was shown to be without assets?

Held, that the statutory liability imposed upon holders of bank stock by section 6036, R. C. M. 1921, for debts of the bank, is in the nature of a guaranty—not primary, but secondary—and that the liability is created within the meaning of this section, providing that actions to recover on such liability must be brought within three years after the liability "was created"—not when the statute imposing it was enacted, nor when the relation of debtor and creditor between the bank and plaintiff first arose—but when the bank became insolvent, and that therefore the complaint in such an action showing on its face that it was commenced within the three-year period was sufficient as against a general demurrer. *Mitchell v. Banking Corporation of Mont.*, 83 M 581, 592 et seq., 273 P 1055.

Limitation does not begin to run against suit to charge directors of national bank with personal liability for making excessive loans, so long as defendants remain in control. *Adams v. Clarke*, 22 F. 2d 957.

9062. Acknowledgment and part payment. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of sections 9011 to 9066 of this code, unless the same is contained in some writing, signed by the party to be charged thereby. But this section does not alter the effect of any payment of principal or interest, which payment is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.

History: En. Sec. 21, p. 469, Bannack Stat.; re-en. Sec. 19, p. 518, Cod. Stat. 1871; re-en. Sec. 53, p. 50, L. 1877; re-en. Sec. 53, 1st Div. Rev. Stat. 1879; re-en. Sec.

53, 1st Div. Comp. Stat. 1887; amd. Sec. 555, C. Civ. Proc. 1895; re-en. Sec. 6472, Rev. C. 1907; re-en. Sec. 9062, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 360.

Effect of Partial Payment by a Joint Maker

Partial payment by a joint maker of a note, without the assent or ratification of his comaker, does not suspend the operation of the statute as to the comakers. *First National Bank v. Bullard*, 20 M 118, 123, 49 P 658.

A partial payment of a note past due by one joint maker does not extend the time within which the action may be brought as against a comaker who neither authorized nor ratified such payment. *Ole-son v. Wilson*, 20 M 544, 52 P 372.

One joint debtor cannot, by making part payments, suspend the running of the statute as to his joint obligors who do not authorize or ratify his act. *Monidah Trust v. Kemper*, 44 M 1, 5, 118 P 811.

Subdivision 5 of section 10531, that evidence may be given of the act or declaration of a "joint debtor, or other person jointly interested with the party," does not militate against the rule that one joint debtor, by making part payments, may not suspend the running of the statute as to his joint obligors who do not authorize or ratify his act. *Monidah Trust v. Kemper*, 44 M 1, 6, 118 P 811.

In General

Where, at the time an account was stated, the statute of limitations had not intervened against the items contained in the original account, the statement created a new cause of action against which the

statute commenced to run only from the date of its rendition. *O'Hanlon Co. v. Jess*, 58 M 415, 419, 193 P 65.

Part Payment Renews

Part payment renews a note. *Parchen v. Chessman*, 49 M 326, 334, 142 P 631.

What Writing is Sufficient to Take Out of Statute

Letters referring to and acknowledging an entire indebtedness, with a promise to pay, will take the debt out of the statute of limitations. *Galvin v. O'Gorman*, 40 M 391, 397, 106 P 887.

Letters written by a mortgagor nine and ten years after maturity of promissory notes secured thereby, in effect stating that the debtor was negotiating for money to make settlement as promised, was going to pay and the mortgagee would be the first to receive his money, and again that he expected to be in a position to make settlement the following summer, held a sufficient acknowledgment or a new promise to interrupt the running of the bar of the statute of limitations. *Leffek v. Luedeman*, 95 M 457, 465, 27 P 2d 511.

References

Cited or applied as section 53, First Division Compiled Statutes 1887, in *Howes v. Lynde*, 7 M 545, 549, 19 P 249; as section 555, Code of Civil Procedure, in *Guiterman v. Wishon*, 21 M 458, 459, 54 P 566; *Hum-bird et al. v. Arnet et al.*, 99 M 499, 44 P 2d 756.

9063. Action against nonresident. Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the state, and in one of the following cases:

1. Where the cause of action originally accrued in favor of a resident of the state.

2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the state.

History: En. Sec. 556, C. Civ. Proc. 1895; re-en. Sec. 6473, Rev. C. 1907; re-en. Sec. 9063, R. C. M. 1921.

Operation and Effect

In an action on an open account by a resident of another state, defendant, then and for some years prior thereto a resident of Montana, pleaded the bar of the five-year limitation prescribed by section 9030. The court upheld plaintiff's contention,

urged on demurrer to the answer that the bar of the statute applicable was that prescribed by this section, in effect providing that where a cause of action accrues against a nonresident, suit thereon cannot be brought in Montana after the expiration of the time limited by the laws of the foreign state for bringing a like action, and that thereunder the question whether the action was barred depended upon the statute of the foreign

state solely. Held, that the court erred, this section meaning no more than that a debtor, situated as defendant was, shall have in addition to all other statutes of limitation of Montana, the further one provided for therein, if available and he

desires to assert it. *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 92, 10 P 2d 1061.

References

Pincus v. Davis, 95 M 375, 385, 26 P 2d 986.

9064. Existing causes of action not affected. Sections 9011 to 9066 of this code do not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force immediately before the taking effect of this code are applicable to such actions and cases, and are repealed subject to the provisions of this section.

History: En. Sec. 557, C. Civ. Proc. 1895; re-en. Sec. 6474, Rev. C. 1907; re-en. Sec. 9064, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 362.

Operation and Effect

Where the time within which an action upon an account should be brought was changed from five to three years by the adoption of the Code of Civil Procedure of 1895, and plaintiff's right of action accrued, according to the issues, on July 28, 1893, and his action was not brought until

November 21, 1896, plaintiff was held to have had a reasonable time within which to bring his action under the new law, and, having failed to do so, the action was barred by the statute. *Guterman v. Wishon*, 21 M 458, 460, 54 P 566.

Where a promissory note became due June 11, 1886, it was governed by the law in force at its maturity, and the limitations prescribed in the code did not apply. *Wilson v. Pickering*, 28 M 435, 439, 72 P 821.

9065. Objection that action was not commenced in time—how taken. The objection that the action was not commenced within the time limited can be taken only by answer. The corresponding objection to a defense or counterclaim can be taken only by reply, except where a reply is not required, in order to enable the plaintiff to raise an issue of fact upon an allegation contained in the answer.

History: En. Sec. 558, C. Civ. Proc. 1895; re-en. Sec. 6475, Rev. C. 1907; re-en. Sec. 9065, R. C. M. 1921.

Duty of Court Where Bar of Statute Not Raised in Action Against Estate of Deceased Persons

While it is the general rule that the bar of the statute of limitations can be raised only by answer, where it appears to the court in an action against an executor or administrator to recover on a rejected claim that the claim, or a part of it, is barred, it must so hold though the defendant fails to interpose such defense. *Pincus v. Davis*, 95 M 375, 385, 26 P 2d 986.

Intent and Result Where Not Pleased in Answer

If this provision is to be assigned the meaning which its language clearly imports, the legislature has left it entirely optional with the party against whom a cause of action is alleged to avail himself of the protection of the statute or to forbear it. If he omits to invoke it at the proper time and in the proper way, it does not avail him under any circumstances,

even though it appears incidentally that the cause of action alleged against him is completely barred. It is of no concern to the court or to the public that this is so, whether the omission is the result of oversight or of a prior agreement of the adversary party. *Parchen v. Chessman*, 49 M 326, 335, 142 P 631.

Not Applicable to Action Based on Stockholders' Statutory Liability

The rule that the objection that an action was not commenced in time can be taken only by answer (this section) does not apply to an action to enforce a statutory liability by the exercise of a right granted by statute and which did not exist at common law (such as the double liability imposed by section 6036, R. C. M. 1921, as amended by Chapter 9, Laws of 1923, upon holders of state bank stock); in such a case the limitation of time prescribed is of the essence of the right itself and plaintiff must in his complaint show that the action was commenced within the proper time, else the pleading is subject to a general demurrer. *Mitchell v. Banking Corporation of Mont.*, 83 M 581, 590, 273 P 1055.

Not Applicable to Divorce Suits

This section does not apply in divorce suits, as in cases for the adjustment of private rights, as in the former cases the state is interested as an adverse party on the ground of public policy. *Franklin v. Franklin*, 40 M 348, 350, 106 P 353.

Operation in General

The bar of the statute of limitations can only be raised by answer, and is waived by the failure to interpose it as a defense. *Grogan v. Valley Trading Co.*, 30 M 229, 236, 76 P 211; *State ex rel. Kolbow v. District Court*, 38 M 415, 417, 100 P 207.

Under this section, the objection that an action was not commenced within the time limited by law can be taken only by answer, and defendant has the burden of proving it as alleged. *Bielenberg v. Higgins et al.*, 85 M 56, 62, 277 P 631; *Stagg v. Stagg*, 90 M 180, 184, 300 P 539; *Reed*

v. Richardson et al., 94 M 34, 39, 20 P 2d 1054.

Plea Not Available on Demurrer to Cross-Complaint

Under this section, the plea of the statute of limitations is not available to plaintiff on demurrer to defendant's cross-complaint. *Griffiths v. Thrasher*, 95 M 210, 227, 26 P 2d 995.

References

Cited or applied as section 558, Code of Civil Procedure, in *Wastl v. Montana Union Ry. Co.*, 24 M 159, 172, 61 P 9; *State v. Quantie*, 37 M 32, 56, 94 P 491; as section 6475, Revised Codes, in *State ex rel. Kolbow v. District Court*, 38 M 415, 417, 100 P 207; *American Min. Co. v. Basin & Bay State Min. Co.*, 39 M 476, 481, 104 P 525, 24 L. R. A. (N. S.) 305; *Leffek v. Luedeman*, 95 M 457, 477, 27 P 2d 511.

9066. Action includes special proceedings. The word "action," as used in sections 9011 to 9066 of this code, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature. 9066
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History: En. Sec. 559, C. Civ. Proc. 1895; re-en. Sec. 6476, Rev. C. 1907; re-en. Sec. 9066, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 363.

Operation and Effect

The right of a surety, who has paid a judgment against his principal, and himself and other sureties, to enforce contribution from a cosurety, exists so long as the judgment is alive; and such a proceeding is not an ordinary action within the meaning of this section. *Northwestern*

Nat. Bank v. Great Falls Opera House Co., 23 M 1, 7, 57 P 440.

An application for a writ of mandate to compel the reinstatement of a discharged policeman is a special proceeding of a civil nature. *State ex rel. Bennetts v. Duncan*, 47 M 447, 451, 133 P 109.

References

Cited or applied as section 6476, Revised Codes, in *State ex rel. Bailey v. Edwards*, 40 M 313, 319, 106 P 703.

CHAPTER 29

PARTIES TO CIVIL ACTIONS

- Section 9067.** Action to be in name of party in interest.
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- 9069.** When a married woman is a party—actions by and against.
- 9070.** Wife may defend, when.
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- 9084.** Plaintiff may join as defendant persons severally liable on same obligation or instrument.

9085. Tenants in common, etc., may sever in bringing or defending action.
 9086. Action—when not to abate by death, marriage, or other disability—proceedings in such case.
 9087. Another person may be substituted for the defendant interpleader.
 9088. Intervention—when it takes place, and how made.
 9089. Associates may be sued by name of association.
 9090. When other parties must be brought in.
 9091. Action by joint-tenant against his cotenant.
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9067. Action to be in name of party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

History: En. Secs. 4 and 6, pp. 43, 44, Bannack Stat.; amd. Secs. 4 and 6, p. 136, L. 1867; re-en. Secs. 4 and 6, p. 28, Cod. Stat. 1871; re-en. Secs. 4 and 6, p. 40, L. 1877; re-en. Secs. 4 and 6, 1st Div. Rev. Stat. 1879; re-en. Secs. 4 and 6, 1st Div. Comp. Stat. 1887; amd. Sec. 570, C. Civ. Proc. 1895; re-en. Sec. 6477, Rev. C. 1907; re-en. Sec. 9067, R. C. M. 1921. Cal. C. Civ. Proc. Secs. 367, 369.

make such action mandatory or exclusive. National Surety Co. v. Sheridan County, 33 F 2d 473.

Defect in Parties Must be Pleaded

Where it does not appear from the face of the complaint that plaintiff is not the real party in interest, the defect can only be reached by answer and is waived by failure to so plead. La Bonte v. Mutual Fire etc. Ins. Co., 75 M 1, 11, 241 P 631.

Duty to Disclose Interest

To state a cause of action, plaintiff must disclose his interest in the subject matter of the litigation, i. e., he must make it appear that he is the real party in interest. Lefebure et al. v. Baker et al., 69 M 193, 200, 220 P 1111.

Irrigation District Entitled to Enforce Bond for Benefit of Laborers and Materialmen

Irrigation district, under contract and bond, held entitled to enforce bond for benefit of laborers and materialmen. Cove Irr. Dist. v. American Surety Co. of New York, 42 F 2d 957.

Operation in General

In an action for an accounting and to have defendant bank declared trustee of a resulting trust, held under the rule that findings made on conflicting evidence will be set aside only where the evidence preponderates against them, that the finding that plaintiff's husband, and not she, was the real party in interest was correct, and that therefore the court properly rendered judgment in favor of defendant under this section. Kelly v. Gullickson, 75 M 66, 71, 241 P 623.

Right of an Executor or Administrator to Sue

An administrator has a right to the possession of the real estate of the decedent of whose estate he is administrator, and

All Interested Parties May Join

In an action for injury to personal property, all the owners of it, whether as partners or otherwise, must join in the action as parties plaintiff, the purpose of the rule being to save defendant from further vexation at the hands of other claimants to the same demand. Thompson v. Shanley, 93 M 235, 241, 17 P 2d 1085.

County Proper Party in Action to Recover Funds Unlawfully Paid

An action to recover county funds unlawfully paid must be brought by the county attorney in the name of the county, it being the real party in interest, and cannot therefore be maintained by a taxpayer. Gregg v. Bayers, 73 M 165, 168, 235 P 337.

County Proper, Though Not Necessary, Party in Action Against Surety on Policy Issued to County Treasurer Covering Stolen Money

In action against surety on robbery and burglary policy issued to county treasurer to recover for loss of county moneys and securities stolen from treasurer, county was proper, though not necessary, party plaintiff, where surety agreed to pay assured for loss sustained by assured or by owner, and county paid premiums on policy and was owner of property stolen, and section 7472 and this section, entitling treasurer to prosecute action alone, did not

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may bring ejectment in his own name as administrator, for the possession of the same, against a trespasser. *Black v. Story*, 7 M 238, 243, 14 P 703. See also *In re Higgins' Estate*, 15 M 474, 485, 39 P 506; *Kohn v. McKinnon*, 90 F 623, 626.

Right of Landlord and Tenant to Sue

While a landlord has a right of action against a third person for a permanent injury to the reversion, the right of action for a trespass upon the possession of the tenant, or for an injury to his estate, is in the tenant; but, for a wrong that affects both of these distinct interests, the law gives a right of action to the owner of each. *Custer Con. Mines Co. v. City of Helena*, 45 M 146, 153, 122 P 567.

State Proper Party Plaintiff in Action on Bail Bond

In an action on a bail bond in the form prescribed by section 12173, R. C. M. 1921, running to the state, the state and not the county is the proper party plaintiff, though, under section 12433, the money recovered goes to the county and not to the state. *County of Wheatland v. Van et al.*, 64 M 113, 116, 207 P 1003.

Trustee of Express Trust May Sue

Under this section, a bank taking a mortgage in its own name but for convenience assigning two of the notes secured thereby to two of its directors, became a trustee of an express trust to the extent that the two notes and security were owned by the directors and as such entitled to maintain suit in foreclosure without joining them as parties plaintiff, and to secure judgment in its own name. *First State Bank v. Mussigbrod et al.*, 83 M 68, 87, 271 P 695.

When Action May Continue in Name of Assignor

Though under this section, every action must be prosecuted in the name of the real party in interest, where an action on a claim is pending at the time of its assignment, it may, under section 9086,

be continued in the name of the assignor. *Osborne v. McDonald*, 91 M 83, 86, 5 P 2d 568.

When devisees May Sue During Administration of an Estate

Held, that devisees may maintain an action for damages for fraud practiced upon them in the procurement of an agreement to sell the real property of testator, even though at the time the estate was in process of administration and distribution had not been made. *Rumney et al. v. Skinner*, 64 M 75, 82, 208 P 895.

Who is the Real Party in Interest

An assignment of a judgment may not only be made for the benefit of a cosurety, but it may be made directly to the person who is to benefit by it, and he may enforce it in his own name. This is in conformity with the spirit of the statute providing that the real party in interest shall prosecute the action in his own name. *Merchants Nat. Bank v. Great Falls Opera House Co.*, 23 M 33, 39, 57 P 445.

In an action by several individuals, allegedly copartners, to recover on a trade acceptance, the fact that plaintiffs failed to prove that they constituted a partnership, which allegation was denied by defendant, was unimportant; if they were the owners of the paper they were the real parties in interest, and, as such, entitled to sue. *Best et al. v. Boyer*, 98 M 40, 44, 37 P 2d 331.

References

Cited or applied as section 570, Code of Civil Procedure, in *Radford v. Gaskill*, 20 M 293, 296, 50 P 854; *Stadler v. First National bank*, 22 M 190, 209, 56 P 111; *Harmon v. Fox*, 31 M 324, 326, 78 P 517; *Cornish v. Woolverton*, 32 M 456, 473, 81 P 4; as section 6477, Revised Codes, in *Wilson v. Yegen Bros.*, 38 M 504, 508, 100 P 613; *J. L. Case Threshing Machine Co. v. Simpson*, 54 M 316, 318, 170 P 12; *Holt v. Custer County et al.*, 75 M 328, 330, 243 P 811; *Abell et al. v. Bishop*, 86 M 478, 493, 284 P 525.

9068. Assignment of thing in action not to prejudice defense. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity.

History: En. Sec. 5, p. 44, *Bannack Stat.*; re-en. Sec. 5, p. 136, *L. 1867*; re-en. Sec. 5, p. 28, *Cod. Stat. 1871*; re-en. Sec. 5, p. 40, *L. 1877*; re-en. Sec. 5, 1st Div. *Rev. Stat. 1879*; re-en. Sec. 5, 1st Div. *Comp. Stat. 1887*; re-en. Sec. 571, *C. Civ. Proc. 1895*; re-en. Sec. 6478, *Rev. C. 1907*;

re-en. Sec. 9068, *R. C. M. 1921. Cal. C. Civ. Proc. Sec. 368.*

Defenses Available Against Assignee

A receiver of an insolvent commercial bank acts as assignee of the insolvent, and as such must, in the collection of its

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assets, recognize the right of set-off where it exists, just as the bank would have been compelled to do had it sought to enforce collection prior to insolvency. *Williams v. Johnson*, 50 M 7, 16, 144 P 768; *Aetna Accident & Liability Co. v. Miller*, 54 M 377, 389, 170 P 760.

Defendant in a mortgage foreclosure suit based on nonpayment of a promissory note which had been assigned by the payee to another and retransferred by the latter to the former after default had been entered was not prejudiced by an amendment of the complaint, after default, by substitution of the original payee for the assignee as party plaintiff, since any defense he may have had against the payee on the note whether negotiable in the first instance or non-negotiable, was equally available to him against the assignee, plaintiff in the foreclosure suit. *Price et al. v. Skylstead*, 69 M 453, 222 P 1059.

Effect of Payment to Assignor

Where the maker of a non-negotiable contract made for the payment of money or personal property pays the assignor the debt or obligation without notice of an assignment of such contract, and in good faith, and takes an acquittance, such payment constitutes a complete defense to an action by the assignee. *Cornish v. Woolverton*, 32 M 456, 475, 81 P 4.

Not Applicable to Set-Off Arising Intermediate the Indorsement and Notice Thereof

This section does not permit the set-off against the assignee of a demand against

the assignor arising intermediate the indorsement and notice thereof. Where a debtor of a bank has deposits, the certificates of which have not matured, the insolvency of the bank will not give the debtor the right to have such deposits set off against his debt. *Stadler v. First National Bank*, 22 M 190, 209, 56 P 111.

Not in Conflict With Section 7415

This section is not in conflict with section 7415, nor does one in anywise limit the operation of, or expand, the other. *Stadler v. First National Bank*, 22 M 190, 209, 56 P 111; *Cornish v. Woolverton*, 32 M 456, 473, 81 P 4.

Reason for the Section

The change in the rule of the common law, whereby the assignee of a non-negotiable contract could not maintain an action thereon in his own name, but only in the name of the assignor, brought about by the preceding section, was the reason for and rendered necessary the enactment of this section. *Stadler v. First National Bank*, 22 M 190, 209, 56 P 111; *Cornish v. Woolverton*, 32 M 456, 473, 81 P 4.

References

Cited or applied as section 571, Code of Civil Procedure, in *Tanner v. Bowen*, 34 M 121, 125, 85 P 876; as section 6478, Revised Codes, in *Northwestern Improvement Co. v. Rhoades*, 52 M 428, 434, 158 P 832; *Rice v. Chicago etc. Ry. Co.*, 59 M 570, 582, 197 P 999; *Erlandson v. Erskine et al.*, 76 M 547, 546, 248 P 209; *Apple v. Edwards et al.*, 92 M 524, 535, 16 P 2d 700.

9069. When a married woman is a party—actions by and against. A married woman may sue and be sued in the same manner as if she were sole.

History: En. Sec. 7, 1st Div. Comp. Stat. 1887; re-en. Sec. 572, C. Civ. Proc. 1895; re-en. Sec. 6479, Rev. C. 1907; re-en. Sec. 9069, R. C. M. 1921.

Action Against Husband

Held that the common-law doctrine under which one spouse may not sue the other for a personal tort is in force in Mon-

tana, and that, therefore, the complaint of a wife against her husband for damages resultant from personal injuries sustained by reason of the alleged negligence of defendant's chauffeur while plaintiff was riding in defendant's car, was vulnerable to a demurrer. *Conley v. Conley*, 92 M 425, 15 P 2d 922.

9070. Wife may defend, when. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.

History: En. Sec. 8, p. 44, Bannack Stat.; re-en. Sec. 8, p. 136, L. 1867; re-en. Sec. 8, p. 28, Cod. Stat. 1871; amd. Sec. 8, p. 41, L. 1877; re-en. Sec. 8, 1st Div. Rev. Stat. 1879; re-en. Sec. 8, 1st Div. Comp. Stat. 1887; re-en. Sec. 573, C. Civ. Proc. 1895; re-en. Sec. 6480, Rev. C. 1907;

re-en. Sec. 9070, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 371.

Operation and Effect

Under this section providing that if a husband and wife be sued together the wife may defend for her own right, and if

the husband neglects to defend, she may defend for his right also, a wife, pending suit for divorce brought by her, had authority to employ counsel on behalf of her husband, in a suit for partition against both of them in which he had failed to

appear. *Buckhouse v. Parsons*, 60 M 156, 164, 198 P 443.

References

Conley v. Conley, 92 M 425, 15 P 2d 922.

9071. Infant, etc., to appear by guardian. When an infant or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, in each case. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.

History: Ap. p. Sec. 9, p. 44, *Bannack Stat.*; re-en. Sec. 9, p. 133, L. 1867; re-en. Sec. 9, p. 28, *Cod. Stat.* 1871; re-en. Sec. 9, p. 41, L. 1877; re-en. Sec. 9, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 9, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 574, C. Civ. *Proc.* 1895; re-en. Sec. 6481, *Rev. C.* 1907; re-en. Sec. 9071, R. C. M. 1921. *Cal. C. Civ. Proc.* Sec. 372.

Appearance by an Incompetent

An incompetent, whether plaintiff or defendant, must appear either by his general guardian, or, in case he has none, or the guardian fails or refuses to appear, by a guardian ad litem appointed by the court. *State ex rel. Happel v. District Court*, 38 M 166, 174, 99 P 291.

Duty to Apprise Court When Defendant is Infant Before Proceeding to Default

An infant defendant can only appear by his general guardian or by a guardian ad litem, the mere fact that a parent is the natural guardian of the child not entitling him or her to appear and defend for it; and where it appears that an infant has no such guardian it is the duty of plaintiff to bring the matter to the attention of the court before proceeding to default or judgment. *Maloney v. Schandelmier*, 65 M 531, 534 et seq., 212 P 493.

Id. Since an infant defendant could not have appeared in an action against him prior to the appointment of a guardian ad litem had he so desired, and no such guardian had been appointed at the time judgment by default was entered against him, the default was properly vacated against the contention of plaintiff that counsel employed by the father of defendant had made an insufficient showing of inadvertence or excusable neglect.

Infant Cannot Complain on Appeal

An infant plaintiff, represented in an action at law by a guardian ad litem as provided in the next section, may not com-

plain on appeal of errors occurring at the trial not affecting his substantial rights, where experienced counsel failed to make objections and save exceptions, and where there is no evidence of fraud or collusion on the part of counsel. *Byrnes v. Butte Brewing Co.*, 44 M 328, 337, 119 P 788.

In General

Under this section, a minor may maintain an action for personal injuries by his guardian ad litem; the provisions of section 9075 not being exclusive. *Flaherty v. Butte Electric Ry. Co.*, 40 M 454, 459, 460, 107 P 416.

Where minors bring an action by their guardian, the action is not by the guardian, but by the minors, who are required to appear through or by a guardian; and any objection to the capacity of the minors to sue, if not taken as prescribed in section 9136, is deemed waived. *O'Donnell v. City of Butte*, 44 M 97, 98, 119 P 281.

Refers to Civil Actions

This section refers to civil actions as distinguished from probate proceedings. *State ex rel. Eakins v. District Court*, 34 M 226, 231, 85 P 1022.

When Guardian May be Appointed

Where it is disclosed by proof upon the trial that the plaintiff is a minor, and the complaint is then amended to show the minority and emancipation of plaintiff, the court, upon the suggestion of plaintiff's minority, should clothe him with capacity to sue by the appointment of a guardian, and allow amendment of his complaint by inserting the name of such guardian. *Hoskins v. White*, 13 M 70, 75, 32 P 163.

Where the daughter of an insane father, as his next friend, files a complaint and demands judgment that a decree of divorce granted to the wife of the incompetent be set aside, because personal service of summons was not had upon him, and asks that the court appoint a guardian ad litem to

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prosecute the action, his general guardian having refused to act, the court should make the appointment; and it is an arbitrary abuse of discretion to refuse to do so. *State ex rel. Happel v. District Court*, 38 M 166, 175, 99 P 291.

Id. Where the appointment of a guardian ad litem for an insane person is requested, the court had a discretion in the selection of the person to represent him, but its discretion does not extend to

a refusal in limine to make the appointment and to assume jurisdiction, when a prima facie right to prosecute the action is made to appear.

References

Cited or applied as section 574, Code of Civil Procedure, in *Power v. Lenoir*, 22 M 169, 178, 56 P 106; as section 6481, Revised Codes, in *Melzner v. Northern Pac. Ry. Co.*, 46 M 162, 175, 127 P 146.

9072. Guardian—how appointed. When a guardian ad litem is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or, if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or, if under that age, or if he neglects so to apply, then upon the application of a relative, or friend of the infant, or of any other party to the action.

3. When an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

History: Ap. p. Sec. 10, p. 44, *Bannack Stat.*; re-en. Sec. 10, p. 136, L. 1867; re-en. Sec. 10, p. 28, *Cod. Stat.* 1871; re-en. Sec. 10, p. 41, L. 1877; re-en. Sec. 10, 1st Div. Rev. Stat. 1879; re-en. Sec. 10, 1st Div. Comp. Stat. 1887; re-en. Sec. 575, C. Civ. Proc. 1895; re-en. Sec. 6482, Rev. C. 1907; re-en. Sec. 9072, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 373.

Operation and Effect

A guardian ad litem is appointed upon the application of a friend or relative, or of a party to the action; in all cases, where

the incompetent is plaintiff, the application, it is apprehended, should be made by a relative or friend. *State ex rel. Happel v. District Court*, 38 M 166, 174, 99 P 291.

References

Cited or applied as section 575, Code of Civil Procedure, in *Power v. Lenoir*, 22 M 169, 178, 56 P 106; *State ex rel. Eakins v. District Court*, 34 M 226, 229, 85 P 1022; as section 6482, Revised Codes, in *Byrnes v. Butte Brewing Co.*, 44 M 328, 337, 119 P 788; *Maloney v. Schandelmier*, 65 M 531, 534, 212 P 493.

9073. Unmarried female may sue for her own seduction. An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

History: En. Sec. 11, p. 41, L. 1877; re-en. Sec. 11, 1st Div. Rev. Stat. 1879; re-en. Sec. 11, 1st Div. Comp. Stat. 1887;

re-en. Sec. 576, C. Civ. Proc. 1895; re-en. Sec. 6483, Rev. C. 1907; re-en. Sec. 9073, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 374.

9074. Parent or guardian may sue for seduction of daughter or ward. A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

History: En. Sec. 12, p. 41, L. 1877; re-en. Sec. 12, 1st Div. Rev. Stat. 1879; re-en. Sec. 12, 1st Div. Comp. Stat. 1887;

re-en. Sec. 577, C. Civ. Proc. 1895; re-en. Sec. 6484, Rev. C. 1907; re-en. Sec. 9074, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 375.

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9075. Parent or guardian may sue for injury or death of child or ward. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

History: En. Sec. 11, p. 44, Bannack Stat.; amd. Sec. 11, p. 136, L. 1867; re-en. Sec. 11, p. 29, Cod. Stat. 1871; re-en. Sec. 13, p. 42, L. 1877; re-en. Sec. 13, 1st Div. Rev. Stat. 1879; re-en. Sec. 13, 1st Div. Comp. Stat. 1887; amd. Sec. 578, C. Civ. Proc. 1895; re-en. Sec. 6485, Rev. C. 1907; re-en. Sec. 9075, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 376.

Essentials of Complaint When Action is Instituted by the Mother

The complaint, in an action brought by the mother of a child to recover damages for personal injuries sustained by the latter, must set forth that the father was dead or had deserted his family at the time the action was commenced, and in the absence of such allegation the complaint fails to state a cause of action in favor of the mother of the child. *Martin v. City of Butte*, 34 M 281, 283, 86 P 264.

Not Exclusive Remedy

The provisions of this section are not exclusive, but the minor may proceed under section 9071, and sue by his guardian ad litem. *Flaherty v. Butte Electric Ry. Co.*, 40 M 454, 459, 460, 107 P 416.

Operation in General

In an action for the death of his minor son, the plaintiff can recover for pecuniary benefits reasonably to be expected to be received from the deceased after his majority, in view of this section, giving an action for the death of a minor child, the next succeeding section, permitting the award of such damages as may be just, and section 5843 making it the duty of children to support a parent who is unable to maintain himself. *Gilman v. G. W.*

9076. When representative may sue for death of one caused by the wrongful act of another. When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.

History: Ap. p. Sec. 1, p. 561, Cod. Stat. 1871; en. Sec. 14, p. 42, L. 1877; re-en. Sec. 14, 1st Div. Rev. Stat. 1879; re-en. Sec. 14, 1st Div. Comp. Stat. 1887; re-en. Sec. 579, C.

Dart Hardware Co., 42 M 96, 98, 111 P 550.

In so far as this section authorizes a guardian to prosecute an action for injury to his ward, it relates only to such an action as the minor has during his lifetime; while, in case of the death of the minor from such injury, his action or right of action survives, and is to be maintained by his personal representative. *Melzner v. Northern Pac. Ry. Co.*, 46 M 162, 180, 127 P 146.

Id. In an action, under the federal employers' liability act, brought by the personal representative of one injured while employed by a common carrier in interstate commerce, the complaint must allege, and the proof show, that there are in existence persons answering the description of the beneficiaries named in the statute.

In the case of a personal injury to a minor one cause of action arises in his own favor, and another in favor of the parents for loss of services during minority; in case of death the action in favor of the minor survives and may be prosecuted by his administrator (this section), and recovery of damages by a parent, either as guardian ad litem of the living child, or as administrator of the estate of the decedent in the surviving action, is no bar to recovery by the parent in his own right for damages by reason of injury to the child (subject to an exception not involved herein). *Burns v. Eminger*, 84 M 397, 405, 276 P 437.

References

Liston v. Reynolds, 69 M 480, 500, 223 P 507.

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Civ. Proc. 1895; re-en. Sec. 6486, Rev. C. 1907; re-en. Sec. 9076, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 377.

Damages a Jury Question

As this section does not limit the right of recovery for the death of a parent to minors, it was for the jury to say, under the evidence, whether the children of the deceased, both of legal age, suffered damage through the death of their father, and what sum would compensate them. *Hollingsworth v. Davis-Daly E. C. Co.*, 38 M 143, 163, 99 P 142.

Damages How Determinable

In an action by a widow for the death of her husband, caused by the alleged negligence of the defendant, she may recover, as an element of damages, the pecuniary loss, if any, because of her being deprived of the comfort, protection, society, and companionship of her husband. *Mize v. Rocky Mountain Bell Tel. Co.*, 38 M 521, 535, 100 P 971.

In an action for damages for death by wrongful act, brought by the mother of a boy nineteen years of age, who was killed while engaged in the discharge of his duties within the scope of his employment as fireman for a stationary engine, by coming in contact with a high-tension power wire, a verdict for eighteen thousand dollars was held not to be excessive, the mother being altogether dependent upon him for her support. *Hollenback v. Stone & Webster Eng. Corp.*, 46 M 559, 570, 129 P 1058.

Where a man not a minor has been killed by the wrongful act or neglect of another, the right of his widow and children to recover damages depends upon whether the decedent, had he survived his injuries, could have recovered inasmuch as they claim under him. *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 10, 12, 130 P 441.

Defenses to Action

Where a man not a minor is killed by the wrongful act or negligence of another, and his widow and children sue for damages, they cannot recover if death was due to the decedent's own fault; and the defendant may, therefore, interpose the defense of contributory negligence, assumption of risk, etc. *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 8, 11, 130 P 441.

Since the right of action given by this section to the heirs or personal representatives of one whose death was caused by the wrongful act of another, though distinct from that which the deceased would have had in case he had only been injured, is the same in character and dependent upon the same facts, the heirs

of a miner who himself was responsible for his death because of his violation of a rule of defendant company requiring him to close the doors of a safety-cage while being hoisted to the surface, were barred of recovery; deceased could not have maintained the action because of his contributory negligence, and therefore his heirs cannot do so. *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 260, 136 P 968.

Id. Where a complaint in an action for wrongful death discloses a breach of statutory duty, such as in failing to close the cage doors before attempting to hoist or lower employees in a mining shaft, as required by section 11268, it sets forth facts constituting legal negligence on the part of the defendant, who may interpose any of the ordinary defenses applicable in negligence cases.

Exemplary Damages

There is no reason why section 8666, relative to exemplary damages, should not apply to actions begun by virtue of the legislative permission granted by the above section, when the defendant is charged primarily as the wrongdoer. *Olsen v. Montana Ore Purchasing Co.*, 35 M 400, 412, 89 P 731.

Master Liable for Servant's Negligence

A master and his servant may properly be joined as defendants in an action for personal injuries, directly caused by the negligence of the servant, for which negligent act the master is answerable under the doctrine of respondeat superior. *Knuckey v. Butte Electric Ry. Co.*, 41 M 314, 320, 109 P 979.

Operation in General

This section does not create a cause of action in favor of the wife and children of one, not a minor, killed by the wrongful act or neglect of another, because of the wrong done to them; the words of the statute "wrongful act or neglect of another" imply actionable wrong or negligence toward the decedent and not toward his surviving wife and children. *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 8, 130 P 441.

While this section imposes responsibility upon all whose actual wrongdoing contributes to the death of another, whether they be employees or employers, indemnitees or indemnitors, responsibility for reputed wrongdoing is imposed upon but one class, namely, employers; and the rule of *expressio unius est exclusio alterius*, therefore, operates to exclude all liability of indemnitors, except for actual, as distinguished from imputed, wrongdoing. *Northam v. Casualty Co. of America*, 177 Fed. 981, 985.

Parties

The right of action for damages given by this section to the heirs or personal representative of an adult whose death is caused by wrongful act or negligence is solely for the benefit of the heirs, the representative merely acting as their trustee and the amount recovered not being a part of decedent's estate; hence the complaint of an administrator setting forth the damages sustained by decedent's father and mother was not open to demurrer on the ground of misjoinder of parties plaintiff (the administrator and the heirs) or causes of action, recovery by the administrator barring a subsequent action by the heirs. *Batchoff v. Butte*

Pacific Copper Co., 60 M 179, 182, 198 P 132.

References

Cited or applied as section 579, Code of Civil Procedure, in *Walter v. Mitchell*, 25 M 385, 386, 65 P 5; as section 6486, Revised Codes, in *Dillon v. Great Northern Ry. Co.*, 38 M 485, 493, 100 P 960; *Yergy v. Helena Light & Ry. Co.*, 39 M 213, 242, 102 P 310; *Gilman v. G. W. Dart Hardware Co.*, 42 M 96, 98, 111 P 550; *Bruce v. McAdoo*, 65 M 275, 289, 211 P 772; *Anderson et al. v. Wirkman*, 67 M 176, 182, 215 P 224; *Liston v. Reynolds*, 69 M 480, 500, 223 P 507; *Mosby v. Manhattan Oil Co.*, 52 F. 2d 364; *American R. Co. of Porto Rico v. Ortega*, 3 F. 2d 358.

9077. Who may be joined as plaintiffs. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this chapter.

History: En. Sec. 12, p. 44, *Bannack Stat.*; re-en. Sec. 12, p. 136, L. 1867; re-en. Sec. 12, p. 29, *Cod. Stat.* 1871; re-en. Sec. 15, p. 42, L. 1877; re-en. Sec. 15, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 15, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 580, C. Civ. *Proc.* 1895; re-en. Sec. 6487, *Rev. C.* 1907; re-en. Sec. 9077, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 378.

Operation and Effect

Where one plaintiff was the owner of cattle at the time of their alleged conversion, and the other was entitled to their

possession under an agreement whereby he was to care for them in consideration of one-half the net proceeds of sale, both had a sufficient interest to entitle them to join as plaintiffs. *Frost et al. v. Long & Co. et al.*, 66 M 385, 393, 213 P 1107.

References

Cited or applied as section 580, Code of Civil Procedure, in *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 19 M 313, 318, 48 P 305; *Rumney v. Skinner*, 64 M 75, 82, 208 P 895; *Abell et al. v. Bishop*, 86 M 478, 493, 284 P 525.

9078. Who may be joined as defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.

History: Ap. p. Sec. 13, p. 44, *Bannack Stat.*; re-en. Sec. 13, p. 136, L. 1867; re-en. Sec. 13, p. 29, *Cod. Stat.* 1871; re-en. Sec. 16, p. 42, L. 1877; re-en. Sec. 16, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 16, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 581, C. Civ. *Proc.* 1895; re-en. Sec. 6488, *Rev. C.* 1907; re-en. Sec. 9078, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 379.

Operation and Effect

In an action upon a promissory note, made between former partners, providing that it is to be subject to all defenses which the maker may have against the payee on account of any debts of the firm which the maker may be compelled, or become liable to pay, where the complaint

alleges that the maker resists payment on the ground of an outstanding liability of the firm, but that no such liability exists, the parties to whom the maker claims liability are proper parties defendant under this section. *Hoskins v. McGirl*, 12 M 563, 564, 31 P 544.

One who has an equitable interest in a claim for wages is properly made a party defendant, to the end that a complete determination of the controversy may be had in one action. *Reid v. Hennessy*, 45 M 462, 464, 124 P 273.

In an action on a bond executed jointly by the principal and a surety company it was optional with plaintiff to proceed against either or both of the obligors, but

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where it was also sought to reform the contract and the surety moved that the principal be served with process, it was error to deny the motion. *Comerford v. United States F. & G. Co.*, 59 M 243, 252, 196 P 984.

References

Cited or applied as section 581, Code of Civil Procedure, in *Mantle v. Casey*, 31 M 408, 411, 78 P 591; *Beers v. W. P. Devereux Co. et al.*, 87 M 210, 212, 286 P 406.

9079. Joinder of state as defendant in certain actions. In any action or proceeding brought in any district court of the state of Montana affecting the title to real or personal property in which the state of Montana has, or claims to have, an interest or claim, the state of Montana may be made a party defendant to such actions or proceedings, and its rights or interests adjudicated; provided, however, that in no event shall any money judgment be rendered against the state of Montana in any action or proceeding brought under the provisions of this act.

History: En. Sec. 1, Ch. 210, L. 1921; re-en. Sec. 9079, R. C. M. 1921; amd. Sec. 1, Ch. 65, L. 1931.

9080. Service of process—how made. In any action or proceeding commenced under the provisions of this act, to which the state of Montana shall have been made a party, service of process upon the state of Montana shall be made upon the attorney general thereof.

History: En. Sec. 2, Ch. 210, L. 1921; re-en. Sec. 9080, R. C. M. 1921.

9081. Parties defendant in an action to determine conflicting claims to real property. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and the persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action against whom the judgment has passed.

History: En. Sec. 17, p. 42, L. 1877; re-en. Sec. 17, 1st Div. Rev. Stat. 1879; re-en. Sec. 17, 1st Div. Comp. Stat. 1887; re-en. Sec. 582, C. Civ. Proc. 1895; re-en. Sec. 6489, Rev. C. 1907; re-en. Sec. 9081, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 380.

Operation and Effect

If a third party is in possession, the defendant claiming adversely may be joined as defendant with the party in possession. In that case the appropriate action would assume the aspect of an action at law in ejectment, which might, under some cir-

cumstances, be joined with a count for equitable relief. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 310, 70 P 1114.

While a judgment in favor of plaintiff, in an action to quiet title, out of possession, need not direct the issuance of a writ of possession, he may have such a writ whether the judgment so provides or not; therefore defendant may not complain of the inclusion of an order in the judgment directing its issuance. *Doggett v. Johnson*, 82 M 338, 348, 267 P 292.

9082. Parties holding title under a common source—when may join. Any two or more persons claiming an estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, or in severalty, may unite in an action against any person claiming an adverse interest or estate therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

History: En. Sec. 18, p. 43, L. 1877; re-en. Sec. 18, 1st Div. Rev. Stat. 1879; re-en. Sec. 18, 1st Div. Comp. Stat. 1887; re-en. Sec. 583, C. Civ. Proc. 1895; re-en. Sec. 6490, Rev. C. 1907; re-en. Sec. 9082, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 381.

9083. Parties in interest—when to be joined—when one or more may sue or defend for the whole. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

History: En. Sec. 14, p. 45, Bannack Stat.; re-en. Sec. 14, p. 136, L. 1867; re-en. Sec. 14, p. 29, Cod. Stat. 1871; re-en. Sec. 19, 1st Div. Rev. Stat. 1879; re-en. Sec. 19, 1st Div. Comp. Stat. 1887; re-en. Sec. 584, C. Civ. Proc. 1895; re-en. Sec. 6491, Rev. C. 1907; re-en. Sec. 9083, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 382.

Essentials of an Action by Few for Benefit of a Number

Where an action is brought by a few persons in a representative capacity, that fact must be alleged in the pleading, the usual averment being that the action is brought, not only for the benefit of the plaintiffs, but also for the benefit of all others similarly interested who may elect to come in and contribute to the costs and expenses of the suit. *Rohr et al. v. Stanton et al.*, 78 M 494, 499 et seq., 254 P 869.

Id. Under the above rule, held that where the complaint in an action by a number of creditors of an insolvent bank alleged that they for and in behalf of themselves and all other creditors of the bank were filing the complaint, that the number of creditors were more than 1,000, that their names were unknown to plaintiffs, etc., praying for an order permitting them to maintain the action on behalf of all the creditors of the bank, it was sufficient under this section.

A suit brought under this section by a creditor of a defunct bank for the benefit of all its creditors is one in equity (though not a "creditor's suit," technically speaking), and therefore the parties are not entitled to a jury trial; in such a suit it is not necessary that those creditors whose names do not appear as plaintiffs should be "similarly situated" as the party who brings it, it being sufficient if they are commonly or generally interested in the subject matter involved. See also *Opinion on Motion for Rehearing, State v. District Court et al.*, 90 M 213, 220, 300 P 544.

9084. Plaintiff may join as defendants persons severally liable on same obligation or instrument. Persons severally liable upon the same obligation

Operation in General

In an action for debt on an injunction bond, all of the obligees are necessary parties to the action, the bond being as to them joint and not several, and the fact that some of the obligees had no interest in the subject of the suit in which the injunction was granted does not change the rule. *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 19 M 313, 318, 48 P 305.

Neither in actions *ex contractu* nor in actions *ex delicto* can the plea of an obligation to the plaintiff individually be sustained by the proof of an obligation running to himself and others jointly, for the reason that, to maintain a joint obligation, all the obligees must be parties to the action. This was the rule at common law, and it is the rule under this section of the code. *American L. & L. Co. v. Great Northern Ry. Co.*, 48 M 495, 503, 138 P 1102. See *Scott v. Waggoner*, 48 M 536, 548, 139 P 454.

An obligation running to a combination of persons jointly could not be changed into one actionable by any member of it, by the fact that defendant's agent knew, from previous transactions, that plaintiff was a member of the combination, and that failure to perform would result in damage to the latter. *American L. & L. Co. v. Great Northern Ry. Co.*, 48 M 495, 503, 138 P 1102.

When Party May be Made Defendant

The only particular in which the common-law rule relative to the uniting or severance of joint obligees, covenantees or promisees has been changed is the one provided for by this section, to the effect that a party who refuses to join as a plaintiff may be made a defendant. *Hand et al. v. Heslet et al.*, 81 M 68, 75, 261 P 609.

References

Cited or applied as section 584, Code of Civil Procedure, in *Brown v. Daly*, 33 M 523, 528, 84 P 883; *Comerford v. United States F. & G. Co.*, 59 M 243, 252, 196 P 984; *McKenzie v. Evans et al.*, 96 M 1, 29 P 2d 657.

or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

History: En. Sec. 15, p. 45, Bannack Stat.; re-en. Sec. 15, p. 137, L. 1867; re-en. Sec. 15, p. 29, Cod. Stat. 1871; re-en. Sec. 20, 1st Div. Rev. Stat. 1879; re-en. Sec. 20, 1st Div. Comp. Stat. 1887; re-en. Sec. 585, C. Civ. Proc. 1895; re-en. Sec. 6492, Rev. C. 1907; re-en. Sec. 9084, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 383.

Operation and Effect

Where a bond is executed by sureties for the fulfillment of a contract entered into by their principals in a separate instrument, both principals and sureties may be sued jointly in an action for a breach of the contract. *Wibaux v. Grinnell Live Stock Co.*, 9 M 154, 160, 22 P 492.

If an official bond, joint and several in character, has been signed by the principal an action may be maintained against a surety thereon without joining the principal. *Deer Lodge County v. United States*

F. & G. Co., 42 M 315, 325, 112 P 1060.

Sureties, bound with their principal as original promisors on the same contract may be sued jointly with the principal. *Cole Mfg. Co. v. Morton*, 24 M 58, 64, 60 P 587.

In an action on a bond executed jointly by the principal and a surety company it was optional with plaintiff to proceed against either or both of the obligors, but where it was also sought to reform the contract and the surety moved that the principal be served with process, it was error to deny the motion. *Comerford v. United States F. & G. Co.*, 59 M 243, 196 P 984; *Foster v. Royal Indemnity Co.*, 83 M 170, 174, 271 P 609.

References

Cited or applied as section 585, Code of Civil Procedure, in *Brownlee v. Young*, 25 M 38, 40, 63 P 798.

9085. Tenants in common, etc., may sever in bringing or defending action. All persons holding as tenants in common, joint tenants, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. In all cases one tenant in common or joint tenant can sue his cotenant.

History: En. Sec. 21, p. 43, L. 1877; re-en. Sec. 21, 1st Div. Rev. Stat. 1879; re-en. Sec. 21, 1st Div. Comp. Stat. 1887; amd. Sec. 586, C. Civ. Proc. 1895; re-en. Sec. 6493, Rev. C. 1907; re-en. Sec. 9085, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 384.

References

Hand et al. v. Heslet et al., 81 M 68, 74, 261 P 609; *Fender et al. v. Foust et al.*, 82 M 73, 77, 265 P 15.

9086. Action—when not to abate by death, marriage, or other disability—proceedings in such case. An action, or cause of action, or defense, shall not abate by death, or other disability of a party, or by the transfer of any interest therein, but shall in all cases, where a cause of action or defense arose in favor of such party prior to his death or other disability, or transfer of interest therein, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the court shall, on motion, allow the action or proceeding to be continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

History: Ap. p. Sec. 16, Bannack Stat.; 43, L. 1877; re-en. Sec. 22, 1st Div. Rev. Stat. 1879; en. Sec. 1, p. 98, L. 1883; re-en. Sec. 16, p. 29, Cod. Stat. 1871; amd. Sec. 22, p. Sec. 22, 1st Div. Comp. Stat. 1887; amd.

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Sec. 587, C. Civ. Proc. 1895; re-en. Sec. 6494, Rev. C. 1907; re-en. Sec. 9086, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 385.

Action May be Continued in Name of Assignor

Though under section 9067 every action must be prosecuted in the name of the real party in interest, where an action on a claim is pending at the time of its assignment, it may, under this section, be continued in the name of the assignor. *Osborne v. McDonald*, 91 M 83, 86, 5 P 2d 568.

Assignment May be Proved Though Not Pledged

The assignee of an account to whom it had been transferred by the original plaintiff after a complaint and answer had been filed, and who had been substituted as plaintiff, may prove the assignment although it had not been pleaded in the complaint. *Campbell v. Irvine*, 17 M 476, 43 P 626.

Defense Survives

A defense does not abate by the death of a defendant after the commencement of an action, although there had been no service of summons, but survives under this section, and may be maintained by his representatives. *Lavell v. Frost*, 16 M 93, 94, 40 P 146.

Directors' Liability Survives

The right of action given by a statute requiring the annual preparation and filing of a report, by the directors of a domestic trading corporation, showing the financial affairs of the company, and, in case of their default, making these directors liable for debts of the corporation while the default continues, survives their death, and may be prosecuted against their estates. *First Nat. Bk. v. Cottonwood Land Co.*, 51 M 544, 548, 154 P 582. See *Northern Pacific Ry. Co. v. Crowell*, 245 F. 668, 671.

Dower Right Survives to Representatives

An action by a widow to recover a dower right and for the value of rents and profits, does not abate upon her death, but survives to her legal representative. *Lynde v. Wakefield*, 19 M 23, 47 P 5.

Operation in General

Under this section, the administrator of the estate of a minor, who died before action could be brought to recover damages for personal injuries which he survived for an appreciable length of time, could properly bring suit in that behalf, and the contention that either the parent or guardian was the proper party plaintiff, under sec-

tion 9075, was without merit. *Melzner v. Northern Pacific Ry. Co.*, 46 M 162, 176, 127 P 146.

An action for either breach of promise or seduction survives, and may be maintained against the administrator of the estate of defendant. *Kennedy v. Rogan*, 52 M 242, 243, 156 P 1078.

A cause of action in favor of one whose death results from the wrongful act of another, under this section (a general survival statute), survives the death of the wrongdoer as well as the death of the party whose rights were infringed. *Ander-son et al. v. Wirkman*, 67 M 176, 182, 183, 215 P 224.

Id. Held, that the latter portion of this section, which indicates the person who may commence the action declared by the fore part thereof not to abate by death, or to continue it if commenced before the death of the party defendant, is adjective law.

Where an action is pending against a decedent at the time of his death, the action does not abate, under the general survival statute (this section), if the plaintiff presents his claim to the executor or administrator of defendant's estate for allowance or rejection as required by section 10183, R. C. M. 1921. In *re Stevenson*, 87 M 486, 493, 289 P 566.

Proceeding for Removal of Officer Does Not Abate With Death

Held, under the general survival statute (this section) that a proceeding for the removal of a county commissioner from office on a charge of illegal collection of fees, resulting in his ouster, did not abate with his death, and that therefore his personal representative was entitled to prosecute the appeal taken by defendant during his lifetime. *State v. Russell*, 84 M 61, 63, 274 P 148.

Survival Statute Presupposes the Existence of a Cause of Action

Every survival statute presupposes the existence of a cause of action in favor of the injured party. Such a statute does not create a new cause of action, but only carries forward the right which the injured party had before his death. *Dillon v. Great Northern Ry. Co.*, 38 M 485, 492, 100 P 960.

This section creates no new right of action, and the representative's right is conditioned upon the right of the party to maintain an action himself; hence, in a case of instantaneous death, the representative cannot recover for conscious suffering by his deceased before death, since deceased himself would have no action. *Chicago, Milwaukee & St. Paul Ry. Co. v. Clement*, 226 Fed. 426, 427, 141 C. C. A. 256.

References

Cited or applied as section 16, p. 45, Bannack Statutes, in *McGregor v. Wells Fargo & Co.*, 1 M 142; as section 22, First Division Compiled Statutes 1887; in *O'Rourke v. Schultz*, 23 M 285, 296, 58 P 712; as section 6494, Revised Codes, in

Melzner v. Northern Pacific Ry. Co., 46 M 277, 286, 127 P 1002; *Bruce v. McAdoo*, 65 M 275, 289, 211 P 772; *Price et al. v. Skylstead*, 69 M 453, 461, 222 P 1059; *Hand et al. v. Heslet et al.*, 81 M 68, 72, 261 P 609.

9087. Another person may be substituted for the defendant-interpleader.

A defendant, against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

History: Ap. p. Sec. 441, p. 132, Bannack Stat.; re-en. Sec. 598, p. 157, Cod. Stat. 1871; re-en. Sec. 23, p. 44, L. 1877; re-en. Sec. 23, 1st Div. Rev. Stat. 1879; re-en. Sec. 23, 1st Div. Comp. Stat. 1887; en. Sec. 588, C. Civ. Proc. 1895; re-en. Sec. 6495, Rev. C. 1907; re-en. Sec. 9087, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 386.

Complaint Insufficient as Interpleader

A cross-complaint filed by defendant as part of his answer held not susceptible of interpretation as a complaint in interpleader, in the absence of compliance with this section, requiring that defendant before answering file the affidavit provided for or apply for an order substituting attaching creditors in his place; held, further, that the pleading was insufficient to bring it within the concluding part of the section, which, under a different set of circumstances, provides for an original action against the claimants to compel them to interplead and litigate their several claims among themselves. *Security State Bank of Roy v. Melchert*, 67 M 535, 539 et seq., 216 P 340.

Covers Both Law and Equity

Where, in an action by an assignee on an account, a justice of the peace permitted the defendant to pay into court the amount sued for, and thereupon sub-

stituted as defendants the assignor and one other who claimed to be entitled to the money, the order of substitution did not convert the purely legal cause of action into an equitable one so as to deprive the justice of jurisdiction of the action, since this section covers the subject of interpleader both at law and in equity. *Anderson v. Red Metal Min. Co.*, 36 M 312, 322, 93 P 44.

This section provides for substitution and interpleader; it covers the subject of interpleader both at law and in equity; in an equity suit neither party is entitled to a jury trial, as a matter of right, though the trial court may call to its aid a jury to advise upon disputed questions of fact. *Missoula T. & S. Bank v. Iman & Son*, 50 M 355, 356, 146 P 941.

Effect of Paying Into Court When Unauthorized

One bringing an interpleader action under the second clause of this section, which does not provide for payment of money in his possession to which conflicting claims are made, into court, does not relieve himself of responsibility by placing it in the clerk's hands; if he does so and the clerk receives it, it is not in the latter's official custody, and by receiving it without authority so to do, the clerk be-

comes a mere bailee for the depositor: Doggett et al. v. Johnson et al., 82 M 21, 26, 27, 265 P 673.

Extent of Hearing on Interpleader

In an action in interpleader to determine the rights of attaching creditors and of an attorney to funds in the hands of a fire insurance company which had been assigned by the insured to the attorney, who then had not performed any services to the assignor but who under the assignment was to retain, after the payment of certain debts, such sum as might be due him for fees, wherein the attorney alleged that his services were worth \$1,500, and the creditors averred that they were worth only \$150, the court erred in not deciding the issue thus directly raised as to the reasonable value of the attorney's services. Davis et al v. Claxton et al., 82 M 574, 589, 268 P 787.

Intention of Act

This section, taken as a whole, is intended to cover the subject of interpleader, both at law and in equity; one purpose being to enable courts of law to grant relief in a summary way in many cases in which theretofore they could grant none. Anderson v. Red Metal Min. Co., 36 M 312, 321, 93 P 44.

Interpleader and Cross-Complaint Statutes Not in Conflict

Held, that this section, authorizing defendant who has money in his possession to which others make conflicting claims, to bring an action to compel the claimants to interplead and litigate their several claims among themselves, and section 9151, under which a defendant may make other claimants to the subject matter of the action parties thereto by filing a cross-complaint, are not in conflict, the latter rather supplementing the interpleader statute by providing for a class of cases not comprehended by the former, the purpose of each being to expedite litigation and afford protection to both persons and property involved in litigation. Zunchich v. Security Building etc. Assn., 85 M 341, 346 et seq., 278 P 1011.

Operation in General

Under this section, one who holds a fund in his possession to which conflicting claims are made and is unwilling to assume the responsibility of determining its ownership, may invoke the equitable aid of the district court by an action in interpleader, whereupon the court on acquiring jurisdiction over all persons claiming the fund or any part thereof, will determine and enforce the rights of the several parties made defendants in the action. First National Bank v. Conner, 85 M 229, 237, 278 P 143.

Requisites of Party Applying for Substitution

In an action in claim and delivery, the court cannot make an order substituting in place of defendant a claimant of the property, on application of defendant who has no control over the property and no power to deliver it on the order of the court. State ex rel. Weinstein Co. v. District Court, 28 M 445, 447, 72 P 867.

Id. Though the statute grants the right to the order upon a proper showing, the showing made must meet all of its substantial requirements; otherwise, the court has no power to make the order.

Substitution Presumed Regular

Where the answer shows that persons appear as defendants, who were not originally defendants, but were by the order of the court substituted as such, it may be inferred from such fact that the substitution was made in pursuance of the provisions of this section. Mettler v. Adamson, 38 M 198, 201, 99 P 441.

Waiver of Right to Object to Procedure

Where an application for substitution is made on an amended answer, and the party substituted becomes defendant without objection, he waives irregularities in the mode of substitution. Anderson v. Red Metal Min. Co., 36 M 312, 323, 93 P 44.

References

State v. Banking Corp. of Montana, 74 M 491, 508, 241 P 626; Maser v. Farmers' etc. Bank of Winnett, 90 M 33, 40, 300 P 199; State v. District Court et al., 94 M 551, 25 P 2d 396.

9088. Intervention—when it takes place, and how made. Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds

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upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.

History: En. Sec. 442, p. 132, Bannack Stat.; re-en. Sec. 599, p. 158, Cod. Stat. 1871; re-en. Sec. 24, p. 44, L. 1877; re-en. Sec. 24, 1st Div. Rev. Stat. 1879; re-en. Sec. 24, 1st Div. Comp. Stat. 1887; re-en. Sec. 589, C. Civ. Proc. 1895; re-en. Sec. 6496, Rev. C. 1907; re-en. Sec. 9088, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 387.

Answer to Intervention

Where a complaint in intervention is adverse to both parties in which filed, both are considered as defendants as respects the intervener and they must plead to his complaint as defendants in an ordinary action. *State Bank of New Salem v. Schultze*, 63 M 410, 419, 209 P 599.

Extent of Rights of Intervener

While an intervener must accept the action in which he intervenes as he finds it at the time of intervention, his rights thereafter are as broad as those of the original parties to it. *State Bank of New Salem v. Schultze*, 63 M 410, 419, 209 P 599.

Fact That Party May Have Another Remedy Does Not Preclude Intervention

The fact that a party claiming an interest in attached property may have a remedy, after seizure or sale, under section 9273, or by an action in conversion or replevin, does not deprive him of his right to intervene in the action in which the attachment was procured. *Moreland v. Monarch Mining Co.*, 55 M 419, 425, 178 P 175.

Interest in Action Necessary

A third party, who claimed to own property which had been attached to secure any judgment which might be recovered in an action, had such an interest in the subject-matter of the litigation as to entitle him to intervene and have his rights determined. *Moreland v. Monarch Mining Co.*, 55 M 419, 424, 178 P 175.

Refusal to permit a party to intervene is error where such party makes a prima facie showing of interest in the subject matter of the litigation (this section). *Equity Co-operative Assn. v. Milling Co.*, 63 M 26, 37, 206 P 349.

In an action in claim and delivery to recover a carload of ore, complaint in intervention by a sheriff who alleged that pursuant to an agreement between labor claimants (interveners) and defendant against whom they had secured judgments on which executions were issued, he had shipped the ore as their trustee and as

such was lawfully entitled to the proceeds derived from the ore, held, sufficient to show a creation of trust in, and acceptance thereof by him, as against the assertion that the sheriff had no interest in the subject matter of the action and therefore was not entitled to intervene, under this section. *Stephenson v. Combination Leasing etc. Co.*, 86 M 322, 325, 283 P 1110.

Intervention in Mandamus Proceedings

Held, that under this section, providing that any person who has an interest in the matter in litigation may intervene in an action or proceeding, a person having an interest in the matter or thing sought to be compelled by mandamus may be permitted to intervene for the purpose of resisting the granting of the writ. *State v. Northern Pac. Ry. Co.*, 88 M 529, 549, 295 P 257.

Intervention Not Permitted in Supreme Court

On application to the supreme court for writ of supervisory control to review the action of the district court in denying a petition for interpleader, one not a party to such petition in the lower court, nor a party to the action in which interpleader is sought, will not be permitted to intervene; his remedy lying in a petition for intervention in the trial court. *State v. District Court et al.*, 94 M 551, 557, 25 P 2d 396.

Intervention Should be Liberally Permitted

Courts of equity are liberal in allowing the right to intervene in an action where the petitioner's rights will be directly affected by the decree, for the purpose of doing complete justice. *State ex rel. Thelen v. District Court*, 93 M 149, 157, 17 P 2d 57.

Not Applicable to Will Contests

This section does not apply to the filing of grounds for contesting a will. *State ex rel. Donovan v. District Court*, 25 M 355, 363, 65 P 120.

Procedure to Intervene

One desiring to intervene in an action, as he may do under this section, should, when he files his petition for leave to intervene, serve a copy of his complaint in intervention upon the parties to the action as set forth in the section with the petition and, if leave be granted, forthwith file his complaint. *State ex rel. Thelen v. District Court*, 93 M 149, 157, 17 P 2d 57.

Purpose

The purpose of this section is to avoid circuity of action and multiplicity of suits. *Moreland v. Monarch Mining Co.*, 55 M 419, 425, 178 P 175.

The purpose of this section permitting a person to intervene in an action between others if his interest be such that he would be prejudicially affected as a necessary consequence of the determination of the action without his presence as a party to it, is to avoid circuity of action and needless multiplicity of suits. *State Bank of Outlook v. Sheridan County*, 72 M 1, 4, 230 P 1097.

Requisites to Intervention

A party who is a stranger to a suit as commenced, but who, without a showing by complaint or obtaining leave of court, appears upon his own motion and demurs to the complaint, is not an intervener within the meaning of this section, and his demurrer so filed may be properly disregarded by the trial court. *Dietrich v. Steam Dredge & Amalgamator*, 14 M 261, 268, 36 P 81.

A party will not be permitted to file a complaint under this section after defendant's default for want of an answer has been entered, and when nothing remains to be done, but to enter the judgment. *Safely v. Caldwell*, 17 M 184, 42 P 766.

9089. Associates may be sued by name of association. When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability.

History: En. Sec. 439, p. 132, Bannack Stat.; re-en. Sec. 596, p. 157, Cod. Stat. 1871; amd. Sec. 25, p. 44, L. 1877; re-en. Sec. 25, 1st Div. Rev. Stat. 1879; re-en. Sec. 25, 1st Div. Comp. Stat. 1887; re-en. Sec. 590, C. Civ. Proc. 1895; re-en. Sec. 6497, Rev. C. 1907; re-en. Sec. 9089, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 388.

Applicable to Partnerships

This section providing that where two or more persons are transacting business under a common name they may be sued under such name, held applicable to a partnership. *Gardiner v. Eclipse Grocery Co.*, 72 M 540, 544, 234 P 490; *Lindsay Great Falls Co. v. McKinney M. Co.*, 79 M 136, 140, 255 P 25.

9090. When other parties must be brought in. The court may determine any controversy between parties before it, when it can be done without

One who has not filed his adverse claim under the federal statute cannot intervene in an action to determine adverse claims to a mining location, though he claims an interest in the premises adverse to both plaintiff and defendant. *Murray v. Polglase*, 23 M 401, 416, 417, 59 P 439. See *Poore v. Kaufman*, 44 M 248, 258, 119 P 785.

A demurrer to a complaint in intervention will be sustained, where the intervenor's notice of lien was so defective as not to support the lien, since the right to intervene is dependent upon the existence of a valid lien in the subject-matter of the action. *Interstate Lumber Co. v. Magill-Nevin etc. Co.*, 57 M 334, 188 P 144.

Under this section, intervention is permissible in any case, provided only the person seeking to intervene can show either an interest in the subject matter of the action, or an interest in the success of either of the parties, or an interest in the subject matter as against both. *Stack v. Coyle*, 59 M 444, 450, 197 P 747.

References

Cited or applied as section 24, First Division Compiled Statutes 1887, in *Murphy v. Cannon*, 18 M 348, 45 P 216; as section 6496, Revised Codes, in *State ex rel. Myersick v. District Court*, 53 M 450, 454, 164 P 546; *State ex rel. Sands v. District Court*, 95 M 427, 432, 26 P 2d 970.

Not Applicable to Parties Plaintiff

This section having no application to parties plaintiff, an action may not be brought in a copartnership or firm name. *Doll v. Hennessy Mercantile Co.*, 33 M 80, 86, 81 P 625.

Not Authorizing Suit in Name of President

A voluntary association of laborers may be sued in its common name; but, in the absence of a statute authorizing it, it cannot be sued in the name of its president. *Vance v. McGinley*, 39 M 46, 49, 101 P 247.

References

State v. Yegen, 74 M 126, 138, 238 P 603.

9089
102 Mont. 386
58 P (2d) 272
102 Mont. 429
58 P (2d) 275

9089
181 P. (2) 603

9090
100 Mont. 138
46 P (2d) 42
100 Mont. 590
51 P (2d) 639
101 Mont. 401
409
54 P (2d) 596-600
102 Mont. 386
58 P (2d) 273

9090
114 P. (2d) 269,
271
9090
158 P. 2d 306

9090
62 P (2d) 682
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200 P. (2d) 251
9090
73 P (2d) 205

prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

History: Ap. p. Sec. 17, p. 45, Bannack Stat.; amd. Sec. 17, p. 137, L. 1867; re-en. Secs. 17, 18, p. 29, Cod. Stat. 1871; re-en. Sec. 26, p. 45, L. 1877; re-en. Secs. 26, 27, 1st Div. Rev. Stat. 1879; re-en. Secs. 26, 27, 1st Div. Comp. Stat. 1887; en. Sec. 591, C. Civ. Proc. 1895; re-en. Sec. 6498, Rev. C. 1907; re-en. Sec. 9090, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 389.

Operation and Effect

To a suit by a taxpayer against the commissioners and clerk of a county brought for the purpose of having the execution of a county printing contract enjoined, the successful bidder was an indispensable party, who, under this section, was rightfully permitted to intervene, and as such party was entitled to file, among other papers, an affidavit disqualifying the district judge for imputed bias and prejudice. *State ex rel. Sherman v. District Court*, 51 M 220, 224, 152 P 32.

In a representative suit brought by one creditor of a bank for the benefit of all other creditors, the statute of limitations is suspended as to the latter, until the court orders them brought in under this section; the statute and the time constitut-

ing laches not commencing to run until then. *State v. District Court et al.*, 90 M 213, 221, 300 P 544.

Under this section, where the necessary parties to a full determination of a controversy are not before the court, it is its duty on its own motion to order them brought in, irrespective of the failure of defendant to raise the point out of defect of parties; the court's omission to make such order is fatal to the judgment, and dismissal of the action because of such defect without giving plaintiff a reasonable opportunity to bring in the absent parties is error. *McKenzie v. Evans et al.*, 96 M 1, 10, 29 P 2d 657; *Stauffacher v. Great Falls P. S. Co. et al.*, 99 M 324, 43 P 2d 647.

References

Cited or applied as section 6498, Revised Codes, in *Alywin v. Morley*, 41 M 191, 206, 108 P 778; *Albers v. Barnett*, 53 M 71, 80, 161 P 518; *Security State Bank of Roy v. Melchert*, 67 M 535, 543, 216 P 340; *Beer v. W. P. Devereux Co. et al.*, 87 M 210, 212, 286 P 406; *State ex rel. Sands v. District Court*, 95 M 427, 432, 26 P 2d 970.

9091. Action by joint-tenant against his cotenant. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist; provided, that nothing herein contained shall prevent one cotenant or joint-tenant, or any number of cotenants or joint-tenants acting together less than all, from entering on the common property at any point or points not then in the actual occupancy of the nonjoining cotenants or joint-tenants, and enjoying all rights of occupancy of the property, without waste; and in the case of mining property, from mining the same in a minerlike manner, and extracting, milling, and disposing of the ore from the common property, paying its or their own expenses, and subject to accounting to the nonjoining cotenant or joint-tenant for the net profits of such mining operations, if any made; and all liens for labor and materials incurred in such mining shall attach only to the undivided interest or interests of the working cotenants or joint-tenants, but nothing herein shall prevent or preclude the cotenant or joint-tenant, not joining in the operation of such mining property, from receiv-

ing his, its, or their proportionate share of all ore or ores on the dump, upon payment or tendering payment of the actual cost of mining the same.

History: Ap. p. Sec. 2, p. 454, Bannack Stat.; re-en. Sec. 2, p. 504, Cod. Stat. 1871; re-en. Sec. 771, 5th Div. Rev. Stat. 1879; re-en. Sec. 1285, 5th Div. Comp. Stat. 1887; amd. Sec. 592, C. Civ. Proc. 1895; en. Sec. 1, p. 134, L. 1899; re-en. Sec. 6499, Rev. C. 1907; re-en. Sec. 9091, R. C. M. 1921.

Constitutionality

The provisos of this act apply to cotenants whose estates were in existence when the law was passed, and, as to such estates, the act is an attempt to disturb or destroy vested rights, and is therefore inoperative and void. *Butte & B. Co. v. Montana O. P. Co.*, 25 M 41, 79, 63 P 825.

Inapplicable to Cotenancy Created Prior to Its Passage

This act is inapplicable to a cotenancy created prior to its passage. *Ayotte v. Nadeau*, 32 M 498, 512, 81 P 145.

Obligations of Entry Must be Strictly Complied With

To be excepted from the liabilities for injury under this section, a cotenant, entering upon mining property and enjoying the rights given by the proviso, must comply strictly with the obligations attached to the privilege of such entry. *Butte & B. Co. v. Montana O. P. Co.*, 24 M 125, 137, 60 P 1039.

Id. Unless a working cotenant brings himself squarely within the provisos of this act, the law preserves to his non-working cotenant exactly the same actions against such working cotenant as he had before the act was in force.

Rights as Between Cotenants

Where one cotenant occupies mining property in compliance with the provisions of this act, the statute does not always give to another cotenant an equal right to mine elsewhere on the same claim. *Butte & B. Co. v. Montana O. P. Co.*, 24 M 125, 137, 60 P 1039.

Each tenant in common has the right to have mining property stand as it is until it is finally partitioned, and there must be a clear showing to justify a court in invading this right and mining the prop-

erty through a receiver. *Heinze v. Kleinschmidt*, 25 M 89, 106, 63 P 927.

An action for the reasonable value of the use and occupation of a city lot is maintainable by one cotenant against another as to the net profits resulting from such occupation, whether they be the result of rents received from third persons holding under one cotenant, or from a profitable use of the common property by the cotenant himself. *Ayotte v. Nadeau*, 32 M 498, 515, 81 P 145.

Id. Tenants in common may contract with reference to the use of the common property. This is particularly the case under the statute, since their respective interests partake in great measure of the nature of estates in severalty.

When One Cotenant May Enjoin Removal of Ore

A cotenant, not joining in the operation of a mine, and suing for damages for the removal of ore therefrom through another mine, owned by his tenant in common, to which plaintiff had no right of access, was entitled to an injunction *pendente lite* to restrain such removal, though defendant offered to account for ore extracted therefrom. *Butte & B. Co. v. Montana O. P. Co.*, 24 M 125, 138, 60 P 1039.

Id. A cotenant, whose estate was created before the amendment of 1899 to this section became operative, is entitled to restrain by injunction such mining and removal of ore from the common property by his cotenant as is therein prohibited, provided that the remedy at law is inadequate and the threatened injury irreparable.

References

Cited or applied as section 592, Code of Civil Procedure, before amendment, in *Anaconda Copper Min. Co. v. Butte & Boston Min. Co.*, 17 M 519, 524, 43 P 924; *Red Mountain Consol. Min. Co. v. Esler*, 18 M 174, 177, 44 P 523; *Connole v. B. & M. Co.*, 20 M 523, 526, 52 P 263; *Harrigan v. Lynch*, 21 M 36, 42, 52 P 642; *Butte & B. Co. v. Montana O. P. Co.*, 21 M 539, 541, 52 P 375; *Hochsprung v. Stevenson*, 82 M 222, 238, 266 P 406.

9092. Who may be sued on overdue negotiable instruments—transfer. A holder of overdue bills of exchange and promissory notes may sue all the parties thereto collectively or severally, but if any of the parties thereto, who are not primarily liable for the payment, shall tender the amount of principal, interest, and costs thereon, he shall transfer the paper, and if a judgment be rendered thereon, he shall assign the judgment to

such party so making the tender; and in case of refusal he may be compelled to do so by summary proceedings, for that purpose instituted, in the district court of the district in which he shall reside.

History: En. Sec. 593, C. Civ. Proc. 1895; re-en. Sec. 6500, Rev. C. 1907; re-en. Sec. 9092, R. C. M. 1921.

References

Cited or applied as section 593, Code of Civil Procedure, in *Brownlee v. Young*, 25 M 38, 40, 63 P 798.

CHAPTER 30

PLACE OF TRIAL OF CIVIL ACTIONS

- Section 9093. Certain actions to be tried where the subject, or some part thereof, is situated.
9094. Other actions—where the cause or some part thereof arose.
9095. Place of trial of actions against counties.
9096. Other actions, according to the residence of the parties.
9097. Actions may be tried in any county, unless the defendant demands a trial in the proper county.
9098. Place of trial may be changed in certain cases.
9099. When judge is disqualified, cause to be transferred.
9100. Papers to be transmitted—costs and fees—jurisdiction.
9101. Proceedings after judgment in certain cases transferred.
9102. Change of place of trial on agreement of parties.
9103. Costs of witnesses on change of place of trial.
9104. Costs of trial as between counties.

9093. Certain actions to be tried where the subject, or some part thereof, is situated. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this code:

1. For the recovery of real property, or of an estate or an interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

History: Ap. p. Sec. 18, p. 46, Bannack Stat.; en. Sec. 18, p. 137, L. 1867; re-en. Sec. 23, p. 30, Cod. Stat. 1871; re-en. Sec. 56, p. 51, L. 1877; re-en. Sec. 56, 1st Div. Rev. Stat. 1879; re-en. Sec. 56, 1st Div. Comp. Stat. 1887; re-en. Sec. 610, C. Civ. Proc. 1895; re-en. Sec. 6501, Rev. C. 1907; re-en. Sec. 9093, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 392.

Operation and Effect

This section does not contravene section 11, article VIII, of the constitution. *Bookwalter v. Conrad*, 15 M 464, 39 P 573, 851.

Proceedings to condemn water appropriated for irrigation purposes may be brought and tried in the court in which the land is situated, though the water is to be taken in another county. *City of Helena v. Rogan*, 26 M 452, 470, 68 P 798.

This section has no application to an

action to enforce the specific performance of a contract for the conveyance of real estate. *Silver Camp Min. Co. v. Dickert*, 31 M 488, 494, 78 P 965.

Statute Relates to Both Actions at Law and Suits in Equity

While the Code sections relating to venue and change of venue refer only to "actions" which, technically speaking, may be said to apply only to actions at law, the term includes "suits" embracing both law actions and suits in equity. *McKinney v. Mires et al.*, 95 M 191, 195, 26 P 2d 169.

References

Cited or applied as section 6501, Revised Codes, in *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 604, 172 P 1030; *Bullard v. Zimmerman et al.*, 82 M 434, 442, 268 P 512.

9094. Other actions—where the cause or some part thereof arose. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except that, when it is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed.

2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer.

History: En. Sec. 19, p. 46, Bannack Stat.; re-en. Sec. 19, p. 137, L. 1867; re-en. Sec. 24, p. 31, Cod. Stat. 1871; re-en. Sec. 57, p. 51, L. 1877; re-en. Sec. 57, 1st Div. Rev. Stat. 1879; re-en. Sec. 57, 1st Div. Comp. Stat. 1887; re-en. Sec. 611, C. Civ. Proc. 1895; re-en. Sec. 6502, Rev. C. 1907; re-en. Sec. 9094, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 393.

Operation and Effect

An action against the warden of the state penitentiary, for tortious acts alleged to have been committed by him in the exercise of his authority as a public officer, is properly triable in the county where such acts were done; and, if the plaintiff selects another place of trial, the defendant has no absolute right to have it changed to the county where such acts were committed. *State ex rel. Stephens v. District Court*, 43 M 571, 577, 118 P 268.

Under this section, a public officer (sheriff) sued in his official capacity is entitled to have the case tried in the county of which he is such officer. *State ex rel. Davis v. District Court et al.*, 72 M 56, 57, 231 P 395.

The liability of directors of a domestic corporation created by section 6003, R. C. M. 1921, and amendments (Chapter 5, Laws of 1927), under which they become answerable for its debts if they shall fail to file within the proper time the annual

financial statement provided for therein, whether such debts were created before or after such failure, is in the nature of a penalty and is not based upon contract, and therefore the venue of an action to recover on such liability is, under this section, in the county where the cause of action, or some part thereof, arose. *National Supply Co.-Midwest v. Abell*, 87 M 555, 558, 289 P 577.

Under this section, providing that where an action is brought against a public officer for an act done by him by virtue of his office, it is triable where the cause or some part of it arose, where a sheriff made an arrest in a county other than his own without a warrant, there placing plaintiff in jail several hours, and thereafter transported him to his own county and detained him in jail there for some twelve days, at least a portion of several causes of action stated in such person's complaint against the officer and his sureties for false arrest and imprisonment arose in the county in which he was arrested, and therefore his action was properly triable there. *Enos v. American Surety Company of New York*, 95 M 588, 593, 28 P 2d 197.

References

Bullard v. Zimmerman et al., 82 M 434, 442, 268 P 512; *McKinney v. Mires et al.*, 95 M 191, 196, 26 P 2d 169.

9095. Place of trial of actions against counties. An action against a county may be commenced and tried in such county, unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto.

History: Ap. p. Sec. 58, p. 52, L. 1877; re-en. Sec. 58, 1st Div. Rev. Stat. 1879; re-en. Sec. 58, 1st Div. Comp. Stat. 1887; amd. Sec. 612, C. Civ. Proc. 1895; re-en. Sec. 6503, Rev. C. 1907; re-en. Sec. 9095, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 394.

Operation and Effect

Construing this section, held that by the provision thereof that "an action against a county may be commenced" therein (by a litigant other than a county) constitutes a grant of authority to sue, otherwise

9094
65 P (2d) 1189
9094
81 P.(2d) 425
.....Mont.....

9094
111 P.(2d) 287-
291
111 P.(2d) 808

9094, subsec. 2
107 P.(2d) 534,
535

9094
146 P.(2d) 152,
153

9094
205 P.(2d) 511

9095
101 Mont. 472
54 P (2d) 581

9095
81 P.(2d) 425
.....Mont.....

9095
146 P.(2d) 152,
153

9095
205 P.(2d) 511

lacking, that the provision must be strictly pursued, and that if an action be brought in a county other than the one sued, the district court thereof is without jurisdiction to try it. *Good Roads Machinery Co. v. Broadwater Co.*, 94 M 68, 70, 20 P 2d 834.

References

Cited or applied as section 6503, Revised Codes, in *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 604, 172 P 1030; *McKinney v. Mires et al.*, 95 M 191, 196, 26 P 2d 169.

9096. Other actions, according to the residence of the parties. In all other cases the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found; or, if none of the defendants reside in the state, or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the state, such action may be tried in any county where either of the parties may reside, or service be had. Actions upon contracts may be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed; subject, however, to the power of the court to change the place of trial as provided in this code.

History: Ap. p. Sec. 20, p. 46, *Bannack Stat.*; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, *Cod. Stat.* 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 59, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 613, *C. Civ. Proc.* 1895; re-en. Sec. 6504, *Rev. C.* 1907; re-en. Sec. 9096, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 395.

Action for Damages to Livestock in Shipment

Whether an action against a railway company, a foreign corporation and therefore a nonresident of the state, to recover damages to a shipment of livestock from a point in this state to another state, due to unreasonable delays and negligence occurring outside the state, be treated as one ex contractu or ex delicto, the cause of action accrued at point of destination and under that portion of this section, providing that an action must be tried where the plaintiff resides and the defendant may be found, the action was properly triable in the county of plaintiff's residence in which an agent of defendant was served with summons, though in the act of transportation no part of such county was traversed, and a motion for change of venue to a county through which defendant company's track ran and transportation of the livestock was had was properly denied. *Hanlon v. Great Northern Ry. Co.*, 83 M 15, 20, 268 P 547.

Action for Wages

Where men are employed to work at a mine, and no place of payment is mentioned, an action for wages may be tried

in the county where the mine is situated; that being the place of performance. *State ex rel. Coburn v. District Court*, 41 M 84, 86, 108 P 144.

Actions in Tort

Where the complaint contained two causes of action in tort, in the first of which the county in which the tort was committed was stated, while in the second it was not, a change of venue was properly granted to the county of defendant's residence on the second cause of action, and the defendant's right to such change could not be abridged by reason of the fact that the first cause of action was properly triable in the county where the action was commenced. *Yore v. Murphy*, 10 M 304, 310, 25 P 1039.

In an action for personal injuries sustained by an employee of a railroad company, a change of venue will not be granted to the county of defendant's residence, where the complaint averred that the railroad upon which plaintiff was employed was lying within a particular county, and, at the time of the injury, the plaintiff was in the service of the defendant upon said railroad, as such averments sufficiently state the county in which the contract of employment was to be performed. *Oels v. Helena & Livingston S. & R. Co.*, 10 M 524, 526, 26 P 1000.

Under this section, an action for tort must be tried in the county in which it was committed; hence an action by a railroad employee for personal injuries sustained in a county other than that of his residence, was properly triable in the

county where the accident occurred, subject to the power of the court to change the place of trial. *Dryer v. Director-General of Railroads*, 66 M 298, 299, 300, 213 P 210.

In an action for false imprisonment commenced in a county other than the one in which the tort was alleged to have been committed, held that the district court abused its discretion in denying defendant's motion for change of venue asked for on the ground of the convenience of witnesses and the promotion of justice, under section 9098, on affidavits showing, among other things, that a large number of its witnesses residing in Idaho a short distance from the county seat of the county to which it was proposed to have the cause removed, would attend the trial, but would decline to attend if held in the county in which the action was brought, some 340 miles distant, etc., no affidavits being filed in opposition; held further, that irrespective of company's showing in support of the motion as made, it was entitled to the change of place of trial, under this section, to the county where the alleged tort was committed. *Atkinson v. Bonners Ferry Lbr. Co., Ltd.*, 74 M 393, 397, 240 P 823.

An action for tort is properly triable in the county where the tort was committed. *Stewart v. First Nat. Bk. etc. Co. et al.*, 93 M 390, 392, 18 P 2d 801; *Enos v. American Surety Co. of New York*, 95 M 588, 592, 28 P 2d 197.

Action of Claim and Delivery

The action in claim and delivery is founded upon a tort and must be tried in the county where the tort was committed. *Kalberg v. Greiner*, 91 M 509, 511, 8 P 2d 799.

Action on an Account

Actions on an account should be brought in the county in which the defendants, or some of them, reside, or in the county in which plaintiff resides and in which defendants, or any of them, may be found. *McDonnell v. Collins*, 19 M 372, 373, 48 P 549.

Where two of the three causes of action alleged in a complaint were actions on an open account for medical services rendered in B. county, and not on express contracts to render such services, plaintiff was not entitled to sue thereon in B. county. *Bond v. Hurd*, 31 M 314, 317, 78 P 579.

Action to Redeem From a Mortgage

Although an action to redeem from a mortgage on real property should have been brought in the county in which the mortgagee resided, yet where it was insti-

tuted in the county in which the mortgagor had his residence, but defendant failed to ask for a change of venue to his home county, as he could have done under the next succeeding section, the court in which the suit was commenced had jurisdiction to try it. *State ex rel. Schatz v. District Court*, 40 M 173, 177, 105 P 554.

Actions Upon Contracts

Where the complaint is silent as to the place where the contract sued on was to be performed, and the defendant, upon appearing, demurs and moves for a change of the place of trial to the county of his residence, which is resisted on the ground of convenience of witnesses, it is error for the court to deny the motion without prejudice to its renewal after answer filed, as the defendant's right to a change of venue must be determined by the conditions existing at the time he first appears in the action, and the convenience of witnesses as a ground for retaining the action in the county where it was commenced can not be considered until after answer. *Wallace v. Owsley*, 11 M 219, 220, 27 P 790.

Where a contract of indemnity did not designate any specific place for payment in case of loss to the insured, defendant company was required to make payment at the place of business or residence of the insured, and the county wherein such place was situate was the place of trial of an action by the insured to recover for loss sustained, and a motion for change of venue to the county of defendant surety company's residence was properly denied. *State ex rel. Western A. & I. Co. v. District Court*, 55 M 330, 333, 176 P 613.

Under this section, refusal to change the place of trial of an action on a contract from the county of plaintiff's residence to the county in which the contract was to be performed was error. *Feldman v. Security State Bank*, 62 M 330, 334, 206 P 425.

Where a contract does not designate the place of payment of a money obligation, the law makes it payable where the creditor resides or where he may be found, if within the state, and upon failure of the debtor to seek the creditor for the purpose of making payment, the latter may sue in the county of his residence. *Silver v. Morin*, 74 M 398, 402, 240 P 825.

Where a contract of sale of personal property provides that payment shall be made in a county other than the one in which action is commenced, the defendant is entitled to a change of venue to that county, but where it does not so provide, the presumption is that payment is to be made at the creditor's residence or place of business and the action is triable in his county. *Courtney v. Gordon*, 74 M 408, 412, 241 P 233.

The provisions of this section, that actions upon contracts must be tried in the county in which the one in question was to be performed means full, not part, performance. *Hanlon v. Great Northern Ry. Co.*, 83 M 15, 20, 268 P 547.

Where an express contract for the payment of money is silent as to the place of performance, the presumption is that payment is to be made at the place of the creditor's residence or business, and, under this section, an action thereon is properly triable in the county of the latter. *Electrical Products Consol. v. Goldstein*, 97 M 581, 585, 36 P 2d 1033.

"Contract" Defined

The term "contract," as used in this section, not being limited in meaning either by the context or by any qualifying word, must be accepted in its broadest signification, and as including every kind of contract, whether express or implied. *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 607, 172 P 1030.

Equity Actions

Held, that a suit seeking to establish a trust in corporate stock, asking for an accounting and an injunction against the transfer of any shares of stock pending suit, in which proof of the contract out of which it arose was but incidental to the establishment of the trust, was purely equitable and transitory, and governed, as to venue, by the principal clause of this section, i. e., the place of residence of the defendants or any of them. *McKinney v. Mires et al.*, 95 M 191, 196 et seq., 26 P 2d 169.

Though, generally speaking, all equitable suits (injunction, inter alia) are properly triable, under this section, in the county in which defendants, or any of them, reside, Section 3847.14 specifically provides that a party injured by the illegal operation of a motor vehicle for hire may by writ of injunction seek enforcement of the Act in any county in which the motor carrier is engaged in business; hence, where injunctive relief was sought against such a carrier in a county between the county seat of which and that of his home county defendant

was doing business, the court erred in granting a change of venue to the latter county. *Great Northern Ry. Co. v. Hatch et al.*, 98 M 269, 277, 38 P 2d 976.

"May" Construed as "Must" in This Section

The last sentence of this section should be read to mean that actions upon contracts must (not may) be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed. *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 604, 172 P 1030.

When Defendants Do Not Reside in the State

This section expressly provides that, if none of the defendants reside in this state, an action may be tried in any county which the plaintiff may designate in his complaint. As to what are styled local actions—such, for example, as those relating to interests in lands—usually the venue or place of trial is the district or the county where the subject-matter lies. But in general, transitory actions may be tried wherever personal service can be made on the defendant. *State ex rel. Mackey v. District Court*, 40 M 359, 366, 106 P 1098.

When Venue May Be Changed as a Matter of Right

Where, at the time suit was brought in B. county, where plaintiff resided, on a cause of action included within this section, defendant was a bona fide resident of V. county, in which he was served, defendant was entitled to a change of venue to V. county as a matter of right. *Bond v. Hurd*, 31 M 314, 317, 78 P 579.

References

Cited or applied as section 6504, Revised Codes, in *State ex rel. Stephens v. District Court*, 43 M 571, 573, 118 P 268; *State v. District Court et al.*, 69 M 415, 422, 222 P 444; *Stiemke v. Jankovich et al.*, 72 M 363, 367, 233 P 904; *Bullard v. Zimmerman et al.*, 82 M 434, 442, 268 P 512; *Dawson v. Dawson*, 92 M 46, 49, 10 P 2d 381; *Heinecke v. Scott et al.*, 95 M 200, 207, 26 P 2d 167.

9097. Actions may be tried in any county, unless the defendant demands a trial in the proper county. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.

History: En. Sec. 61, p. 53, L. 1877; re-en. Sec. 61, 1st Div. Rev. Stat. 1879; re-en. Sec. 61, 1st Div. Comp. Stat. 1887; re-en. Sec. 614, C. Civ. Proc. 1895; re-en. Sec. 6505, Rev. C. 1907; re-en. Sec. 9097, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 396.

Affidavit of Merits

The "affidavit of merits," mentioned in this section, is not the same as that required for relief from a default judgment, under section 9187; the latter must set forth the merits of the defense. *State ex rel. Stephens v. District Court*, 43 M 571, 575, 118 P 268.

The affidavit of merits required by this section, on demand for a change in the place of trial, need not set forth the facts relied upon by the defendant as a defense to the action, but is sufficient if it contains the statement "that the defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense upon the merits in the action, as he is advised by his counsel and verily believes." *State ex rel. Stephens v. District Court*, 43 M 571, 576, 118 P 268.

The burden is upon the party moving for a change of venue, to disclose the facts which entitle him to the change; hence where defendant instead of setting forth the facts entitling him to a change on the ground that the contract was to be performed in his county, simply alleged a conclusion to that effect, that his place of business was in that county and that he had been served with summons there, the motion was properly denied. *Courtney v. Gordon*, 74 M 408, 413, 241 P 233.

Demand for Change to Improper County of No Avail

Under this section, the district court may act only on a demand for a change of venue, and a demand for a change to an improper county is of no avail. *McKinney v. Mires et al.*, 95 M 191, 197, 26 P 2d 169.

An action for the payment of money was commenced in the county where the contract giving rise to the debt was made; the instrument did not provide where payment should be made. Defendant was served with process in another county where he then resided and where plaintiff corporation had no place of business; he moved for change of venue to the county of his residence, alleging in his motion, *inter alia*, that plaintiff had its place of business in a third county. The motion was denied. Held, that the court decided correctly, since such an action may be tried in any county unless change of venue be asked to the proper one, and since, upon the assumption that the last county mentioned was the proper one for trial, no motion for change to it had been made, the motion as made, on the contrary, having sought a transfer to an improper county. *Electrical Products Consol. v. Goldstein*, 97 M 581, 585, 36 P 2d 1033.

Essential Steps to Change of Venue

This section and the following, providing for change of venue, are companion measures and must be construed together. Under this, the applicant must file an affidavit of merits and demand in writing for the change. Under the following section, he must apply to the court for an order to change the place. In the absence of an agreement of the parties these separate steps are imperative. Defendant filed the affidavit and with it a notice of motion and motion but did not file a demand in writing. Held, on application for writ of supervisory control, that a demand for the change was indispensable and that in its absence the court properly denied the motion. *State ex rel. Davis v. District Court et al.*, 72 M 56, 58, 59, 231 P 395.

A defendant seeking a change of place of trial under this and the following sections must, first, file an affidavit of merits and a demand in writing; second, apply to or move the court for an order changing the place of trial; in the absence of an agreement of the parties, these requirements are indispensable and imperative. *O'Hanion v. Great Northern Ry. Co.*, 76 M 128, 134, 245 P 518.

While the statute (this section) requires that one seeking a change of venue must do so in writing, no special form of demand is prescribed. *Stewart v. First Nat. Bk. etc. Co. et al.*, 93 M 390, 395, 18 P 2d 801.

Where defendant seeks a change of venue under this section, the approved practice is to file, with his notice of motion, a statement of the contents of the motion he intends to make, and either it or the notice should state the grounds upon which the motion is to be made. *Great Northern Ry. Co. v. Hatch et al.*, 98 M 269, 38 P 2d 976.

Id. Defendant in his notice of motion for change of place of trial advised plaintiff that his motion would be made upon the papers and records filed in the cause, the demand for change and the affidavit of merits filed. Plaintiff appeared and contested the motion without raising the point that the moving papers were insufficient to warrant the change. Held, that even though reference in the notice to the other instruments filed, advising plaintiff of the grounds on which the change of place of trial was based, did not cure the alleged defect, plaintiff, by contesting the motion, will be held on appeal to have waived such defect.

May Waive Right

The right to have a cause tried in a particular county is a personal privilege, which one may waive expressly or by implication, and in the absence of a timely

application, on the part of defendant, the plaintiff is entitled to have the cause tried in the county of his residence. *State ex rel. Williams v. District Court*, 56 M 478, 479, 185 P 458.

Id. This section is analogous to a statute of limitations, and where, by reason of fault of the agency or means selected for transmitting the papers, as when transmitted by mail and there is a delay in handling the same, if the delay is beyond the statutory time for the filing thereof, the privilege of the transfer of the venue allowed by this section is lost.

A defendant may waive his right to the privilege of a change of venue by omitting to demand the right or by failing to observe the statutory requirements. *O'Hanion v. Great Northern Ry. Co.*, 76 M 128, 134, 135, 245 P 518.

Where plaintiff in a case which may be tried in any county in the state, after change of place of trial makes appearance in the court to which it was transferred and proceeds to trial, he waives his right thereafter to question the propriety of its removal to such county; where, however, he goes into such court only for the purpose of taking the necessary steps in aid of his appeal from the order of removal, the question of waiver does not arise if by such steps he does not challenge his adversary in any way. *Great Northern Ry. Co. v. Hatch et al.*, 98 M 269, 38 P 2d 976.

Party Must Demand Change

Since the district court can only act upon motion in the matter of changing the place of trial, it is the duty of defendant desiring a change of venue on the ground that the county in which the action was brought was not the county of his residence, under the following section, to make a motion to that effect, the demand for such change referred to in this section not supplying the place of such motion. *Danielson v. Danielson*, 62 M 83, 85, 86, 203 P 506.

Remedy by Appeal Available

Where defendant correctly pursues the statute (this section), in his endeavor to secure a change of place of trial and is entitled to such change but is denied it, he has a remedy by appeal. (Language appearing in *Feldman v. Security State Bank*, 62 M 330, at bottom of page 334, intimating otherwise, expressly disproved.) *State ex rel. Davis v. District Court et al.*, 72 M 56, 231 P 395.

When to be Made

A motion for a change of venue, on the ground that the action was not commenced in the proper county, must be made by defendant upon his first appearance. *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 608, 172 P 1030.

Where defendant makes application for change of venue because the county in which the action is commenced is not the proper one for its trial, he must do so, under this section, at the time he answers or demurs; if made before, it is premature, and if made thereafter, it comes too late. The motion for change must be made and determined in advance of any other judicial action in the case. *Dawson v. Dawson*, 92 M 46, 49, 50, 10 P 2d 381; *McKinney v. Mires et al.*, 95 M 191, 195, 26 P 2d 169.

The provisions of this section, requiring defendant seeking a change of place of trial to demand such change at the time he appears and answers or demurs, does not mean that he must act upon his first appearance in the cause, but only when he appears for the purpose of filing a demurrer or answer; therefore, by appearance in an action in which an attachment had been issued, for the purpose of filing exception to the sufficiency of the sureties thereon, defendants did not waive their right thereafter to petition for a change of place of trial when they filed a demurrer to the complaint. *Helena Adjustment Co. v. Predivich*, 98 M 162, 166, 37 P 2d 651.

For the purpose of moving for a change of place of trial, the defendant must, under this section, appear generally; a motion before such appearance is premature and may not be heard. *Great Northern Ry. Co. v. Hatch et al.*, 98 M 269, 38 P 2d 976.

References

Cited or applied as section 61, First Division Compiled Statutes 1887, in *Bookwalter v. Conrad*, 15 M 464, 39 P 573, 851; as section 614, Code of Civil Procedure, in *McDonnell v. Collins*, 19 M 372, 48 P 549; *State ex rel. Independent Pub. Co. v. Smith*, 23 M 329, 331, 58 P 867; as section 6505, Revised Codes, in *State ex rel. Schatz v. District Court*, 40 M 173, 177, 105 P 554; *State ex rel. Jacobs v. District Court*, 48 M 410, 414, 138 P 1091; *Crawford v. Pierce*, 56 M 371, 375, 185 P 315; *State v. District Court et al.*, 69 M 415, 422, 222 P 444; *Atkinson v. Bonners Ferry Lbr. Co., Ltd.*, 74 M 393, 397, 240 P 823; *Bullard v. Zimmerman et al.*, 82 M 434, 442, 268 P 512.

9098. Place of trial may be changed in certain cases. The court or judge must, on motion, change the place of trial in the following cases:

9098
81 P.(2d) 425

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88 P.(2d) 5

9098
137 P.(2d) 671,
672

9098
146 P.(2d) 152

9098
151 P. 2d 1006

9098
157 P. 2d 104
159 P. 2d 340

9098
186 P. (2) 94

1. When the county designated in the complaint is not the proper county.

2. When there is reason to believe that an impartial trial cannot be had therein.

3. When the convenience of witnesses and the ends of justice would be promoted by the change.

4. When, from any cause, the judge is disqualified from acting; but in case the parties shall agree in writing upon another district judge, or upon a member of the bar as judge pro tempore, as provided for by the constitution; or if any qualified district judge shall be called in and shall, within thirty days after the motion is made, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made. If such judge shall so appear he shall be vested with, and shall exercise, in said cause, all the authority of the judge of the district in which said action or proceeding may be pending.

History: Ap. p. Sec. 21, p. 46, Bannack Stat.; amd. Ch. 8, L. 3d Session 1866, which was set aside by Act of Congress of March 2, 1867; amd. Sec. 1, p. 68, L. 1867; amd. Sec. 27, p. 31, Cod. Stat. 1871; re-en. Sec. 62, p. 53, L. 1877; re-en. Sec. 62, 1st Div. Rev. Stat. 1879; re-en. Sec. 62, 1st Div. Comp. Stat. 1887; amd. Sec. 615, C. Civ. Proc. 1895; en. Ch. 2, Ex. L. 1903; re-en. Sec. 6506, Rev. C. 1907; re-en. Sec. 9098, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 397.

Authority of Disqualified Judge— Powers of Substituted Judge

When a district judge is disqualified for imputed bias he is without authority to act further in the action in which the disqualifying affidavit is filed, except to arrange the calendar, regulate the order of the business of the court, call in another judge or transfer the cause where a transfer is proper, and where another judge is called in he has all the authority of the judge inviting him. *Pineus v. Davis*, 95 M 375, 380, 26 P 2d 986.

In view of the provision of this section, subdivision 4, that a district judge who is called in to sit in place of one who is disqualified shall be vested with all the authority of the judge of the district extending the call, the disqualified judge may not in his call limit the invited judge in his authority over the cause in which he is to preside. *State ex rel. King v. District Court*, 95 M 400, 404, 26 P 2d 966.

Considerations in Allowing Changes of Venue

The power of courts to grant changes of venue is limited to the exercise of a judicial discretion, on good cause shown, which must consist of facts beyond the mere opinion and conclusions of the party making the affidavits. *Kennon v. Gilmer*,

5 M 257, 261, 5 P 847. See *Territory v. Manton*, 8 M 95, 102, 19 P 387.

Constitutionality

This section is not in conflict with the constitution. *State ex rel. Anaconda C. M. Co. v. Clancy*, 30 M 529, 77 P 312.

Construed With Section 8868

This section and section 8868 are companion sections and are to be construed together. *State ex rel. Wooster v. District Court*, 58 M 50, 52, 190 P 133.

Convenience of Witnesses and Promotion of Justice as Reason for Change of Venue

In an action for false imprisonment commenced in a county other than the one in which the tort was alleged to have been committed, held that the district court abused its discretion in denying defendant's motion for change of venue asked for on the ground of the convenience of witnesses and the promotion of justice, under this section, on affidavits showing, among other things, that a large number of its witnesses residing in Idaho a short distance from the county seat of the county to which it was proposed to have the cause removed, would attend the trial, but would decline to attend if held in the county in which the action was brought, some 340 miles distant, etc., no affidavits being filed in opposition; held, further, that irrespective of company's showing in support of the motion as made, it was entitled to the change of place of trial, under section 9096, to the county where the alleged tort was committed. *Atkinson v. Bonners Ferry Lbr. Co., Ltd.*, 74 M 393, 396, 240 P 823.

Essentials to Change of Venue

The preceding section and this one, providing for change of venue, are companion measures and must be construed together.

9098, subd. 1
107 P.(d) 534

9098, subd. 3
205 P.(2d) 511,
512

9098
Sub. 4
194 P.(2d)
234

Under the first, the applicant must file an affidavit of merits and demand in writing for the change. Under this one, he must apply to the court for an order to change the place. In the absence of an agreement of the parties these separate steps are imperative. Defendant filed the affidavit and with it a notice of motion and motion but did not file a demand in writing. Held, on application for writ of supervisory control, that a demand for the change was indispensable and that in its absence the court properly denied the motion. *State ex rel. Davis v. District Court et al.*, 72 M 56, 58, 59, 231 P 395.

A defendant seeking a change of place of trial under the preceding section and this section must, first, file an affidavit of merits and a demand in writing; second, apply to or move the court for an order changing the place of trial; in the absence of an agreement of the parties, these requirements are indispensable and imperative. *O'Hanion v. Great Northern Ry. Co.*, 76 M 128, 134, 135, 245 P 518.

May be Changed Where an Impartial Trial Cannot be Had

In all cases where the venue is properly laid, the court may change the place of trial where there is reason to believe that an impartial trial cannot be had in the county first selected, or when the convenience of witnesses and the ends of justice would be promoted by the change, or when the judge is disqualified. *State ex rel. Stephens v. District Court*, 43 M 571, 578, 118 P 268.

Motion for Change of Judge not Contemplated

It is not contemplated by this section that a motion for a change of judge shall be made, and such motion, if made, is of no effect, and could properly be disregarded altogether. *State ex rel. Durand v. District Court*, 30 M 547, 549, 77 P 318.

Necessity for a Motion

Since the district court can only act upon motion in the matter of changing the place of trial, it is the duty of defendant desiring a change of venue on the ground that the county in which the action was brought was not the county of his residence, under this section, to make a motion to that effect, the demand for such change referred to in the preceding section not supplying the place of such motion. *Danielson v. Danielson*, 62 M 83, 85, 86, 203 P 506.

Not Applicable to Contempt Cases

This section does not apply to contempt proceedings. *State ex rel. Boston & M. Co. v. Harney*, 30 M 193, 196, 76 P 10; *State ex rel. Carleton v. District Court*, 33 M 138, 141, 82 P 789.

Notice of Motion Need Not be Given to Adverse Party

Notice of motion for change of place of trial is not required to be given to the adverse party. *State ex rel. Jenkins v. District Court*, 32 M 595, 598, 81 P 351; *State ex rel. Lohman v. District Court*, 49 M 247, 249, 141 P 659.

"Place of Trial"

In the expression "place of trial," as used in statutes of this character, the word "place" primarily means county, and not the immediate place where the trial court sits. In this connection it is equivalent to neighborhood or place of a crime, or a cause of action, or the political division within which a jury must be gathered for the trial, and is synonymous with the word "venue." *State ex rel. Sackett v. Thomas*, 25 M 226, 237, 64 P 503.

Provisions Are Mandatory

The provisions of this section are mandatory, and require the district court to change the venue, but only after a motion has been filed and a showing made as required by the particular subdivision of the section under which the change of venue is sought. The court cannot act of its own motion, for, while a party may have an absolute right to a change of venue, it is a right that he may waive, and the court is without authority to invoke the statute in his behalf. *State ex rel. Gnose v. District Court*, 30 M 188, 189, 75 P 1109.

When Order Refusing Change of Venue Will be Disturbed on Appeal

An order refusing an application for a change of venue will not be set aside in the absence of an abuse of judicial discretion. *Territory v. Corbett*, 3 M 50, 56; *Kennon v. Gilmer*, 5 M 257, 261, 5 P 847; *Territory v. Manton*, 8 M 95, 102, 19 P 387; *In re Davis' Estate*, 11 M 1, 23, 27 P 342; *State v. Spotted Hawk*, 22 M 33, 52, 55 P 1026.

A motion for change of venue asked for on the ground (subd. 2, this section) that the movant cannot have an impartial trial in the county in which the action was brought, is addressed to the sound legal discretion of the court and its denial of the motion, though based upon conflicting affidavits, will not be disturbed on appeal unless it clearly appears that the court abused its discretion. *Torstenon v. Independent Publishing Co.*, 86 M 163, 167, 282 P 861.

When Right to Change May be Waived

In the event that a judge is disqualified, that a motion is made for a change of venue, and that no qualified judge appears within thirty days to try the case, the motion is suspended for that length of time, at the expiration of which the trans-

fer may be demanded, but the moving party is not bound to demand it; and if he does not, but thereafter has the cause set for hearing, he must be conclusively presumed to have waived the right to have it transferred. *Bean v. Missoula Lumber Co.*, 40 M 31, 35, 104 P 869.

A defendant may waive his right to the privilege of a change of venue by omitting to demand the right or by failing to observe the statutory requirements. *O'Hanion v. Great Northern Ry. Co.*, 76 M 128, 134, 135, 245 P 518.

When Venue May be Changed When Judge is Disqualified

When a judge is disqualified in any cause for any of the reasons enumerated in the statute, and a motion is made to transfer it, the moving party is entitled to have the transfer made, subject, however, to the proviso that, if a qualified judge is called to try it, and appears for that purpose, within thirty days, no transfer may be made. The motion is thus held suspended for this length of time. *Bean v. Missoula Lumber Co.*, 40 M 31, 35, 104 P 869; *State ex rel. Lohman v. District Court*, 49 M 247, 251, 141 P 659.

Where a district judge called in to try a case, because of the disqualification of the presiding judge, fails to appear and assume jurisdiction within thirty days after filing of the motion for change of venue, the presiding judge must change the place of trial. *State ex rel. Lohman v. District Court*, 49 M 247, 251, 141 P 659.

Where a judge has been invited to sit at the trial of a cause, after the filing of an affidavit disqualifying the regular trial judge, such invited judge must have failed for thirty days to sit as proposed, before

an order for a change of venue may be made, the parties to the action having first been given an opportunity to agree upon another judge or a judge pro tempore; otherwise a change of venue may be made only on motion. *State ex rel. Sell v. District Court*, 52 M 457, 459, 158 P 1018.

Where an affidavit of disqualification for imputed bias was filed in a district having three judges, it was the duty of the judge to call in another judge of his district to preside, and he had no power to grant a change of venue until he had done so, and the judge who was called in had failed to appear and assume jurisdiction for thirty days after the motion was made. *State ex rel. Wooster v. District Court*, 58 M 50, 52, 190 P 133.

References

Cited or applied as section 62, First Division Compiled Statutes 1887, in *Bookwalter v. Conrad*, 15 M 464, 39 P 573, 851; *Harris v. Ramsay*, 16 M 302, 40 P 589; as section 615, Code of Civil Procedure, before amendment, in *State ex rel. Independent Pub. Co. v. Smith*, 23 M 329, 331, 58 P 867; as amended, in *State ex rel. Boston & M. Co. v. Harney*, 30 M 193, 196, 76 P 10; *State ex rel. Carleton v. District Court*, 33 M 138, 141, 82 P 789; as section 6506, Revised Codes, in *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 604, 172 P 1030; *State ex rel. Western A. & I. Co. v. District Court*, 55 M 330, 334, 176 P 613; *Rowan v. Gazette Printing Co. et al.*, 69 M 170, 174, 220 P 1104; *Dawson v. Dawson*, 92 M 46, 49 et seq., 10 P 2d 381; *McKinney v. Mires et al.*, 95 M 191, 195, 26 P 2d 169.

9099. When judge is disqualified, cause to be transferred. If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, from any cause, the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

1. If in a district court, to another district court.
2. If in a justice's court, to another justice's court in the same county.

History: En. Sec. 63, p. 53, L. 1877; re-en. Sec. 63, 1st Div. Rev. Stat. 1879; re-en. Sec. 63, 1st Div. Comp. Stat. 1887; re-en. Sec. 616, C. Civ. Proc. 1895; re-en. Sec. 6507, Rev. C. 1907; re-en. Sec. 9099, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 398.

Operation and Effect

This section is a general statute, applicable to changes effected for any cause

for which a change of venue may be had. *State ex rel. Lohman v. District Court*, 49 M 247, 251, 141 P 659.

Id. Where a district judge is disqualified for imputed bias, and the judge called in to sit in his place fails, for thirty days after motion for change of venue has been filed, to appear and assume jurisdiction of the case, the former must transfer it

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to the nearest district court of another judicial district.

Id. Under this section and section 9105, where a change of venue, for disqualification of the presiding judge, is required, by the filing of a disqualifying affidavit, the cause must be transferred to the "nearest district court" of another judicial district, and that is the one that can be reached by the shortest route of travel in the usual mode of travel.

References

Cited or applied as section 616, Code of Civil Procedure, in *State ex rel. Carleton v. District Court*, 33 M 138, 142, 82 P 789; as section 6507, Revised Codes, in *State ex rel. Sell v. District Court*, 52 M 457, 459, 158 P 1018; *State ex rel. Wooster v. District Court*, 58 M 50, 52, 190 P 133; *St. Paul Fire & Marine Ins. Co. v. Freeman*, 80 M 266, 274, 260 P 124.

9100. Papers to be transmitted—costs and fees—jurisdiction. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleading and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 399.

References

Great Northern Ry. Co. v. Hatch et al., 98 M 269, 38 P 2d 976.

9101. Proceedings after judgment in certain cases transferred. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify, under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the record of the court, briefly designating it as a judgment transferred from.....court (naming the proper court).

History: En. Sec. 65, p. 54, L. 1877; re-en. Sec. 65, 1st Div. Rev. Stat. 1879; re-en. Sec. 65, 1st Div. Comp. Stat. 1887; re-en. Sec. 618, C. Civ. Proc. 1895;

re-en. Sec. 6509, Rev. C. 1907; re-en. Sec. 9101, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 400.

9102. Change of place of trial on agreement of parties. All the parties to an action, by stipulation or by consent in open court, entered in the minutes, may agree that the place of trial may be changed to any county in the state. Thereupon the court must order the change as agreed upon.

History: En. Sec. 619, C. Civ. Proc. 1895; re-en. Sec. 6510, Rev. C. 1907; re-en. Sec. 9102, R. C. M. 1921.

Operation and Effect

Confession of a motion for change of venue is tantamount to a stipulation for a change, and under this section where the parties stipulate to that effect, the district court must order the change to the

county agreed upon. *State v. District Court et al.*, 74 M 338, 344, 240 P 388.

References

Cited or applied as section 619, Code of Civil Procedure, in *State ex rel. Sackett v. Thomas*, 25 M 226, 237, 64 P 503; *O'Hanion v. Great Northern Ry. Co.*, 76 M 128, 135, 245 P 518; *Dawson v. Dawson*, 92 M 46, 51, 10 P 2d 381.

9103. Costs of witnesses on change of place of trial. Where an affidavit is filed disqualifying a judge, as provided in the fourth subdivision of section 9098, after the action or proceeding is set for trial or hearing, the party filing the same shall pay to the opposite party all costs necessarily incurred in securing the attendance of witnesses between the date the order was made fixing the day of hearing or trial and the time the affidavit was filed, and such costs so paid shall not be recoverable in the action or proceeding.

History: En. Sec. 1, Ch. 5, Ex. L. 1903; re-en. Sec. 6511, Rev. C. 1907; re-en. Sec. 9103, R. C. M. 1921.

References

Cited and applied as section 620, Code of Civil Procedure, in *State ex rel. Carleton v. District Court*, 33 M 138, 150, 82 P 789.

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9104. Costs of trial as between counties. In case of a change of the place of trial from one county to another, as provided for in section 9098 of this code, the county in which the action or proceeding is tried shall recover from the county in which the action was commenced all additional costs or expenses that may have been incurred by such county by reason of extra jurors or bailiff's fees, or other court expenses incurred by such county by reason of the hearing or trial of said action, motion, or proceeding; such extra costs shall be allowed by the court, and the clerk of the court of such county shall certify the same to the board of county commissioners of the county in which said action, motion, or proceeding was commenced, and said board shall allow and cause the same to be paid.

History: En. Sec. 1, Ch. 5, Ex. L. 1903; re-en. Sec. 6512, Rev. C. 1907; re-en. Sec. 9104, R. C. M. 1921.

References

Cited or applied as section 621, Code of Civil Procedure, in *State ex rel. Carleton v. District Court*, 34 M 138, 150, 82 P 789.

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CHAPTER 31

MANNER OF COMMENCING CIVIL ACTIONS—SERVICE OF SUMMONS

- Section 9105. Actions—how commenced.
9106. Complaint—how indorsed—when summons may be issued, and how waived.
9107. Summons—how issued, directed, and what to contain.
9108. Alias summons—manner and time of issuing.
9109. Notice of the pendency of an action affecting the title to real property.
9110. Summons—how served and returned.
9111. Summons—how served.
9112. Service of summons on certain corporations—made on secretary of state.
9113. When and how service is made—fee for service.
9114. Duty of secretary of state.
9115. Service to be deemed personal.
9116. Service of other notices.
9117. Publication of summons.
9118. Manner of publication.
9119. What summons for publication to contain.
9120. Sheriff to serve papers sent by mail.
9121. Proceedings when only part of the defendants are served.
9122. Proof of service of summons and complaint—how made.
9123. When jurisdiction of action acquired.
9124. Return of summons.

9105. Actions—how commenced. Civil actions in the courts of record of this state are commenced by filing a complaint.

History: Ap. p. Sec. 22, p. 47, Bannack Stat.; re-en. Sec. 28, p. 32, Cod. Stat. 1871; amd. Sec. 66, p. 54, L. 1877; re-en. Sec. 66, 1st Div. Rev. Stat. 1879; re-en. Sec. 66, 1st Div. Comp. Stat. 1887; amd. Sec. 630, C. Civ. Proc. 1895; re-en. Sec. 6513, Rev. C. 1907; re-en. Sec. 9105, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 405.

Operation and Effect

A complaint filed within six years confers jurisdiction, though the summons is not served within that time. Haupt v. Burton, 21 M 572, 577, 55 P 110.

Until a complaint is filed in a civil action, no action is commenced or can be pending. State ex rel. Working v. Mayor, 43 M 61, 64, 114 P 777.

The district court is a court of general jurisdiction, and has power to hear and determine all classes of cases, except petty cases, of which exclusive jurisdiction is given justices of the peace and police courts by the constitution; but it can acquire jurisdiction of a particular civil case only by the filing of a written complaint. Crawford v. Pierse, 56 M 371, 377, 185 P 315, 7 A. L. R. 1678.

References

Cited or applied as section 6513, Revised Codes, in American Surety Co. v. Kartowitz, 54 M 92, 94, 166 P 685; Dreidlein v. Manger, 69 M 155, 166, 220 P 1107; Gates v. Powell, 77 M 554, 558, 252 P 377.

9106. Complaint—how indorsed—when summons may be issued, and how waived. The clerk must indorse on the complaint the day, month, and year that it is filed, and at any time within one year thereafter the plaintiff may have summons issued; and if the action be brought against two or more defendants, who reside in different counties, may have summons issued for each of such counties at the same time. But at any time within one year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year at any time before trial.

History: Ap. p. Sec. 23, p. 47, Bannack Stat.; re-en. Sec. 23, p. 139, L. 1867; re-en. Sec. 29, p. 32, Cod. Stat. 1871; en. sec. 67, p. 54, L. 1877; re-en. Sec. 67, 1st Div. Rev. Stat. 1879; re-en. Sec. 67, 1st Div. Comp. Stat. 1887; re-en. Sec. 631,

C. Civ. Proc. 1895; re-en. Sec. 6514, Rev. C. 1907; re-en. Sec. 9106, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 406.

References

Labbitt v. Bunston, 80 M 293, 306, 260 P 727.

9107. Summons—how issued, directed, and what to contain. The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain: The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed, and must be substantially as follows:

(Title of court and cause.)

The State of Montana to the above-named defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said court, this day of

The name of the plaintiff's attorney must be indorsed on the summons.

History: Ap. p. Sec. 24, p. 47, Bannack Stat.; re-en. Sec. 30, p. 32, Cod. Stat. 1871; amd. Sec. 68, p. 54, L. 1877; re-en. Sec.

68, 1st Div. Rev. Stat. 1879; re-en. Sec. 68, 1st Div. Comp. Stat. 1887; en. Sec. 632, C. Civ. Proc. 1895; re-en. Sec. 6515,

Rev. C. 1907; re-en. Sec. 9107, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 407.

Correct Title Essential

A summons entitled in the wrong county is void and will not support an attachment. *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 92, 149 P 494.

Issuance of Summons Exhausts Power of Clerk to Issue Other Than Alias Summons

After summons is issued correctly in compliance with this section, no other summons, save an alias summons, may issue, and the latter only upon a showing that the statutory exigency exists and that the requirements of the statute have been met. *State v. District Court et al.*, 74 M 338, 343, 240 P 388.

Plaintiff's Attorney to be Indorsed on Summons

The purpose of the requirement of this section, that the name of plaintiff's attorney must be indorsed on the summons, is to advise defendant who plaintiff's attorney is, so that he may know to whom notice must be given of any step he may desire to take in his defense. *State ex rel. Jerry v. District Court*, 57 M 328, 188 P 365.

Held, that the provision of this section, that the name of plaintiff's attorney must be indorsed on a summons is mandatory, unless it be affirmatively shown that the absence of his name could not possibly have worked prejudice to defendant, and that under section 9119, which inter alia provides that where service is had by publication, the summons shall contain what is prescribed by this section, the published summons must also bear the name of plaintiff's attorney, and that if it does not, it is void. *Holt v. Sather*, 81 M 442, 446 et seq., 264 P 108.

Provisions Are Mandatory

The language of this section is mandatory, and must be substantially complied with. *Dyas v. Keaton*, 3 M 495, 498; *Sawyer v. Robertson*, 11 M 416, 421, 28 P 456; *Sharman v. Huot*, 20 M 555, 557, 52 P 558; *In re Farrell*, 36 M 254, 263, 92 P 785; *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 92, 149 P 494.

"Seal of Court" is Essential

A district court summons is void if issued without the seal of the court, where the statute provides that it "must be issued under the seal of the court," and no jurisdiction of the defendant is acquired by the service thereof. *Choate v. Spencer*, 13 M 127, 132, 32 P 651. See *Burke v. Interstate Sav. & Loan Assn.*, 25 M 315, 328, 64 P 879; *Kipp v. Burton*, 29 M 96, 99, 103, 74 P 85; *In re Farrell*, 36 M 254, 263, 92 P 785.

"Signature of Clerk" is Essential

The signature of the clerk is a matter of substance, and a fundamental part of the summons, without which there is no summons. *Sharman v. Huot*, 20 M 555, 557, 52 P 558; *In re Farrell*, 36 M 254, 263, 92 P 785. See *Kipp v. Burton*, 29 M 96, 103, 74 P 85.

References

Cited or applied as section 632, Code of Civil Procedure, in *Mantle v. Casey*, 31 M 408, 413, 78 P 591; *Yellowstone Park R. Co. v. Bridger Coal Co.*, 34 M 545, 554, 87 P 963; as section 6515, Revised Codes, in *State ex rel. Thompson v. District Court*, 57 M 432, 188 P 902; *Munger v. Nelson*, 61 M 104, 107, 108, 201 P 286; *Edenfield v. Seal Co., Inc.*, 74 M 509, 513, 241 P 227; *Helena Adjustment Co. v. Predivich*, 98 M 162, 37 P 2d 651.

9108. Alias summons—manner and time of issuing. If the summons is returned without being served on any or all of the defendants, or part of defendants, or if it has been lost, the clerk, upon demand of the plaintiff, or his attorney, accompanied by a statement in writing filed with the clerk that said summons has been lost, or has not been served upon any or all of the defendants, shall issue an alias summons in the same form as the original, but no such alias summons shall be issued after the expiration of three years from the filing of the complaint; provided, that this act shall not be construed to affect pending actions in which more than one year has elapsed since the filing of the complaint.

History: Ap. p. Sec. 69, p. 55, L. 1877; re-en. Sec. 69, 1st Div. Rev. Stat. 1879; re-en. Sec. 69, 1st Div. Comp. Stat. 1887; amd. Sec. 633, C. Civ. Proc. 1895; en. Sec. 1, p. 143, L. 1899; re-en. Sec. 6516, Rev. C.

1907; re-en. Sec. 9108, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 408.

Operation and Effect

Where the original summons was void because entitled in the wrong county, a

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so-called "alias summons" was not such in fact, but was the first valid summons issued in the action, and could not give legal effect to an attachment issued and served prior to its issuance. *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 92, 149 P 494.

References

Cited or applied as section 6516, Revised Codes, in *McCarthy v. State Bank of Townsend*, 54 M 319, 328, 170 P 15; *State v. District Court et al.*, 74 M 338, 343, 240 P 388.

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200 P.(2d) 251

9109. Notice of the pendency of an action affecting the title to real property. In an action affecting the title or right of possession of real property, or in an action between husband and wife, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file in the office of the clerk of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing of such notice only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

History: En. Sec. 27, p. 48, *Bannack Stat.*; re-en. Sec. 27, p. 139, L. 1867; re-en. Sec. 33, p. 33, *Cod. Stat.* 1871; amd. Sec. 70, p. 55, L. 1877; re-en. Sec. 70, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 70, 1st Div. *Comp. Stat.* 1887; amd. Sec. 634, *C. Civ. Proc.* 1895; re-en. Sec. 6517, *Rev. C.* 1907;

re-en. Sec. 9109, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 409.

References

Cited or applied as section 70, *First Division Compiled Statutes* 1887, in *Baker v. Bartlett*, 18 M 446, 45 P 1084; *Thomson v. Nygaard*, 98 M 529, 41 P 2d 1.

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89 P.(2d) 1022

9110
139 P.(2d) 530

9110. Summons—how served and returned. The summons may be served by the sheriff of the county where the defendant is found, or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. When the summons is served by the sheriff, it must be returned, with his certificate of service, and of the service of any copy of the complaint, where such copy is served, to the office of the clerk from which it is issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of the copy of the complaint, where such copy is served.

History: Ap. p. Sec. 28, p. 48, *Bannack Stat.*; amd. Sec. 28, p. 139, L. 1867; re-en. Sec. 34, p. 33, *Cod. Stat.* 1871; amd. Sec. 20, p. 54, L. 1874; amd. Sec. 71, p. 56, L. 1877; re-en. Sec. 71, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 71, 1st Div. *Comp. Stat.* 1887; en. Sec. 635, *C. Civ. Proc.* 1895; re-en. Sec. 6518, *Rev. C.* 1907; re-en. Sec. 9110, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 410.

Effect of Service of Summons Without a Copy of the Complaint

The service of a summons issued by a justice of the peace without a copy of the complaint gives no jurisdiction of defend-

ant. The return on such summons is presumed to show all that was done by the person making the service. *State ex rel. Reagan v. Harrington*, 31 M 294, 297, 78 P 484.

Effect of the Failure of Affidavit to State Age of Party Serving

Where an affidavit of service of summons omitted the statement that the person serving the same was over eighteen years of age, a judgment rendered thereon was not void on its face, so as to be subject to collateral attack; the judgment roll showing no want of jurisdiction, but merely irregularity in obtaining it. *Burke*

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146 P.(2d)
1014, 1015

9110
186 P. (2) 888

v. Interstate Sav. & Loan Assn., 25 M 315, 323, 64 P 879.

Id. Service of summons by one who was not of the age required by statute, though defective, would not make void or subject to collateral attack a judgment rendered by a court having jurisdiction of the subject-matter and parties, and keeping within the limits of its power.

The failure of the affidavit of service to show the competency of the person making the service only constitutes an irregularity, rendering the judgment voidable and not void, and is not subject to collateral attack. *State ex rel. Smith v. District Court*, 55 M 602, 607, 179 P 831.

Operation in General

It is not necessary that a summons be served by an officer of the court, and the court has no jurisdiction of defendant until the summons is served. *Kipp v. Burton*, 29 M 96, 103, 4 P 85, 63 L. R. A. 325.

Service Where There is More Than One Defendant

Where several defendants reside in the same county, and a copy of the complaint is served on one of them with the sum-

mons, a return of service need not show that defendants all reside in the county. *Mantle v. Casey*, 31 M 408, 411, 78 P 591.

Id. Where all the defendants in an action to quiet title, residing in the same county, were served with summons, and one defendant was served with a copy of the complaint as required by this section, the fact that such defendant filed a disclaimer of any interest in the land did not affect the service on the other defendants; there being nothing to show that he was not made a defendant in good faith.

When Proof of Service Must be Made by Affidavit

When service of summons in an action pending in a justice's court is made by a person appointed by the justice, proof of service must be made by affidavit; one so appointed is not a constable, and cannot prove service of process by a certificate under this section. *Layton v. Trapp*, 20 M 453, 455, 52 P 208.

References

Cited or applied in *State ex rel. Jerry v. District Court*, 57 M 328, 330, 188 P 365; *State v. District Court et al.*, 73 M 84, 90, 235 P 751; *Hoppin v. Long*, 74 M 558, 574, 241 P 636.

9111. Summons—how served. The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this state, to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

2. If the suit is against a foreign corporation, or a nonresident joint-stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier, or secretary, or to a person designated as provided in section 6652 of the Civil Code.

3. If against a minor under the age of fourteen years, residing within this state, to such minor, personally, and also to his father, mother, or guardian; or, if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person residing within this state, who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such person, and also to his guardian.

5. If against a county, city or town, to the president or chairman of the board of county commissioners, president of the council or trustees, mayor, or other head of the legislative department thereof.

6. In all other cases to the defendant personally.

History: Ap. p. Sec. 29, p. 48, Bannack Cod. Stat. 1871; amd. Sec. 20, p. 54, L. Stat.; amd. Sec. 29, p. 140, L. 1867; amd. 1874; amd. Sec. 72, p. 56, L. 1877; re-en. Sec. 5, p. 75, L. 1869; re-en. Sec. 36, p. 34, Sec. 72, 1st Div. Rev. Stat. 1879; re-en.

9111
subsec. 1
186 P. (2) 888,
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9111 subsec. 2
102 Mont. 279
57 P (2d) 775
102 Mont. 428-
431
58 P (2d) 275, 276

9111
amended
L. 37 c. 175
sec. 1 p. 530

9111
rel. matter
L. 37 c. 10
pp. 12-14

9111
86 P.(2d) 753

9111
amended
L. 39 c. 186
sec. 1 p. 478

9111, subs. 2
105 P. (2d) 678

9111
Subsec. 2
124 P.(2d) 578

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133 P.(2d) 595

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186 P. (2) 889

Sec. 72, 1st Div. Comp. Stat. 1887 (giving subd. 2 as amd. by Sec. 3, p. 8, L. 1881); en. Sec. 636, C. Civ. Proc. 1895; re-en. Sec. 6519, Rev. C. 1907; re-en. Sec. 9111, R. C. M. 1921; subd. 3, Sec. 9112 of this code, amd. Sec. 1, Ch. 22, L. 1915; rep. Sec. 1, Ch. 37, L. 1917. Cal. C. Civ. Proc. Sec. 411.

Foreign Corporations "Doing Business" in State

"Doing business" in the state by a foreign corporation within the meaning of this section, prescribing the manner in which such corporations shall be served with summons, means conducting business in such a way and to such an extent as to warrant the inference that it has subjected itself to the jurisdiction of the state, the section contemplating a more or less continuous course of business; hence, an isolated transaction (a sale of machinery) did not bring the corporation within the section. *State et al. v. District Court et al.*, 98 M 278, 282, 41 P 2d 26.

Id. Where a foreign corporation was not doing business within the state, did not maintain a local office nor have a resident agent, and therefore could not be served with summons in the manner prescribed in this section, service upon its alleged managing or business agent (a nonresident and temporarily in the state) was ineffectual as to the corporation.

Operation and Effect

Where the record on appeal failed to show any service of summons on the defendant, and there was simply a return of the sheriff, reciting that he had per-

sonally served the summons on B, he being the agent of the defendant, there was no compliance with the statute in regard to the manner of service. *Davidson v. Clark*, 7 M 100, 101, 14 P 663.

In order to clothe the district court with jurisdiction in a suit for divorce brought by the wife against her insane husband, summons must have been served upon the latter personally. *State ex rel. Happel v. District Court*, 38 M 166, 170, 99 P 291.

A return upon a summons that the officer served the same upon one C, "a trustee being the defendant named in said summons," is fatally defective in failing to show a service upon the corporation. *Mathias v. White Sulphur Springs Association*, 17 M 542, 43 P 921.

Service of notice upon the chairman of a board of school trustees, directors to the board, is sufficient as against the contention that it should have been served upon each member thereof. *State ex rel. Stephens v. Keaster et al.*, 82 M 126, 140, 266 P 387.

References

Cited or applied as section 72, First Division Compiled Statutes 1887, in *Congdon v. Butte Consolidated Ry. Co.*, 17 M 481, 43 P 629; as section 636, Code of Civil Procedure, in *State ex rel. Reagan v. Harrington*, 31 M 294, 297, 78 P 484; as section 6519, Revised Codes, before amendment, in *Vadnais v. East Butte Extension C. Min. Co.*, 42 M 543, 545, 113 P 747; *Rothrock v. Bauman et al.*, 73 M 401, 404, 236 P 1077; *Hoppin v. Long*, 74 M 558, 574 et seq., 241 P 636; *Minnesota Assn. v. Benn*, 261 U. S. 140, 142.

9112. Service of summons on certain corporations—made on secretary of state. When an action is pending in any court in this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in this state, upon any cause of action arising within this state, and the president or other head, secretary, cashier, or managing agent of such domestic corporation, or the business agent, cashier, secretary, or agent appointed to receive service of process by such corporation organized under the laws of any other state or country, or any clerk, superintendent, general agent, cashier, principal director, ticket agent, station-keeper, managing agent, or other agent, having the management, direction, or control of any property of any corporation doing business in this state, cannot be found, upon which service of process can be made, and an affidavit is filed in the office of the clerk of the court in which the action is pending, setting forth that an action is pending in that court, and that the plaintiff has a good cause of action upon the merits, and that such corporation is a necessary party therein, and that none of the persons or officers above named can be found within the state,

9112
ref. to
L. 37 c. 175
Sec. 1 (6)
p. 531

9112
rel. matter
L. 37 c. 90
Sec. 7
pp. 247-249

9112
sim. matter
L. 37 c. 10
pp. 12-14

9112
ref. to
L. 39 c. 186
Sec. 1 p. 479

9112
124 P. (2d) 578

9112
139 P. (2d) 530

9112
Amended
S.L. '49, C. 135
Sec. 1, P. 286

upon whom service of process can be made, the clerk of the court shall make an order directing process to be served upon the secretary of state of the state of Montana, or, in his absence from his office, upon the deputy secretary of state of the state of Montana.

History: En. Sec. 1, Ch. 22, L. 1915; and. Sec. 1, Ch. 37, L. 1917; re-en. Sec. 9112, R. C. M. 1921.

Operation and Effect

The affidavit for substituted service of summons required by this section need not recite that plaintiff's cause of action arose within this state. *Rothrock v. Bauman et al.*, 73 M 401, 403 et seq., 236 P 1077.

Id. Where substituted service of summons upon a corporation was properly made on the deputy secretary of state in the absence of the secretary himself, and

that officer did what he was required to do in the premises, the fact that the clerk in issuing the order for the substituted service directed that it be made upon the secretary of state or upon his deputy, instead of upon the secretary or "in his absence from his office" upon the deputy in conformity with the requirement of this section, did not render the order invalid so as to deprive the court of jurisdiction to render judgment by default.

References

Minnesota Assn. v. Benn, 261 U. S. 140, 142.

9113. When and how service is made—fee for service. When such order is made, the summons and complaint, together with a copy of such order, shall be served upon the secretary of state of the state of Montana, or, in his absence from his office, upon the deputy secretary of state, by delivering to and leaving with him a true copy of the summons and complaint, and a copy of such order, and shall likewise pay to the said secretary a fee of two dollars, which shall be covered into the state treasury by him, and may be taxed as costs by the plaintiff.

9113
101 Mont. 540
54 P (2d) 565

History: En. Sec. 2, Ch. 37, L. 1917; re-en. Sec. 9113, R. C. M. 1921.

9114. Duty of secretary of state. Upon such service being so made upon the secretary of state or his deputy, the said secretary of state or his deputy shall promptly mail the copy of summons and complaint, and copy of the order, by registered mail to the address of such corporation, at its principal home office, as shown by the papers on file in the office of the secretary of state, and shall make out and mail to the clerk of the court in which the action is pending, a certificate of such mailing, which shall have attached thereto the registry receipt for such letter.

9114
rel. matter
L. 37 c. 10
pp. 12-14

History: En. Sec. 3, Ch. 37, L. 1917; re-en. Sec. 9114, R. C. M. 1921.

References

Rothrock v. Bauman et al., 73 M 401, 406, 236 P 1077.

9115. Service to be deemed personal. When service is so made, it shall be deemed personal service on such corporation, and the said secretary of state, or his deputy when the secretary is absent from his office, is hereby appointed agent of such corporation for service of process in cases hereinbefore mentioned.

History: En. Sec. 4, Ch. 37, L. 1917; re-en. Sec. 9115, R. C. M. 1921.

Operation and Effect

Although this section designates service made upon the secretary of state or his deputy "personal service," it is nevertheless substituted service, as distinguished

from constructive service; that is to say, it is service upon a public officer who does not bear any actual relationship of agency to the corporation, but is by the statute merely designated agent for the purpose of service. *Rothrock v. Bauman et al.*, 73 M 401, 405, 236 P 1077.

9116. Service of other notices. When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation, service of all other notices required by law to be served in such action may be served upon the secretary of state.

History: En. Sec. 5, Ch. 37, L. 1917; re-en. Sec. 9116, R. C. M. 1921.

9117. Publication of summons. When the person on whom the service of a summons is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of the summons; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary, or other officer within the state, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made, and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof. The provisions of this section shall apply to all actions and proceedings in which personal service of summons is not required to be made in order to obtain relief, including every action or proceeding commenced in any district court of this state to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance, or lien, or cloud, upon the title of real or personal property within this state.

History: Ap. p. Sec. 30, p. 49, Bannack Stat.; amd. Sec. 30, p. 140, L. 1867; re-en. Sec. 40, p. 34, Cod. Stat. 1871; amd. Sec. 73, p. 57, L. 1877; re-en. Sec. 73, 1st Div. Rev. Stat. 1879; amd. Sec. 4, p. 9, L. 1881; amd. Sec. 1, p. 50, L. 1883; amd. Sec. 73, 1st Div. Comp. Stat. 1887; amd. Sec. 637, C. Civ. Proc. 1895; en. Sec. 1, Ch. 36, L. 1907; Sec. 6520, Rev. C. 1907; re-en. Sec. 9117, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 412.

Applicable to an Action in Rem

In a proceeding against property owned by a non-resident, jurisdiction to render a valid judgment in rem may be acquired by substituted service. *Gassert v. Strong*, 38 M 18, 30, 98 P 497.

Applicable to an Action Quasi in Rem

An action against a non-resident holding the legal title to corporate stock, in the possession of a third person in the state, to establish and enforce a trust therein, is one quasi in rem, and service by publication was sufficient to enable the district court to determine the relative rights of the parties to the stock. *Gassert v. Strong*, 38 M 18, 35, 98 P 497.

Personal Service Requisite in Action in Personam

A general statute providing for the publication of summons in civil actions does not abrogate the common-law rule which required personal service of summons in

actions in personam. *Silver Camp Mining Co. v. Dickert*, 31 M 488, 500, 78 P 967.

Service by publication does not warrant a judgment in a proceeding strictly in personam. *Gassert v. Strong*, 38 M 18, 30, 98 P 497.

An action by the purchaser of personal property to compel the seller, a non-resident, to surrender promissory notes given by plaintiff to defendant in payment of the property, because of alleged fraud in the sale, was an action in personam, and the fact that the notes were in the possession of a local attorney did not change the character of the action where the attorney was not made a party to the action and the notes were not impounded by court process; the court did not obtain jurisdiction by substituted service of summons and its judgment rendered on default of defendant was void. *Winnett Times Pub. Co. v. Berg*, 82 M 141, 145, 265 P 710.

Statute Strictly Construed

A more accurate observance with statutory provisions relative to service of summons is required in the case of constructive service than in personal service, and the presumption in favor of jurisdiction upon rendition of judgment is not as strong when the judgment is based upon constructive service as when based upon personal service. *Holt v. Sather*, 81 M 442, 448, 264 P 108.

What the Affidavit Must Contain

The clerk of the district court being a ministerial officer, and having no power to pass judicially upon the sufficiency of an affidavit filed as a basis for the publication of a summons, it is not necessary that the affidavit should set forth the probative facts, as before a judicial officer, but it is sufficient if it sets forth substantially in the language of the statute enough of the ultimate facts recited in the statute as reasons for the publication of the summons. *Ervin v. Milne*, 17 M 494, 496, 43 P 706; *Alderson v. Marshall*, 7 M 288, 16 P 576, and *Palmer v. McMaster*, 8 M 186, 19 P 585, distinguished.

An affidavit for the publication of summons, where the defendant resides out of the state, is sufficient, although the statements that the defendant is a non-resident, that the plaintiff has a cause of action against him, and that he is a necessary or proper party to the action, are made

upon information and belief. *Smith v. Collis*, 42 M 350, 363, 112 P 1070.

If an affidavit for publication of service of notice of a proceeding to determine heirship set forth the ultimate facts which form the bases for such service (this section), it is sufficient, and where it is made by the attorney for foreign heirs it may be made on information and belief. In re *Baxter's Estate*, 98 M 291, 302, 39 P 2d 186.

References

Cited or applied as section 6520, Revised Codes, in *State ex rel. Floyd v. District Court*, 41 M 357, 368, 109 P 438; *State ex rel. Smith v. District Court*, 55 M 602, 607, 179 P 831; *State ex rel. Thompson v. District Court*, 57 M 432, 188 P 902; *Rothrock v. Bauman et al.*, 73 M 401, 405, 236 P 1077; *Hoppin v. Long*, 74 M 558, 574, 241 P 636; *Skinner v. Carlsyle Oil Development Co.*, 80 M 464, 465 et seq., 260 P 1038; In re *Huppe*, 92 M 211, 219, 11 P 2d 793.

9118. Manner of publication. The order of the clerk must direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, at least once a week for four successive weeks. In case of publication, where the residence of a non-resident or absent defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the postoffice, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the postoffice. The service of summons is complete on the day of the fourth publication.

History: Ap. p. Sec. 31, p. 49, *Bannack Stat.*; amd. Sec. 31, p. 140, L. 1867; amd. Sec. 41, p. 35, *Cod. Stat.* 1871; amd. Sec. 74, p. 57, L. 1877; re-en. Sec. 74, 1st Div. *Rev. Stat.* 1879; amd. Sec. 2, p. 50, L. 1883; amd. Sec. 74, 1st Div. *Comp. Stat.* 1887; en. Sec. 638, *C. Civ. Proc.* 1895; re-en. Sec. 6521, *Rev. C.* 1907; re-en. Sec. 9118, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 413.

Effect of Service on Non-Resident Who Appears Specially

Service of summons on a non-resident defendant will not warrant a judgment in personam against a defendant who appears specially to challenge the jurisdiction of the court. *Silver Camp Mining Co. v. Dickert*, 31 M 488, 496, 78 P 967. See *Gassert v. Strong*, 38 M 18, 30, 98 P 497; *Thrift v. Thrift*, 54 M 463, 464, 171 P 272.

When Service is Complete

A non-resident of the state, when personally served with summons, together with a copy of the complaint, in lieu of publication and mailing, after an order of publication has been made, has the full period of four weeks and twenty days in

which to make his appearance. *McLean v. Moran*, 38 M 298, 301, 99 P 836.

This section is satisfied by publication of the summons once in each of four successive weeks; it does not require the period of publication to cover four full weeks, or twenty-eight days; the service is complete "on the day of the fourth publication." *Smith v. Collis*, 42 M 350, 359, 112 P 1070.

Where, after the making of an order for publication of summons upon a non-resident defendant, the summons is personally served under this section, the service does not become complete until the day on which the fourth publication would have been made if plaintiff had proceeded under the order of publication, and the date of personal service is considered the date of the first publication for the purpose of computing the time of service. *Reynolds v. Gladys Belle Oil Co.*, 75 M 332, 343, 243 P 576.

References

Cited or applied as section 6521, Revised Codes, in *State ex rel. Smith v. District Court*, 55 M 602, 607, 179 P 831; *State ex*

9118
ref. to
L. 41 c. 115
sec. 1 p. 186

9118
Amended
S.L. '47, C. 16
Sec. 1, p. 16

9118
Ref. to
S.L. '49, C. 181
Sec. 1, P. 388

rel. Thompson v. District Court, 57 M 432, 188 P 902; Skinner v. Carlysle Oil Development Co., 80 M 464, 465 et seq.,

260 P 1038; Holt v. Sather, 81 M 442, 448, 264 P 108; Winnett Times Pub. Co. v. Berg, 82 M 141, 145, 265 P 710.

9119. What summons for publication to contain. If service is had by publication, the summons, in addition to the requirements of section 9107, shall contain a general statement of the nature of the action.

History: En. Sec. 639, C. Civ. Proc. 1895; re-en. Sec. 6522, Rev. C. 1907; re-en. Sec. 9119, R. C. M. 1921.

published summons must also bear the name of plaintiff's attorney, and that if it does not, it is void. Holt v. Sather, 81 M 442, 454, 264 P 108.

Operation and Effect

Held that the provision of section 9107, that the name of plaintiff's attorney must be indorsed on a summons is mandatory, unless it be affirmatively shown that the absence of his name could not possibly have worked prejudice to defendant, and that under this section which inter alia provides that where service is had by publication, the summons shall contain what is prescribed by section 9107, the

References

Cited or applied as section 6522, Revised Codes, in State ex rel. Mackey v. District Court, 40 M 359, 360, 106 P 1098; State ex rel. Thomson v. District Court, 57 M 432, 188 P 902; MacGinniss Realty Co. v. Hinderager, 63 M 172, 182, 206 P 436; Murray et al. v. Creese et al., 80 M 453, 465, 260 P 1051.

9120. Sheriff to serve papers sent by mail. It is the duty of the clerk of any district court, at the request of a party in any civil action pending in such court, his agent or attorney, to forward by mail any process, summons, or other papers required in the cause, and it is the duty of the sheriff or other officer to whom said papers may be directed to receive the same at the place where the same are directed, and for service shall be entitled to charge mileage only from the point where received to the place of service; but in such case it is lawful for the officer to return the process to the court by mail or express. But in no case shall the officer receiving papers for service be required to serve the same, unless the person in whose behalf the service is made, his agent or attorney, first pay the cost of the service upon a demand therefor by the officer; and when process in one county is intended for service in another, it is the duty of the clerk to forward the same in like manner, and the sheriff or other officer serving the same is entitled to like mileage, and no more, and may make like return of the papers served. If any sheriff or other officer refuse to receive any summons or other process at the point where directed to him, or to serve the same, he is guilty of a misdemeanor, and, upon conviction thereof, must be fined in any sum not exceeding one hundred dollars.

History: Ap. p. Sec. 1, 2, p. 7, L. 1881; re-en. Sec. 76, 1st Div. Comp. Stat. 1887; en. Sec. 640, C. Civ. Proc. 1895; re-en.

Sec. 6523, Rev. C. 1907; re-en. Sec. 9120, R. C. M. 1921.

9121. Proceedings when only part of the defendants are served. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

History: En. Sec. 75, p. 57, L. 1877; re-en. Sec. 75, 1st Div. Rev. Stat. 1879; re-en. Sec. 77, 1st Div. Comp. Stat. 1887; re-en. Sec. 641, C. Civ. Proc. 1895; re-en. Sec. 6524, Rev. C. 1907; re-en. Sec. 9121, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 414.

References

O'Hanion v. Great Northern Ry. Co., 76 M 128, 141, 245 P 518.

9119
89 P.(2d) 1021

9119
98 P.(2d) 326

9119
112 P.(2d) 198

9119
162 P.2d 223

9121
ref. to
L. 39 c. 28
sec. 1 p. 37

9122. Proof of service of summons and complaint—how made. Proof of the service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof; or,
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer or publisher of the newspaper, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons and complaint in the postoffice, if the same has been deposited; or,
4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service.

History: Ap. p. Secs. 33, 34, p. 49, Bannack Stat.; amd. Secs. 33, 34, p. 141, L. 1867; re-en. Secs. 43, 44, p. 35, Cod. Stat. 1871; re-en. Secs. 76, 77, p. 58, L. 1877; re-en. Secs. 76, 77, 1st Div. Rev. Stat. 1879; re-en. Secs. 78, 79, 1st Div. Comp. Stat. 1887; en. Sec. 642, C. Civ. Proc. 1895; re-en.

Sec. 6525, Rev. C. 1907; re-en. Sec. 9122, R. C. M. 1921; amd. Sec. 1, Ch. 103, L. 1935. Cal. C. Civ. Proc. Sec. 415.

References

Gilland v. Palatine Ins. Co., Ltd., 59 M 267, 269, 196 P 151.

9122
sub. 3
89 P. (2d) 1022

9122
subsec. 1
186 P. (2) 889

9122
subsec. 4
186 P. (2) 889

9123. When jurisdiction of action acquired. From the time of the service of the summons and a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and a copy of the complaint upon him.

History: Ap. p. Sec. 35, p. 50, Bannack Stat.; amd. Sec. 35, p. 141, L. 1867; amd. Sec. 45, p. 35, Cod. Stat. 1871; amd. Sec. 20, p. 55, L. 1874; en. Sec. 78, p. 58, L. 1877; re-en. Sec. 78, 1st Div. Rev. Stat. 1879; amd. Sec. 5, p. 9, L. 1881; re-en. Sec. 80, 1st Div. Comp. Stat. 1887; en. Sec. 643, C. Civ. Proc. 1895; re-en. Sec. 6526, Rev. C. 1907; re-en. Sec. 9123, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 416.

Operation and Effect

A party, by appearing in a case in response to a summons served upon him, when in fact the service is void, does not make a voluntary appearance so as to

effect a waiver of objection to the service; if he has first appeared specially to question the court's jurisdiction over him, and, on his points being overruled, has saved an exception, he does not, by a subsequent general appearance, waive his right to object to the jurisdiction. State ex rel. Lane v. District Court, 51 M 503, 507, 154 P 200.

Under this section a judgment entered after personal service of summons and regular on its face, is prima facie presumed to have been entered within jurisdiction. State ex rel. Matt v. District Court et al., 86 M 193, 198, 282 P 1042.

9123
24 F.Supp. 585

9123
186 P. (2) 889

9124. Return of summons. It shall be the duty of the sheriff, or other person serving a summons or other process or order required by any of the provisions of this code, issued out of any of the district courts of this state, to make due and legal return of such service, and file the same with the clerk of the court in which such action or proceeding is pending, not more than ten days after the making of such service, where the same was made in the county in which such action or proceeding is pending, and not more than fifteen days after the making of such service, when the same was made outside of the county in which such action or proceeding is pending. Any failure to make and file such return as required may be punished as a contempt of court.

History: En. Sec. 1, Ch. 38, L. 1907; Sec. 6527, Rev. C. 1907; re-en. Sec. 9124, R. C. M. 1921.

References

Reynolds v. Gladys Belle Oil Co., 75 M 332, 345, 243 P 576.

9124
77 P (2d) 1040
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CHAPTER 32

PLEADINGS IN GENERAL

Section 9125. Definition of pleadings.

9126. This code prescribes the form and rules of pleadings.

9127. What pleadings are allowed.

9125. Definition of pleadings. The pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the court.

History: En. Sec. 36, p. 50, Bannack Stat.; re-en. Sec. 36, p. 142, L. 1867; re-en. Sec. 46, p. 37, Cod. Stat. 1871; re-en. Sec. 79, p. 58, L. 1877; re-en. Sec. 79, 1st Div. Rev. Stat. 1879; re-en. Sec. 81, 1st Div. Comp. Stat. 1887; re-en. Sec. 660, C. Civ. Proc. 1895; re-en. Sec. 6528, Rev. C. 1907; re-en. Sec. 9125, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 420.

References

Cited or applied as section 660, Code of Civil Procedure, in *Johnson v. Puritan Min. Co.*, 19 M 30, 45, 47 P 337; *Lumbermen's Trust Co. v. Town of Ryegate*, 61 F. 2d 14.

9126. This code prescribes the form and rules of pleadings. The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.

History: En. Sec. 37, p. 50, Bannack Stat.; re-en. Sec. 37, p. 142, L. 1867; re-en. Sec. 47, p. 37, Cod. Stat. 1871; re-en. Sec. 80, p. 58, L. 1877; re-en. Sec. 80, 1st Div. Rev. Stat. 1879; re-en. Sec. 82, 1st Div. Comp. Stat. 1887; re-en. Sec. 661, C. Civ. Proc. 1895; re-en. Sec. 6529, Rev. C. 1907; re-en. Sec. 9126, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 421.

References

Cited or applied as section 47, p. 37, Codified Statutes 1871, in *Daniels v. Andes Insurance Co.*, 2 M 78, 84; as section 661, Code of Civil Procedure, in *Gilchrist v. Hore*, 34 M 443, 446, 87 P 443; *Lumbermen's Trust Co. v. Town of Ryegate*, 61 F. 2d 14.

9127. What pleadings are allowed. The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The reply to defendant's answer.

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer;
3. The demurrer to reply.

History: En. Sec. 38, p. 50, Bannack Stat.; amd. Sec. 38, p. 142, L. 1867; re-en. Sec. 48, p. 37, Cod. Stat. 1871; amd. Sec. 48, p. 56, L. 1874; amd. Sec. 81, p. 58, L. 1877; re-en. Sec. 81, 1st Div. Rev. Stat. 1879; re-en. Sec. 83, 1st Div. Comp. Stat. 1887; amd. Sec. 662, C. Civ. Proc. 1895; re-en. Sec. 6530, Rev. C. 1907; re-en. Sec. 9127, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 422.

Operation and Effect

Motions are not among the pleadings authorized by this section. *Beach v. Spokane Ranch & Water Co.*, 21 M 7, 9, 52 P 560.

The only pleading of facts on the part of the defendant is the answer, irrespective of whether the action is one at law

or in equity, since there is now but one form of civil action known to our law, as provided in section 9008. *Gilchrist v. Hore*, 34 M 443, 446, 87 P 443.

In this state there is no such pleading as a cross-bill. *Alywin v. Morley*, 41 M 191, 206, 108 P 778.

Improper filing of a pleading is waived by interposition of a demurrer, and the filing of a demurrer at the time a motion to strike is filed constitutes an involuntary waiver of the irregularity sought to be reached by the motion. *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 346, 19 P 2d 223.

References

Hall v. Hall, 70 M 460, 466, 226 P 469.

9127
amended
L. 37 c. 8
sec. 1 p. 10

9127
174 P. (2d) 812

9127
182 P. (2) 483

CHAPTER 33

THE COMPLAINT

- Section 9128. Complaint first pleading.
 9129. Complaint—what to contain.
 9130. What causes of action may be joined.

9128. Complaint first pleading. The first pleading on the part of the plaintiff is the complaint.

History: En. Sec. 82, p. 59, L. 1877; re-en. Sec. 82, 1st Div. Rev. Stat. 1879; re-en. Sec. 84, 1st Div. Comp. Stat. 1887; re-en. Sec. 670, C. Civ. Proc. 1895; re-en. Sec. 6531, Rev. C. 1907; re-en. Sec. 9128, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 425.

References

Story Gold Dredging Co. v. Wilson, 99 M 347, 42 P 2d 1003.

9129. Complaint—what to contain. The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;
2. A statement of the facts constituting the cause of action, in ordinary and concise language;
3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount must be stated.

History: En. Sec. 39, p. 50, Bannack Stat.; amd. Sec. 39, p. 142, L. 1867; re-en. Sec. 49, p. 37, Cod. Stat. 1871; en. Sec. 83, p. 59, L. 1877; re-en. Sec. 83, 1st Div. Rev. Stat. 1879; re-en. Sec. 83, 1st Div. Comp. Stat. 1887; re-en. Sec. 671, C. Civ. Proc. 1895; re-en. Sec. 6532, Rev. C. 1907; re-en. Sec. 9129, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 426.

Code System Has Superseded the Old Common Counts

The common counts have been superseded by the code system of pleading. *Truro v. Passmore*, 38 M 544, 549, 100 P 966.

Id. If the phraseology of any common count is adequate in the particular case to bring the pleader within the code rule, then his pleading is sufficient; otherwise it is not.

Compliance With, in General

In an action to recover damages for the breach of a contract, this section was held to have been complied with in the statement of the facts of the case in ordinary and concise language. *Raiche v. Morrison*, 37 M 244, 246, 95 P 1061.

If the complaint does not contain a statement of the facts constituting the cause of action, in ordinary and concise language, a special demurrer thereto is properly sustained. *Hosty v. Moulton Water Co.*, 39 M 310, 313, 102 P 568.

It is only by means of a complaint in which the facts constituting the particular wrong are made manifest, as provided by this section, that the court acquires juris-

diction to redress such wrong. *Crawford v. Pierce*, 56 M 371, 377, 185 P 315.

The complaint in any kind of action must allege all facts upon which plaintiff seeks to recover, disclosing clearly therein the presence of all the necessary elements upon which he predicates his demand. *Griffin v. Chicago etc. Ry. Co. et al.*, 67 M 386, 392, 216 P 765.

Id. A complaint will be held sufficient if a cause of action is stated upon any theory.

All elements essential to make out a cause of action must be alleged in the complaint. *Union Bank & Trust Co. v. Himmelbauer*, 68 M 42, 45, 216 P 791.

Damages

To state a cause of action for rescission of a contract for fraud, plaintiff need not allege that he suffered pecuniary loss, the statement that he suffered damage or injury being sufficient. *Stillwell v. Rankin*, 55 M 130, 135, 174 P 186.

Id. The term "damage" is often used in the sense of injury, and sometimes its meaning is restricted to financial loss; but the term has a broader signification, as including either pecuniary loss or the alteration of one's position to his prejudice.

Effect of Allegations on Evidence Admissible

Where plaintiff in an action for personal injuries alleges a certain act of negligence as the cause thereof, he will not be permitted to introduce evidence as to acts of negligence which are foreign to his complaint. *Forsell v. Pittsburg & Montana*

9129
111 P.(2d) 303

9129
165 P. 2d 807

9129
182 P. (2) 485-487;
186 P. (2) 504

9129
200 P.(2d) 251

9129
206 P.(2d)
1015

Copper Co., 38 M 403, 409, 100 P 218. See *Rand v. Butte Electric Ry. Co.*, 40 M 398, 407, 107 P 87; *Frederick v. Hale*, 42 M 153, 160, 112 P 70; *De Atley v. Northern Pac. Ry. Co.*, 42 M 224, 229, 112 P 76.

Under a common-law count for money had and received, the plaintiff cannot introduce evidence of fraud on the part of the defendants, the facts showing fraud not being set forth. *Truro v. Passmore*, 38 M 544, 549, 100 P 966.

The plaintiff in a personal injury action must stand or fall upon the cause of action stated in his complaint; he must confine his proofs within the cause of action stated and may not go beyond his material allegations. *Kakos v. Byram et al.*, 88 M 309, 318, 292 P 909.

Form Not Important

The form in which an action is brought is immaterial, for if upon any view of the case made plaintiff is entitled to relief, the pleading will be sustained and the character of the action determined from the nature of the grievance rather than from the form of the declaration. *Samuell v. Moore Mercantile Co. et al.*, 62 M 232, 236, 204 P 376.

Legal Conclusions

A complaint in an action against a city for damages alleged to have been sustained by reason of a defective sidewalk, which merely stated that the city had negligently placed the sidewalk in an unsafe, dangerous, and defective condition, and permitted it to remain so, but failed to specify in what respect the walk was unsafe, dangerous, or defective, did not state facts sufficient to show negligence on the part of the city. The allegation amounted to a bare legal conclusion of the pleader. *Pullen v. City of Butte*, 38 M 194, 196, 99 P 290. See *Forquer v. North*, 42 M 272, 280, 112 P 439.

Complaint in an action against a street railway company alleging that the motor-man of defendant carelessly, negligently, etc., ran his car on a city street at a rate of speed prohibited by ordinance and without ringing the bell at a crossing and as a proximate result thereof ran over and killed plaintiff's decedent, held sufficient as against the objection that in the absence of allegations and details of the happening of the accident it stated mere legal conclusions, the facts and circumstances constituting the negligence being matter of proof and not of averment. *McManus v. Butte Electric Ry. Co.*, 68 M 379, 219 P 241.

Prayer

While this section makes the prayer a part of the complaint, it is made such independently of the statement of facts

constituting the cause of action, and if the facts stated in the body of the complaint entitle plaintiff to any relief, it is error to sustain a general demurrer, no matter what may be the form of the prayer, or whether there be any prayer at all. *Donovan v. McDevitt*, 36 M 61, 65, 92 P 49.

Statement of Facts in Ordinary and Concise Language

A complaint against a city for personal injuries received from falling on a sidewalk, obstructed with accumulations of ice and snow, does not contain a statement of facts in ordinary and concise language, and will not support a judgment, where it fails to allege facts showing that the city had notice of the obstruction for a sufficient length of time before the injury to have given it a reasonable opportunity to prevent accidents. *McEnaney v. City of Butte*, 43 M 526, 532, 117 P 893.

The requirement that a complaint shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language," applies to new matter alleged in the answer. *Vaughan v. Kujath*, 44 M 484, 487, 120 P 1121.

The complaint in a suit to set aside a judgment and vacate the sheriff's sale had to satisfy it, which alleged that the claim forming the basis of the judgment was a "pretense and fraudulent," and "in fraud of the rights" of plaintiffs, but did not set forth the facts upon which the charges of wrongdoing were grounded, was insufficient, such statements consisting of bald conclusions. *Brandt v. McIntosh*, 47 M 70, 72, 130 P 413.

A complaint under this section, against a physician and surgeon, for alleged malpractice in the reduction and treatment of a broken leg, contains "a statement of the facts constituting the cause of action, in ordinary and concise language," where it sets out, in traversable form, the acts or omissions of the defendant upon which the plaintiff seeks recovery, and shows that they occurred through the negligence of the defendant. *Stokes v. Long*, 52 M 470, 477, 159 P 28.

Whatever may be the nature of the cause of action upon which a plaintiff seeks to recover, he must allege in his complaint facts disclosing the presence of all the elements necessary to make it out. *Chealey v. Purdy*, 54 M 489, 491, 171 P 926.

A statement of the facts constituting the cause of action, with the other matters enumerated in this section, is all that is required in a complaint. If the facts stated disclose a violation of the statute and the resulting damage, the complaint is not rendered insufficient because it contains other allegations which might have been omitted. *Kelly v. John R. Daily Co.*, 56 M 63, 74, 181 P 326.

Under this section, requiring a complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language, a complaint which leaves to surmise and conjecture the course of proof that will be offered in support of it, and obliges the court, as well as the opposing party, to accept the pleader's bare statement, is defective. *Montana Amusement Securities Co. v. Goldwyn Distributing Corp.*, 56 M 215, 225, 182 P 119.

The rule under which the facts constituting plaintiff's cause of action must be stated in ordinary and concise language requires the facts to be stated by direct averment, so that the defendant may understand the specific acts of remissness with which he is charged and that the material issues may be framed for trial. *Stricklin v. Chicago etc. Ry. Co.*, 59 M 367, 370, 197 P 839.

The object of pleading is to notify the adverse party of the facts which the pleader expects to prove, and for that reason the allegation of such facts must be made with that certainty which will enable the opponent to prepare his evidence to meet the alleged facts. *Kozasa v. Northern Pac. Ry. Co. et al.*, 61 M 233, 234, 201 P 682; *Story Gold Dredging Co. v. Wilson*, 99 M 347, 42 P 2d 1003.

To state a cause of action for an injunction the complaint must disclose the facts from which the court may draw the conclusion that plaintiff has no plain, speedy and adequate remedy at law, the bare statement that plaintiff has no such remedy being insufficient, it being no more than the averment of a conclusion. *State ex rel. Stephens v. Zuck et al.*, 67 M 324, 327, 328, 215 P 806.

A complaint stating the facts constituting a contract imposing a duty upon defendant, its breach and resulting damages, in ordinary and concise language, is sufficient under this section, and proof against a general demurrer. *Borgeas v. Oregon etc. R. R. Co. et al.*, 73 M 407, 416, 236 P 1069.

If the complaint states ultimate facts and not conclusions of law drawn from facts, in ordinary and concise language, so that the man on the street may know what is charged therein, it is immune to a general demurrer or to an objection to the introduction of testimony on the ground that it does not state a cause of action. *Wells-Dickey Co. v. Embody*, 82 M 150, 156, 266 P 869.

In pleadings, only the ultimate facts and not the evidence to support those facts should be set forth in ordinary and concise language. *First State Bank v. Mussigbrod et al.*, 83 M 68, 73, 271 P 695.

In a personal injury action plaintiff need do no more, in alleging the facts, than set

them forth in ordinary and concise language, and whatever is necessarily implied in or reasonably to be inferred from an allegation is to be taken as directly averred. *Johnson v. Herring et al.*, 89 M 156, 170, 295 P 1100.

The provision of this section, subdivision 2, that the complaint must contain a statement of the cause of action relied upon in "ordinary and concise language" must not be understood as dispensing with all care and skill in framing the statement, but calls for an intelligent and accurate use of language by the pleader. *Custer v. Missoula Public Service Co.*, 91 M 136, 141, 6 P 2d 131.

Technical Defects Not Sufficient Grounds for Reversal

Where defendant was not misled by any allegations or lack of allegations in the complaint but was fully prepared to defend the action upon the merits, the judgment in favor of plaintiff will not be reversed for mere technical defect in the pleading raised by general demurrer. *Davis v. Freisheimer*, 68 M 322, 219 P 236.

Title of Action

Where defendant answered in abatement for misnomer, alleging its true name, it was error for the court to enter judgment on the merits against defendant, but plaintiff should have amended in accordance with the answer, its truth being conceded, or the action have been abated. When the defendant pleads it, if the plaintiff does not then choose to amend his complaint, and if upon a trial of the issue it be found against the plaintiff, the action must abate. *Clark v. Oregon Short Line R. R. Co.*, 29 M 317, 320, 74 P 734.

Use of Extravagant Terms Unaccompanied by Statement of Facts Useless as Pleading

In an action involving fraud, the complaint must set forth the facts constituting the cause of action in ordinary and concise language, the use of such extravagant terms as "fraud," "conspiracy" and the like, unaccompanied by a statement of the facts upon which the charges of wrongdoing rest, being useless as a pleading. *Mining Securities Co. v. Wall et al.*, 99 M 596, 601, 45 P 2d 302.

References

Cited or applied as section 83, First Division Revised Statutes 1879, in *United States v. Williams*, 6 M 379, 386, 12 P 851; as section 85, First Division Compiled Statutes 1887, in *Schuttler v. King*, 13 M 226, 33 P 938; as section 6532, Revised Codes, in *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 186, 99 P 298; *Wahle v. Great Northern Ry Co.*, 41 M 326, 330, 109 P 713; *Allen v. Bear Creek Coal Co.*, 43 M 269, 278,

115 P 673; Moore Bros. Sheep Co. v. Lehfeldt, 57 M 227, 187 P 910; Hensen v. Merton, 57 M 231, 187 P 1017; Boyle v. Chicago etc. Ry Co., 60 M 453, 458, 199 P 283; Callan v. Hamble, 73 M 321, 324, 236 P 550; Gravelin v. Porier et al., 77 M 260, 280,

250 P 823; Robinson v. F. W. Woolworth Co., 80 M 431, 442, 261 P 253; Dickason v. Dickason, 84 M 52, 58, 274 P 145; Kosonen v. Waara, 87 M 24, 31, 285 P 668; Lumbermen's Trust Co. v. Town of Ryegate, 61 F 2d 14.

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9130. What causes of action may be joined. The plaintiff may unite several causes of action, legal or equitable, or both, in the same complaint, where they all arise out of:

1. Contracts, express or implied;
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same, and for an injunction to stay waste or injury thereto;
3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract, or by operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property;
8. Injuries to person and property.

The causes of action so united must all appear on the face of the complaint to belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

History: En. Sec. 63, p. 54, Bannack Stat.; re-en. Sec. 64, p. 145, L. 1867; re-en. Sec. 72, p. 41, Cod. Stat. 1871; re-en. Sec. 84, p. 59, L. 1877; re-en. Sec. 84, 1st Div. Rev. Stat. 1879; re-en. Sec. 86, 1st Div. Comp. Stat. 1887; amd. Sec. 672, C. Civ. Proc. 1895; re-en. Sec. 6533, Rev. C. 1907; re-en. Sec. 9130, R. C. M. 1921; amd. Sec. 1, Ch. 59, L. 1931. Cal. C. Civ. Proc. Sec. 427.

Exception to Rule that Contract and Tort Actions Cannot Be Joined

As an exception to the general rule that an action in tort may not be joined with one on contract, an action to foreclose a chattel mortgage may be united with one in conversion against the purchaser of the mortgaged chattels. Beers v. W. P. Deveaux Co. et al., 87 M 210, 212, 213, 286 P 406.

Failure to Object Waives Right

Where defendant failed to object to a complaint which blended two causes of action contrary to the provisions of this section, the defect will be deemed to be waived by such failure to object. Ayotte v. Naudeau, 32 M 498, 510, 81 P 145.

"Injuries to Property" Include What

Under this section, providing that several causes of action arising out of "injuries to property" may be united in the same complaint, causes of action for damages to real and personal property may properly be united. Weibush et al. v. Jefferson Canal Co., 68 M 586, 220 P 99.

May Be Stated in Different Counts

The trial court may, in its discretion, permit the same cause of action to be stated in different counts in order to meet the exigencies of the case as presented by the evidence. Blankenship v. Decker, 34 M 292, 298, 85 P 1035; Neuman v. Grant, 36 M 77, 80, 92 P 43; Waite v. Shoemaker, 50 M 264, 277, 146 P 736; Lowry v. Carrier, 55 M 392, 397, 177 P 756.

There is nothing in the code to prohibit the plaintiff, acting in good faith, from stating a single cause of action in two counts in a suit to foreclose a mechanics' lien, when the averments of each are not so inconsistent as to be contradictory, and the allegations of either, or both, may be true, dependent upon the evidence to be produced, where the defendant is not mis-

led to his prejudice, and the exigencies of the case seem to demand such form of pleading. *Neuman v. Grant*, 36 M 77, 80, 92 P 43.

May Unite Causes Under Above Subdivisions But Are Not Required to do so

Under subdivision 5 of this section, a plaintiff may elect to unite several causes of action for injury to character, but he is not required to do so. *Paxton v. Woodward*, 31 M 195, 215, 78 P 215.

Misjoinders

Under this section and the rule that a separate liability of the principal cause cannot be joined in an action on the bond against the surety, held that an action by a county against its assessor to recover from him money lost to it by reason of his willful failure and neglect to assess property, was improperly joined with an action against a surety company on the official bond of that officer. *County of Silver Bow v. Kelly et al.*, 68 M 194, 196, 216 P 1106.

An action sounding in tort may not properly be consolidated with one sounding in contract. *St. George v. Boucher*, 84 M 158, 162, 274 P 489.

Must Affect All the Parties

Under this section, causes of action may be united only when they affect all the parties to the action; hence where one of two causes of action affected only one of several defendants, there was a misjoinder and the court erred in overruling a special demurrer to the complaint based on that ground. *Baker v. Hanson et al.*, 72 M 22, 31, 231 P 902.

Must Be Separately Stated and Numbered

Where plaintiff had three causes of action, but failed to state them separately, as required by this section, the proper remedy was a motion to make the complaint more definite and certain by separately stating the causes of action, and not a motion to withdraw from the jury's consideration all evidence relating to two of said causes of action. *Galvin v. O'Gorman*, 40 M 391, 395, 106 P 887; *Marcellus v. Wright*, 51 M 559, 561, 154 P 714.

Where several causes of action are not separately stated and numbered, as required by this section, the remedy is not by demurrer, but by motion to make definite and certain. *Galvin v. O'Gorman*, 40 M 391, 395, 106 P 887; *Marcellus v. Wright*, 51 M 559, 561, 154 P 714; *Roberts v. Sinnott*, 55 M 369, 372, 177 P 252.

Where the plaintiff in a single cause of action alleges the invasion of more than one primary right, a motion to separately state and number is the proper remedy. *McLean v. Dickson*, 58 M 203, 210, 190 P 924.

This section, requiring plaintiff to separately state and number his causes of action in his complaint, and a motion to so separately state and number, refer not to imperfect statements of causes of action, but to causes of action that are proof against a demurrer for substance. *Thwing v. Weiser et al.*, 65 M 28, 30, 210 P 750.

References

Cited or applied as section 672, Code of Civil Procedure, in *Hamilton v. Nelson*, 22 M 539, 57 P 146; *Lennon et al. v. City of Butte*, 67 M 101, 107, 214 P 1101; *Borgeas v. Oregon etc. R. R. Co. et al.*, 73 M 407, 414, 236 P 1069.

CHAPTER 34

DEMURRER TO COMPLAINT

- Section 9131. When defendant may demur.
 9132. Demurrer must specify, etc.
 9133. May be taken to all or part.
 9134. Amended complaints—answer.
 9135. Objection not appearing on complaint may be taken by answer.
 9136. Objections—when deemed waived.

9131. When defendant may demur. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,
2. That the plaintiff has not the legal capacity to sue; or,
3. That there is another action pending between the same parties for the same cause; or,

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4. That there is a defect or misjoinder of parties plaintiff or defendant; or,
5. That causes of action have been improperly united; or,
6. That the complaint does not state facts sufficient to constitute a cause of action; or,
7. That the complaint is ambiguous, unintelligible, or uncertain.

History: En. Sec. 40, p. 51, Bannack Stat.; amd. Sec. 40, p. 142, L. 1867; re-en. Sec. 50, p. 37, Cod. Stat. 1871; re-en. Sec. 85, p. 59, L. 1877; re-en. Sec. 85, 1st Div. Rev. Stat. 1879; re-en. Sec. 87, 1st Div. Comp. Stat. 1887; re-en. Sec. 680, C. Civ. Proc. 1895; re-en. Sec. 6534, Rev. C. 1907; re-en. Sec. 9131, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 430.

Ambiguous, Unintelligible, or Uncertain

If it is necessary to allege a particular fact, it is equally necessary to prove it, if the allegation is put in issue. It would not be sufficient, for instance, for a plaintiff to allege that, as the result of a fraud, he suffered damage "in an appreciable amount," or suffered "material damage," or "substantial damage." Any one of these allegations would render the pleading subject to demurrer under this section. *Stillwell v. Rankin*, 55 M 130, 134, 174 P 186.

A complaint, to be proof against a special demurrer, ought at least to be sufficiently definite and certain to be on its face a bar to another suit on the same cause of action. *Smallhorn v. Freeman*, 61 M 137, 143, 201 P 567.

Uncertainty of averment in a pleading can be reached only by special demurrer. *Adam v. Durfee et al.*, 67 M 315, 318, 215 P 664.

"Another Action Pending"

If it appears from the face of a complaint that another action is pending between the same parties for the same cause, the pleading is open to objection by demurrer, and it may be taken in the words of the statute. *Peterson v. City of Butte*, 44 M 129, 133, 120 P 231.

A demurrer to a complaint on the ground that there is another action pending between the same parties for the same cause is frivolous where the complaint contains no suggestion that such is the case. *Marcellus v. Wright*, 51 M 559, 561, 154 P 714.

Causes Improperly United

Where two causes of action are improperly united, a demurrer, and not a motion to separately state and number, is the proper remedy. *McLean v. Dickson*, 58 M 203, 209, 190 P 924.

Defect or Misjoinder of Parties

Where a defect of parties appears on the face of the complaint, it must be taken ad-

vantage of by demurrer. *Church v. Zywert*, 58 M 102, 107, 190 P 291.

Where it appears on the face of the complaint that causes of action have been improperly united or that there is a misjoinder of parties plaintiff, the objection must be by demurrer; otherwise it is deemed waived. *Frost et al. v. Long & Co. et al.*, 66 M 385, 391, 213 P 1107; *State ex rel. Clark v. Bailey*, 99 M 484, 44 P 2d 740.

In a foreclosure suit against only one of two co-mortgagors, objection that there is a defect of parties must be taken by special demurrer under subdivision 4 of this section, or if the objection be that the complaint does not state a cause of action against defendant alone, it must be raised by general demurrer under subdivision 6 thereof. *National Bank of Montana v. Bingham*, 83 M 21, 269 P 162.

Good pleading requires that all the owners of a chattel, whether partners or not, join in an action to recover damages to, or for the wrongful taking or conversion of, it, or to recover its possession; where this is not done, the pleading is vulnerable to a special demurrer under subdivision 4 of this section, the defect, however, being waived by failure to demur. *Schoenborn v. Williams et al.*, 83 M 477, 480, 272 P 992.

Demurrer and Motion to Strike May Be Used Interchangeably

While a demurrer and a motion to strike a pleading has each its separate and distinct office and neither can perform that of the other, they may be used interchangeably when either would reach the alleged defect, as where the demurrer is based on a ground which justifies the motion, or where the motion is based upon a ground of demurrer. *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 345, 19 P 2d 223.

Inadmissible Use of a Demurrer

Objections to the title or style of the case at bar cannot be considered under a demurrer which alleges "that said action is not brought under the proper caption or style, nor in the proper name, to-wit, in the name of the people of the state of Montana, instead of being brought in the name of the state of Montana," as no such ground of demurrer is known to the statute. *People ex rel. Kern v. McIntyre*, 10 M 166, 168, 25 P 100.

Informality of the prayer in a complaint, or the total absence of one, not being one

of the defects named in this section for which a demurrer will lie to the complaint, a demurrer for that reason should not be sustained, notwithstanding the provision of 9316, that the relief granted to plaintiff, if there be no answer, cannot exceed that demanded in his complaint. *Donovan v. McDevitt*, 36 M 61, 66, 92 P 49.

A motion to strike, and not a demurrer, is the proper method of attacking a complaint alleged to be defective for maintaining conclusions of law or surplusage. *Raiche v. Morrison*, 37 M 244, 246, 95 P 1061.

The objection to a complaint that the causes of action therein contained are not separately stated and numbered cannot be raised by demurrer; the proper remedy for such a defect being a motion to make the pleading more definite and certain. *Galvin v. O'Gorman*, 40 M 391, 395, 106 P 887; *Marcellus v. Wright*, 51 M 559, 561, 154 P 714; *Roberts v. Sinnott*, 55 M 369, 372, 177 P 252.

Want of authority in a taxpayer to maintain a contest of a county seat election forms no ground of special demurrer, and has nothing to do with lack of "legal capacity to sue," mentioned in subdivision 2 of this section, meaning that plaintiff shall be free from such general disability as infancy or insanity, which must appear on the face of the complaint to make the pleading demurrable. *Poe v. Sheridan County*, 52 M 279, 290, 157 P 185.

A demurrer under this section cannot be invoked as an available remedy to cure a complaint containing several causes of action, defective because such causes are not separately stated and numbered as required by section 9130. *Roberts v. Sinnott*, 55 M 369, 372, 177 P 252.

The objection that causes of action are not separately stated and numbered cannot be raised by demurrer, the proper remedy for such a defect being a motion to make the complaint more definite and certain by separately stating the causes of action. *Jorud v. Woodside*, 63 M 23, 25, 206 P 344.

Joint Demurrer

A party's liability is not in any way affected because another, who is not liable, is made a defendant with him; hence, a joint demurrer will be overruled, if a good cause of action is stated against either party. *Cummings v. Reins Copper Co.*, 40 M 599, 619, 107 P 904.

Where two defendants joined in a demurrer to a complaint on the ground that one of them had been improperly made a defendant, whereas under this section the alleged defect should have been raised by special demurrer on the part of the one improperly joined, the court properly overruled the demurrer as to both. *Cummings*

v. Reins Copper Co., 40 M 599, 619, 107 P 904; *Reid v. Hennessy Co.*, 45 M 462, 465, 124 P 273.

"Same Parties"

The action is between the same parties, within the meaning of subdivision 3 of this section, when it appears from the complaint that the defendant in the action is the successor in interest of the defendant in a former action. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 28 M 451, 454, 455, 72 P 865.

Sufficiency of Complaint to State a Cause of Action

The question of the right of a foreign administrator to maintain an action in the courts of this state in his representative capacity is properly raised by general demurrer, the question going to the sufficiency of the complaint to state a cause of action and not to plaintiff's legal capacity to sue, in which latter case a special demurrer lies. *Lefebure et al. v. Baker et al.*, 69 M 193, 199, 220 P 1111.

To state a cause of action the complaint must show that the plaintiff has the right to sue, and where it appears from the face of the pleading that he has no such right, on grounds other than lack of legal capacity, no legal judgment could be entered in the action, and the complaint does not state a cause of action; in such a situation a general demurrer on that ground is sufficient. *Hand et al. v. Heslet et al.*, 81 M 68, 72, 73, 261 P 609.

Uncertainty

Demurrer is the appropriate remedy to reach a pleading objectionable for uncertainty. *Herbst Importing Co. v. Hogan*, 16 M 384, 41 P 135.

Want of Legal Capacity

A demurrer on the ground of want of capacity is something entirely distinct from one which raises the objection that a complaint does not state facts sufficient to constitute a cause of action. When one of these two separate grounds is the basis of a demurrer, the other cannot be considered. *Knight v. Le Beau*, 19 M 223, 226, 47 P 952.

Id. Between a right to recover and the want of legal capacity designated as a ground for demurrer in this section, the difference may not, at times, seem very clear. But if a right to recover is to be regarded as an essential element of the cause of action stated, to such an extent as to include the capacity to sue, then such a doctrine, carried out logically, would completely nullify the specific statutory ground of demurrer for want of legal capacity to sue.

Where lack of capacity in plaintiff to sue does not appear from the face of the

complaint, a demurrer to it on this ground must point out wherein he lacks capacity. *Marcellus v. Wright*, 51 M 559, 560, 154 P 714.

Lack of legal capacity in plaintiff to sue, when apparent on the face of the complaint, can be questioned only by demurrer (this section), and when not so apparent the objection may be taken by answer (Sec. 9135); if not so taken advantage of, it is deemed waived. *Northwestern H. & S. Co. v. Winnett*, 67 M 545, 550, 216 P 568.

Where a defect in the complaint affects only the capacity of plaintiff to sue, as where a real estate broker in an action to recover commissions does not allege that he was duly licensed to act as a broker, such allegation being made a condition precedent to his maintaining the action (Sec. 4075, R. C. M. 1921), defendant by failing to take advantage thereof by special demurrer or answer, waives it, a general demurrer not reaching the point, and may not for the first time raise it on appeal. *Piatt & Heath Co. v. Wilmer*, 87 M 382, 387, 288 P 1021.

When Waived

The point that the complaint discloses a misjoinder of parties, or that causes of action are improperly united, may not be raised by objection to the introduction of

evidence, but must be taken advantage of by special demurrer, else the right to object is waived. *Meredith v. Roman*, 49 M 204, 215, 141 P 643.

Under this practice established by the Code in this state, ambiguity, unintelligibility and uncertainty in a complaint must be taken advantage of by demurrer, pointing out specifically the particular defect relied upon, and, if this is not done, the defendant must be deemed to have waived such defect. *Grant v. Nihill*, 64 M 420, 435, 210 P 914; *Piatt & Heath Co. v. Wilmer*, 87 M 382, 387, 288 P 1021.

References

Cited or applied as section 50, p. 37, Codified Statutes 1871, in *Parchen v. Peck*, 2 M 567, 571; as section 89, First Division Compiled Statutes 1887, in *Duignan v. Montana Club*, 16 M 189, 40 P 294; as section 680, Code of Civil Procedure, in *Power v. Sla*, 24 M 243, 254, 61 P 468; *Haupt v. Independent Tel. M. Co.*, 25 M 122, 130, 63 P 1033; *Hefferlin v. Karlman*, 29 M 139, 150, 74 P 201; *Mantle v. Casey*, 31 M 408, 417, 78 P 591; as section 6534, Revised Codes, in *Wilson v. Yegen Bros.*, 38 M 504, 509, 100 P 613; *O'Donnell v. City of Butte*, 44 M 97, 98, 119 P 281; *Stoffels v. Cherry*, 67 M 443, 445, 215 P 1098; *La Bonte v. Mutual Fire etc. Ins. Co.*, 75 M 1, 11, 241 P 631.

9132. Demurrer must specify, etc. The demurrer must distinctly specify the objections to the complaint; otherwise, it may be disregarded. An objection taken under subdivision 1, 3, or 6 of the preceding section may be stated in the language of the subdivision; an objection taken under either of the other subdivisions must point out specifically the particular defect relied upon.

History: Ap. p. Sec. 41, p. 51, *Bannack Stat.*; amd. Sec. 41, p. 143, L. 1867; re-en. Sec. 51, p. 38, *Cod. Stat.* 1871; re-en. Sec. 85, p. 60, L. 1877; re-en. Sec. 85, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 87, 1st Div. *Comp. Stat.* 1887; en. Sec. 681, *C. Civ. Proc.* 1895; re-en. Sec. 6535, *Rev. C.* 1907; re-en. Sec. 9132, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 431.

Operation and Effect

Under this and the following section, a demurrer must specify objections to the complaint, or to one or more of the separate causes of action stated therein, as a whole. *Plymouth Gold Min. Co. v. United States Fidelity Co.*, 35 M 23, 27, 88 P 565.

An objection of want of capacity to sue, defect or misjoinder of parties, or misjoinder of causes of action, must be made by a pleading which specifically points out the defect relied upon, whether the pleading be a demurrer or an answer. *O'Donnell v. City of Butte*, 44 M 97, 99, 119 P 281.

If a demurrer may follow the language of the statute, in certain cases, the answer need not be more explicit. *Peterson v. City of Butte*, 44 M 129, 134, 120 P 231.

A special demurrer on the ground that the plaintiff has no legal capacity to sue, such as infancy or insanity, must point out the particular defect relied on, and the fact of such disability must appear on the face of the complaint. *Poe v. Sheridan County*, 52 M 279, 291, 157 P 185.

A demurrer for defect of parties must point out the particulars relied on, showing the absence of necessary, as distinguished from merely proper, parties. *Beach v. Spokane R. & W. Co.*, 25 M 379, 384, 65 P 111; *Poe v. Sheridan County*, 52 M 279, 291, 157 P 185.

Where an objection to a defect of parties is taken by demurrer, the defect relied upon must be specifically pointed out. *Church v. Zywert*, 58 M 102, 107, 190 P 291.

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References

Cited or applied as section 87, First Division Compiled Statutes 1887, in *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 M 61, 42 P 109; as section 681, Code of Civil Procedure, in *Power v. Sla*, 24 M 243, 254, 61 P 468; as section 6535, Revised Codes, in *Marcellus v. Wright*, 51 M 559, 560, 154 P 714; *Boyle v. Chicago etc. Ry Co.*, 60 M

453, 458, 199 P 283; *Grant v. Nihill*, 64 M 420, 435, 210 P 914; *Schauer v. Morgan et al.*, 67 M 455, 463, 216 P 347; *Lefebure et al. v. Baker et al.*, 69 M 193, 199, 220 P 1111; *Morrison v. Concordia Fire Ins. Co. et al.*, 72 M 97, 99, 231 P 905; *Hand et al. v. Heslet et al.*, 81 M 68, 73, 261 P 609; *Piatt & Heath Co. v. Wilmer*, 87 M 382, 387, 288 P 1021.

9133. May be taken to all or part. The defendant may demur to the whole complaint, or to one or more separate causes of action stated therein. In the latter case, he may answer the causes of action not demurred to.

History: En. Sec. 42, p. 51, *Bannack Stat.*; re-en. Sec. 42, p. 143, L. 1867; amd. Sec. 52, p. 38, L. 1871; re-en. Sec. 85, p. 60, L. 1877; re-en. Sec. 85, 1st Div. Rev. Stat. 1879; re-en. Sec. 87, 1st Div. Comp. Stat. 1887; amd. Sec. 682, C. Civ. Proc. 1895; re-en. Sec. 6536, Rev. C. 1907; re-en. Sec. 9133, R. C. M. 1921.

Operation and Effect

The purpose of a demurrer is to raise and have determined the question whether the pleading, or cause of action at which

it is directed, taken as a whole, states a case calling for a defense; its aim is to uproot and cast out the whole pleading. *Plymouth Gold Min. Co. v. United States Fidelity Co.*, 35 M 23, 27, 88 P 565.

A demurrer lies only to an entire complaint or to an entire cause of action, and it will not lie to the separate counts of a complaint for damages for death of a child which sets up but one cause of action in four separate counts. *Martin v. Northern Pacific Ry. Co.*, 51 M 31, 37, 149 P 89.

9134. Amended complaints—answer. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon defendants affected thereby. The defendant must answer the amendment or complaint as amended within twenty days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer as in other cases.

History: En. Sec. 43, p. 143, L. 1867; re-en. Sec. 53, p. 38, Cod. Stat. 1871; re-en. Sec. 85, p. 60, L. 1877; re-en. Sec. 85, 1st Div. Rev. Stat. 1879; re-en. Sec. 87, 1st Div. Comp. Stat. 1887; re-en. Sec. 683, C. Civ. Proc. 1895; amd. Sec. 1, p. 158, L. 1901; re-en. Sec. 6537, Rev. C. 1907; re-en. Sec. 9134, R. C. M. 1921. *Cal. C. Civ. Proc.* Sec. 432.

Effect of an Amendment on Original Complaint

Upon service and filing of a second amended complaint, the original and first amended pleadings became *functus officio*, and, under this section, defendant was required to answer within twenty days after such filing, for failure to do which default was properly entered. *Hansen v. Goodrich*, 56 M 140, 143, 181 P 739.

Effect of Failure to Plead Anew to Amended Complaint

Where the answer to the original complaint puts in issue the material allegations of the complaint as amended, the defendant may rely upon his answer and his failure to plead to the amended complaint does not subject him to default. *Danielson v. Danielson*, 62 M 83, 87, 88, 203 P 506.

Id. Where the amended complaint in an action for divorce added a new count, the allegations of which were not denied by the answer to the original complaint, it was incumbent upon defendant to answer or demur anew, failing in which his default was properly entered.

Amendment of a complaint, after answer filed, by striking therefrom an allegation of a conclusion of law which defendant might properly have disregarded as surplusage and did not require an answer, worked no change in the complaint as originally filed, and, therefore, the amended pleading did not supersede the original one. *Johnson v. Herring et al.*, 89 M 156, 169, 295 P 1100.

Id. The right to answer an amended complaint includes the right to demur thereto; but where the amendment, after answer filed, did not change the original pleading but removed an immaterial allegation therefrom, the right to demur to it for ambiguity and uncertainty was waived by answering.

Failure to Serve Amendment on Defendant Not Error When

Though this section provides that where a complaint is amended the amendment must

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be served upon the defendants affected thereby, where the principal defendant, a corporation, defaulted in a foreclosure suit and its secretary by stipulation consented to the amendment, a co-defendant objecting but not asking for a continuance on the ground of surprise was not in a position to complain on appeal of the failure to serve the amendment on the consenting defendant. *Clack v. Clack et al.*, 98 M 552, 563, 41 P 2d 32.

Operation and Effect

When the demurrer to an amended complaint has been overruled, the defendant

must file his answer within the time set by the court; service of it upon counsel for the plaintiff is not equivalent to filing it with the clerk. *State ex rel. Smotherman v. District Court*, 50 M 119, 121, 145 P 724.

References

Cited or applied as section 683, Code of Civil Procedure, before amendment, in *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 M 184, 192, 61 P 3.

9135. Objection not appearing on complaint may be taken by answer.

When any of the matters enumerated in section 9131 do not appear upon the face of the complaint, the objection may be taken by answer.

History: En. Sec. 44, p. 51, *Bannack Stat.*; re-en. Sec. 44, p. 143, L. 1867; re-en. Sec. 54, p. 38, *Cod. Stat.* 1871; re-en. Sec. 86, p. 60, L. 1877; re-en. Sec. 86, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 88, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 684, C. *Civ. Proc.* 1895; re-en. Sec. 6538, *Rev. C.* 1907; re-en. Sec. 9135, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 433.

Operation and Effect

If the fact that another action is pending between the same parties does not appear upon the face of the complaint, the objection that one is pending may be taken by answer. *Peterson v. City of Butte*, 44 M 129, 133, 120 P 231.

An alleged defect of parties, to be available as a ground of demurrer, must appear from the face of the complaint, else the objection can be raised only by answer. *Marcellus v. Wright*, 51 M 559, 561, 154 P 714.

When a corporation brings an action at law in its corporate name it need not affirmatively allege in its complaint that it is a corporation in order to state a cause of action. *Northwestern H. & S. Co. v. Winnett*, 67 M 545, 548, 216 P 568.

Id. Lack of legal capacity in plaintiff to sue, when apparent on the face of the complaint, can be questioned only by demurrer (Sec. 9131), and when not so apparent the objection may be taken by answer

(this section); if not so taken advantage of, it is deemed waived.

Id. The caption of a complaint is not a part of the allegation of the pleading.

Id. Where defendant in an action for goods, wares and merchandise sold, upon the assumption that a recital in the caption of the complaint that defendant was doing business under a certain firm name and style was a necessary allegation, treated it as such in answering thereto, he supplied the omission of an affirmative allegation to that effect in the complaint, and was in no position on appeal to urge error in the admission of accounts charged on plaintiff's books to defendant under the firm name on the ground of variance.

Id. The verdict of a jury will not be disturbed on appeal on the alleged ground of insufficiency of the evidence to sustain it, where the evidence was in substantial conflict upon the material issues raised by the pleadings.

References

Cited or applied as section 54, p. 38, *Codified Statutes* 1871, in *Parchen v. Peek*, 2 M 567, 571; as section 6538, *Revised Codes*, in *Wilson v. Yegen Bros.*, 38 M 504, 509, 100 P 613; *O'Donnell v. City of Butte*, 44 M 97, 99, 119 P 281; *Frost et al. v. Long & Co. et al.*, 66 M 385, 392, 213 P 1107; *La Bonte v. Mutual Fire etc. Ins. Co.*, 75 M 1, 11, 241 P 631.

9136. Objections—when deemed waived. If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

History: En. Sec. 45, p. 51, *Bannack Stat.*; re-en. Sec. 45, p. 143, L. 1867; re-en. Sec. 55, p. 38, *Cod. Stat.* 1871; re-en. Sec. 86, p. 60, L. 1877; re-en. Sec. 86, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 88, 1st Div.

Comp. Stat. 1887; re-en. Sec. 685, C. *Civ. Proc.* 1895; re-en. Sec. 6539, *Rev. C.* 1907; re-en. Sec. 9136, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 434.

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Defect in Plaintiff's Name When Waived

Where the complaint did not state the Christian name of the plaintiff, and defendant answered and admitted that plaintiff was in the possession of certain premises when an alleged trespass was committed thereon, defendant waived his right to raise the question in the supreme court that the complaint was uncertain in stating plaintiff's name. *Nichols v. Dobbins*, 2 M 540, 543.

Defect of Ambiguity or Uncertainty When Waived

Where the defendant charged in a demurrer to a complaint that it did not state facts sufficient to constitute a cause of action, but failed to interpose an objection on the ground that the complaint was ambiguous and uncertain, he must be deemed to have waived the latter objection. *Pryor v. City of Walkerville*, 31 M 618, 621, 79 P 240; *Doane v. Marquisee*, 63 M 166, 170, 206 P 420; *Johnson v. Herring et al.*, 89 M 156, 170, 295 P 1100.

After issue joined, the complaint, though ambiguous in its allegations, should be construed most favorably to the plaintiff, as the defendant waives defects of this character by answering. *Robinson v. Helena Light & Ry Co.*, 38 M 222, 241, 99 P 837.

An objection to a complaint on the ground of indefiniteness is waived unless a special demurrer on that account is interposed. *Billings Realty Co. v. Big Ditch Co.*, 43 M 251, 256, 115 P 828.

Though a complaint is indefinite, that objection is waived, where a special demurrer was interposed, but did not point out this defect. *Cohen v. Clark*, 44 M 151, 156, 119 P 775.

An inadvertent substitution of the word "defendant" for "plaintiff" in the complaint does not render the pleading insufficient, but subject to special demurrer on the ground of uncertainty, which defect is waived by answering to the merits. *Ivanhoff v. Teale*, 47 M 115, 117, 130 P 972.

Where a complaint states a cause of action, failure to demur to the same for ambiguity operates as a waiver of such defect. *Keffler v. Wilds*, 50 M 387, 388, 146 P 1105.

An objection that the complaint is ambiguous and uncertain cannot be urged on appeal where no special demurrer, because of such defects, was interposed in the court below. *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330.

After joinder of issue there is deemed to be a waiver of any right to object by special demurrer to the complaint, on the ground of ambiguity or uncertainty in the allegations of the facts upon which the relief is demanded. *Hamilton v. Hamilton*, 51 M 509, 521, 154 P 717.

Defect of Legal Capacity, When Waived

If no objection to the capacity of minor plaintiffs to sue is taken by demurrer or answer, it is deemed to be waived. *O'Donnell v. City of Butte*, 44 M 97, 100, 119 P 281.

Lack of legal capacity in plaintiff to sue, when apparent on the face of the complaint, can be questioned only by demurrer (Sec. 9131), and when not so apparent the objection may be taken by answer (Sec. 9135); if not so taken advantage of, it is deemed waived. *Northwestern H. & S. Co. v. Winnett*, 67 M 545, 550, 216 P 568; *Piatt & Heath Co. v. Wilmer*, 87 M 382, 387, 288 P 1021.

Defect of Parties, When Waived

Where A brought an action against B as the surviving partner of the firm of B and C, which firm was composed of B, C and D, but the answer of B did not set forth that D was a partner, or that there was a non-joinder of parties, and judgment was entered against B alone, B waived the defect of parties by failing to take advantage of it by demurrer or answer. *Parchen v. Peck*, 2 M 567, 571.

Where the proof showed that too many persons had been joined as defendants, but this fact did not appear upon the face of the complaint, and the answer of the defendant did not plead it, the defendant thereby waived his objection to the misjoinder of the parties defendant. *Conklin v. Fox*, 3 M 208, 211; *Knatz v. Wise*, 16 M 555, 558, 41 P 710. See also *Logan v. Billings & Northern Ry. Co.*, 40 M 467, 471, 107 P 415; *Puckett v. Hopkins et al.*, 63 M 137, 139, 206 P 422; *Frost et al. v. Long & Co. et al.*, 66 M 385, 392, 213 P 1107.

Where a misjoinder of parties defendant is patent upon the face of the complaint, the defect can be availed of only by special demurrer, failure to interpose which waives it. *Schauer v. Morgan et al.*, 67 M 455, 463, 216 P 347.

Where it does not appear from the face of the complaint that plaintiff is not the real party in interest, the defect can only be reached by answer and is waived by failure to so plead. *La Bonte v. Mutual Fire etc. Ins. Co.*, 75 M 1, 11, 241 P 631.

Defects of Misjoinder of Causes When Waived

The objection of a misjoinder of causes of action is waived, unless it is taken by answer or demurrer. *Forsell v. Pittsburg & Montana Copper Co.*, 38 M 403, 407, 100 P 218; *Frost et al. v. Long & Co. et al.*, 66 M 385, 392, 213 P 1107.

Effect of Failure to Stand on an Overruled Demurrer

Where a defendant has interposed a demurrer to a complaint which is overruled, and fails to stand upon his demurrer, but

answers over and goes to trial upon the merits, he waives his right to be heard upon his objection to the action of the court in overruling the demurrer, unless the complaint should be so defective as not to support the judgment. *Perkins v. Davis*, 2 M 474; *Collier v. Ervin*, 3 M 142, 144; *Hershfield v. Aiken*, 3 M 442, 451; *Francisco v. Benepe*, 6 M 243, 244, 11 P 637; *Garver v. Lynde*, 7 M 108, 111, 14 P 697; *Barber v. Briscoe*, 8 M 214, 220, 19 P 589; *Murphy v. Phelps*, 12 M 531, 533, 31 P 64; *Wyman v. Jensen*, 26 M 227, 239, 67 P 114.

Jurisdiction is Never Waived

Under this section the question of jurisdiction may be raised for the first time in the supreme court. *Oppenheimer v. Regan*, 32 M 110, 115, 79 P 695; *McCauley v. Jones*, 35 M 32, 38, 88 P 572.

The fact that the notice of appeal from a justice's court to the district court was served before filing may be urged as a ground for dismissal of the appeal in the supreme court, although the point was not raised in the district court; as the question involves the jurisdiction of the district court to entertain the appeal, it may be raised at any time. *McCauley v. Jones*, 35 M 32, 38, 88 P 572.

Whether an action was commenced in the wrong county goes to the jurisdiction of the court to entertain it, which question may be raised for the first time on appeal. *Good Roads Machinery Co. v. Broadwater Co.*, 94 M 68, 70, 20 P 2d 834.

Sufficiency of a Complaint is Never Waived

The objection that the complaint does not state facts sufficient to constitute a cause of action is never waived. *Parker v. Bond*, 5 M 1, 12, 1 P 209; *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 186, 99 P 298; *Hand et al. v. Heslet et al.*, 81 M 68, 73, 261 P 609.

The sufficiency of a complaint may be questioned for the first time on appeal, and, if found fatally defective, a judgment rendered thereon for the plaintiff will be reversed. *Foster v. Wilson*, 5 M 53, 57, 2 P 310; *Tracy v. Harmon*, 17 M 465, 467, 43 P 500; *Shober v. Blackford*, 46 M 194, 204, 127 P 329; *Cole v. Helena Light & Ry. Co.*, 49 M 443, 450, 143 P 974; *Ellinghouse v. Ajax Live Stock Co.*, 51 M 275, 281, 152 P 481.

The omission to state in a complaint facts essential to make out a cause of action is not cured by the decision and judgment, and the question of its sufficiency may be presented at any time during the progress of the trial, even in the supreme court for the first time. *Whiteside v. Lebcher*, 7 M 473, 478, 17 P 548; *Wyman v. Jensen*, 26 M 227, 239, 67 P 114; *Thornton v. Kaufman*, 35 M 181, 184, 88 P 796;

Badovinac v. Northern Pacific Ry. Co., 39 M 454, 458, 104 P 543.

A complaint, in an action to determine an adverse claim in patent proceedings in the matter of mining property, defective in omitting to allege that an adverse claim has been filed in the land office within sixty days after application for patent, is not aided by allegations in the reply; and the sufficiency of the complaint to support the judgment may be raised at any time during the progress of the case. *Thornton v. Kaufman*, 35 M 181, 184, 88 P 796.

Though the sufficiency of a complaint may be questioned for the first time on appeal, and, if found fatally defective, a judgment rendered thereon for the plaintiff will be reversed, every reasonable deduction will be drawn from the facts stated in order to uphold it when so attacked. *Ellinghouse v. Ajax Live Stock Co.*, 51 M 275, 281, 152 P 481.

Id. A complaint will be held sufficient, if attacked for the first time on appeal, if the defect made the basis of the objection is not a matter going to the root of the cause of action, but is such as might have been remedied by an amendment.

Where official bond was conditioned on defendant's taking an appeal to supreme court, an action thereon, which failed to aver that no appeal was taken, was fatal to the existence of the cause of action, and the right to recover thereon was entirely destroyed where plaintiff affirmatively averred such appeal was in fact taken, and such defects, going to sufficiency of complaint to state cause of action, were not cured by findings of court, in view of this section. (Gilbert, Circuit Judge, dissenting.) *United States Fidelity & Guaranty Co. v. Whittaker*, 8 F. 2d 455.

When the Objection That Complaint Does Not Support the Judgment May Be Raised

The objection that the complaint does not support the judgment can be raised in the appellate court for the first time on appeal from the judgment. *Territory v. Virginia Road Co.*, 2 M 96, 101; *Parker v. Bond*, 5 M 1, 12, 1 P 209; *Foster v. Wilson*, 5 M 53, 57, 2 P 310; *Quirk v. Clark*, 7 M 31, 33, 14 P 669.

References

Cited or applied as section 685, Code of Civil Procedure, in *Haupt v. Independent Tel. M. Co.*, 25 M 122, 130, 63 P 1033; as section 6539, Revised Codes, in *Wilson v. Yegen Bros.*, 38 M 504, 509, 100 P 613; *Meredith v. Roman*, 49 M 204, 216, 141 P 643; *Church v. Zywert*, 58 M 102, 107, 190 P 291; *Grant v. Nihill*, 64 M 420, 435, 210 P 914; *Lefebure et al. v. Baker et al.*, 69 M 193, 199, 220 P 1111; *Kramlich v. Tullock*, 84 M 601, 610, 277 P 411.

CHAPTER 35

ANSWER

- Section 9137. Answer—what to contain.
 9138. Counterclaim defined.
 9139. Counterclaim—rules thereof.
 9140. Judgment on same.
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 9142. Counterclaim by executor or administrator, or other person sued in representative capacity.
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 9146. Defendant may set forth all his defenses and counterclaims.
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9137. Answer—what to contain. The answer of the defendant must contain: 9137
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1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer; 9137
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2. A statement of any new matter constituting a defense or counterclaim.

History: Ap. p. Sec. 46, p. 51, Bannack Stat.; amd. Sec. 46, p. 143, L. 1867; amd. Sec. 6, p. 64, L. 1869; amd. Sec. 56, p. 38, Cod. Stat. 1871; amd. Sec. 1, p. 46, L. 1874; amd. Sec. 87, p. 61, L. 1877; re-en. Sec. 87, 1st Div. Rev. Stat. 1879; re-en. Sec. 89, 1st Div. Comp. Stat. 1887; en. Sec. 690, C. Civ. Proc. 1895; re-en. Sec. 6540, Rev. C. 1907; re-en. Sec. 9137, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 437.

Allegations on Information and Belief

An allegation in defendants' answer that they "say defendants have not sufficient knowledge or information to form a belief as to matters and facts alleged" in a certain paragraph of the complaint, "and therefore deny the same," was in substantial compliance with this section. *Milwaukee Gold Extraction Co. v. Gordon*, 37 M. 209, 215, 95 P 995.

Id. The provisions of this section, relative to denial on information and belief, apply to any and all allegations in a complaint; hence an allegation in the complaint of a corporation, that plaintiff was and is a corporation, was put in issue by such a denial.

Where defendant denied, as to certain specified allegations of the complaint, that he had "any knowledge or information sufficient to form a belief," the omission of

the word "thereof," as used in this section, was immaterial. *Pengelly v. Peeler*, 39 M 26, 31, 101 P 147.

A denial of knowledge or information sufficient to form a belief as to the truth of an allegation is authorized by this section. *First National Bank v. Silver*, 45 M 231, 235, 122 P 584.

A denial upon information and belief must be substantially in the words of this section; if not, it is insufficient and the allegation of the complaint to which it is addressed stands admitted. *Quickenden v. Hulbert et al.*, 83 M 501, 504, 272 P 994.

A denial in an answer to the effect that defendant has not sufficient information as to a given paragraph in the complaint to form a belief and therefore denies the same may not be said to be an admission of the matter set forth therein, where the pleading closed with a general denial of all matters and things in the complaint not specifically denied, admitted or qualified, the general denial thus covering the allegations of the paragraph. *Nelson v. Stukey*, 89 M 277, 296, 300 P 287.

Counterclaim

A counterclaim must be pleaded, or it cannot be proved. *Union Mercantile Co. v. Jacobs, Sultan & Co.*, 20 M 554, 555, 52 P 375.

A counterclaim for money in an action for a forcible entry cannot be availed of. *Spellman v. Rhode*, 33 M 21, 28, 81 P 395.

A defendant, whether as defendant or as garnishee, cannot avail himself of a counterclaim unless he pleads it; it cannot be asserted under a general denial of indebtedness; and the furnishing of a bill of particulars in which his claim is listed is not pleading a counterclaim. *Dolenty v. Rocky Mountain Bell Tel. Co.*, 41 M 105, 115, 108 P 921.

Id. Any defense that a garnishee could interpose, in an action brought against him by the defendant, may be interposed as garnishee in an action by the attaching creditor; but, if he relies upon a counterclaim, he must, in either case, plead it.

The terms "set-off" and "recoupment" are sometimes included in the term "counterclaim," and must be pleaded in order to enable the court to base a judgment thereon. *Galiger et al. v. McNulty et al.*, 80 M 339, 360, 260 P 401.

Cross-bill

In this state there is no such pleading as a cross-bill. *Alywin v. Morley*, 41 M 191, 206, 108 P 778. See, however, section 9151, subsequently enacted.

Effect of an Admission in Answer

An allegation in an answer that a fact, stated in the complaint as true, is true, or the affirmative statement therein of a fact which is likewise pleaded in the complaint, is an admission of the truth of the allegation of the complaint, and proof thereof is not necessary. *O'Donnell v. City of Butte*, 44 M 97, 101, 119 P 281.

Effect of General Denial

A general denial is proper in cases where certain allegations have already been generally or specifically denied, and in cases where the pleader has already denied any knowledge or information sufficient to form a belief as to the truth of particular allegations, and has specifically admitted others. *Pengelly v. Peeler*, 39 M 26, 30, 101 P 147.

The effect of a general denial is to put in issue every material allegation constituting the cause of action alleged, and thus to cast upon the plaintiff the burden of establishing by his evidence, *prima facie* at least, the presence of every element of it, and hence his right to recover. *Chealey v. Purdy*, 54 M 489, 492, 171 P 926; *Swords v. Occident Elevator Co.*, 72 M 189, 193, 195, 232 P 189.

Extent of Answer

Under the statute, the answer must consist of two parts, the first embodying the admissions and denials, and the second, new matter constituting a defense or counterclaim. *Rand v. Butte Electric Ry. Co.*, 40 M 398, 406, 107 P 87.

Extent of Denials

The new codes extend the method and form of denials, giving far more latitude, apparently, than under the former practice. *State ex rel. Milsted v. Butte City Water Co.*, 18 M 199, 205, 44 P 966.

A defendant may deny generally or specifically certain allegations of the complaint, and may, as to other allegations, deny any knowledge or information thereof sufficient to form a belief, and may admit other allegations, and may put still others, or all others, in issue by a general denial. *Pengelly v. Peeler*, 39 M 26, 30, 101 P 147.

Inconsistent Defenses

A defendant may plead inconsistent defenses, provided they are not so incompatible as necessarily to render one or the other absolutely false. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 166, 108 P 1057; *O'Donnell v. City of Butte*, 44 M 97, 101, 119 P 281; *Day v. Kelly*, 50 M 306, 312, 146 P 930.

Judgment to Conform to Pleadings

Where the complaint, in an action for waste, demands a money judgment only, and the defendant asks that his title be quieted as against the plaintiff, nothing in his answer partaking of the nature of an affirmative cause of action or counterclaim, and the reply demanding, among other things, that the plaintiff have her title quieted as against the defendant, it is error to render judgment in favor of the plaintiff for the possession of the land and quieting her title, the pleadings not justifying such a decree. *Erbes v. Smith*, 35 M 38, 46, 88 P 568.

Purpose of This Section

This section and section 9138 were designed to enable parties litigant to adjust their differences in one action, so far as possible, and thereby to prevent a multiplicity of suits; this conclusion is re-enforced by the provisions of section 9144; and, for statutes so highly remedial, a broad and liberal construction is required in order that the purposes designed by them shall be most completely served. *Scott v. Waggoner*, 48 M 536, 543, 139 P 454.

Set-off

A set-off, as such, is not recognized by the codes. *Dolenty v. Rocky Mountain Bell Tel. Co.*, 41 M 105, 114, 108 P 921.

What Must Be Pleaded Specially

Where a militia officer is sued for destroying private property without the owner's consent, and without compensating the owner therefor, he must, if he would make justification for his defense, plead the same specially. *Herlihy v. Donohue*, 52 M 601, 608, 161 P 164.

When Answer May Be Stricken

An allegation in the answer which is neither an admission nor a denial of any averment contained in the complaint, nor authorized by section 9151, providing for the filing of a cross-complaint, is subject to a motion to strike. *Security State Bank of Roy v. Melchert*, 67 M 535, 538, 216 P 340.

References

Cited or applied as section 690, Code of Civil Procedure, in *Babcock v. Maxwell*, 21 M 507, 510, 54 P 943; *Stadler v. First*

National Bank, 22 M 190, 206, 56 P 111; *Cornish v. Woolverton*, 32 M 456, 473, 81 P 4; *Gilechrist v. Hore*, 34 M 443, 447, 87 P 443; as section 6540, Revised Codes, in *Kaufman v. Cooper*, 39 M 146, 155, 101 P 969; *Vaughan v. Kujath*, 44 M 484, 487, 120 P 1121; *Stephens v. Conley*, 48 M 352, 368, 138 P 189; *Nelson v. Young et al.*, 70 M 112, 116, 117, 224 P 237; *In re Griggs*, 74 M 373, 375, 240 P 820; *Friedrichsen v. Cobb*, 84 M 238, 249, 275 P 267; *Mihelich v. Butte Electric Ry. Co. et al.*, 85 M 604, 281 P 540.

9138. Counterclaim defined. The counterclaim specified in the last section must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

History: Ap. p. Sec. 47, p. 52, *Bannack Stat.*; re-en. Sec. 47, p. 143, L. 1867; re-en. Sec. 57, p. 38, *Cod. Stat.* 1871; re-en. Sec. 88, p. 61, L. 1877; re-en. Sec. 88, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 90, 1st Div. *Comp. Stat.* 1887; en. Sec. 691, *C. Civ. Proc.* 1895; re-en. Sec. 6541, *Rev. C.* 1907; re-en. Sec. 9138, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 438.

Applies to Implied as Well as Express Contracts

The provision of subdivision 2 of this section, that in an action on a contract any other cause of action on contract existing at the commencement of the action may be set up as a counterclaim, applies to implied as well as express contracts. *First National Bank v. Silver*, 45 M 231, 237, 122 P 584.

"Arising Out of the Transaction or Connected With the Subject Matter"

To constitute a counterclaim, a failure to plead which will thereafter bar an action thereon, it must appear affirmatively from the pleadings that the cause of action asserted is one "arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." *Kaufman v. Cooper*, 39 M 146, 155, 101 P 969.

In determining whether a counterclaim arises out of the transaction set forth in the complaint as the foundation of plaintiff's claim (this section), the court is not

limited to the facts alleged in the complaint, but may look to all the facts and circumstances out of which the injury complained of by plaintiff arose. *Mulcahy v. Duggan*, 67 M 9, 12 et seq., 214 P 1106.

In determining whether matter incorporated in a counterclaim arose out of the transaction or contract set forth in the complaint (this section), the court is not limited to the facts therein alleged, but may look to all the facts and circumstances out of which the damage complained of by defendant arose. *Griffiths v. Thrasher*, 95 M 210, 218, 26 P 2d 995.

Id. Under the above rule, held, in an action to foreclose a mortgage on rooming-house furniture and furnishings, wherein defendant interposed a counterclaim for damages resulting from alleged fraudulent representations relating to the character of the house upon which defendant took a three-year lease, the rentals paid by the tenants, etc., that the matters set forth in the counterclaim were properly pleadable as such, as arising out of the contract sued upon by plaintiff, under this section.

Counterclaim in Tort

In an action in tort, the defendant cannot counterclaim any new matter not arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. *Davis v. Frederick*, 6 M 300, 302, 12 P 664; *Potter v. Lohse*, 31 M 91, 97, 77 P 419; *Kaufman v. Cooper*, 39 M 146, 156, 101 P 969.

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Counterclaim Must Diminish or Defeat to be Valid

Under this section, such counterclaims only are allowed as tend in some way to diminish or defeat the plaintiff's recovery. A claim for a money judgment, whether arising out of the transaction set forth in the complaint or not, tends in no way to defeat or diminish the plaintiff's right of recovery of the possession of property wrongfully taken. *Osmers v. Furey*, 32 M 581, 593, 81 P 345.

A counterclaim which does not in any manner diminish or defeat plaintiff's recovery, or which is not in existence and matured prior to the filing of the complaint, is improper. *Cook-Reynolds Co. v. Wilson*, 67 M 147, 150, 214 P 1104.

Id. In an action for an injunction to restrain defendant from harvesting a crop of volunteer wheat, a counterclaim for defendant's share of the crop which was harvested by plaintiff while the injunction was in effect was not allowable, since it did not diminish or defeat plaintiff's recovery and was not in existence at the time the complaint was filed.

Counterclaim to be Effective Must be Plead as Such

A defendant, to entitle himself to a motion for judgment for want of a reply to a counterclaim, must plead it as such, and is estopped from asserting that matter which in his answer he denominates "an equitable defense" is in fact a counterclaim. *Babcock v. Maxwell*, 21 M 507, 514, 54 P 943.

Effect of Demurrer to Counterclaim

A demurrer interposed to a counterclaim on the ground that it was "not one of the character specified" in this section, was sufficient to raise the question whether or not the counterclaim was one which could be set up in the particular action. *Mulcahy v. Duggan*, 67 M 9, 12 et seq., 214 P 1106.

Effect of Failure to Plead

The purpose of the statute permitting the filing of a counterclaim is to enable and require the parties to adjust, in one action, their differences growing out of any given transaction; hence where defendant fails to set up a counterclaim he may have, he is, under section 9144, thereafter barred from maintaining an action thereon against the plaintiff in the action in which it should have been interposed. *Friedrichsen v. Cobb*, 84 M 238, 249, 252, 275 P 267.

Essentials in General

A counterclaim, being a cause of action in favor of the defendant and against the plaintiff, must contain a statement of such facts as would be requisite to the sufficiency of a complaint, must be in existence

and matured at the time of the commencement of the action, and must be pleaded as such, and if not so pleaded, evidence tending to establish it is inadmissible. *Lappin v. Martin et al.*, 71 M 233, 238, 228 P 763.

Must State a Cause of Action Complete Within Itself

Matter in an answer is not a counterclaim, unless it states a cause of action, complete within itself, and tends in some way to diminish or defeat plaintiff's recovery. *Hillman v. Luzon Cafe Co.*, 49 M 180, 188, 142 P 641.

Not Applicable to a Claim Against a Codefendant

In this section, no mention is made of a claim against a codefendant; in an action for an accounting, it may be that a defendant can, upon pleadings adequate to support a judgment, obtain affirmative relief against a codefendant by filing a pleading in the nature of a counterclaim; but this cannot be done where the complaint does not set forth a cause of action, and the defendant's pleading in his own behalf is insufficient to support a judgment. *Alywin v. Morley*, 41 M 191, 206, 108 P 778.

Not Applicable to Condemnation Suits

In condemnation proceedings the defendant is not required to set up his claims for damages, either special or general, and this section will not permit them to be pleaded by way of counterclaim; therefore plaintiff cannot be heard to complain that, by defendant's failure to plead them, it had no notice of their character and amount, and was deprived of an opportunity to controvert them. *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 556, 87 P 963.

Not Applicable to Justice Court Proceedings

The provisions of this section have no application to cases coming within the jurisdiction of justices' courts. *Walter v. Cox*, 36 M 20, 24, 91 P 1063.

Proper Counterclaims

Orders on the property owner to laborers, given by the contractor for work done in the removal of buildings, are properly pleaded as counterclaims in an action by the contractor or his assignees to foreclose a lien for the contract price of such removal. *Boucher v. Powers*, 29 M 342, 345, 74 P 942.

In an action by a landlord for rent due under a written lease and for damages for waste committed on the premises, it is proper for the defendant to interpose a counterclaim for the conversion of personal property placed by him on the premises. *Scott v. Waggoner*, 48 M 536, 547, 139 P 454, L. R. A. 1916C, 491.

Where a chattel mortgage has been given to secure the unpaid purchase-money for an automobile, but on the same day a new arrangement is made between the seller and purchaser, whereby the latter is to run the machine for hire, and the buyer afterward sues the seller for seizing the machine and converting it to his own use, the defendant may counterclaim for the balance on the machine. *Kinsman v. Stanhope*, 50 M 41, 45, 144 P 1083.

"Subject of the Action"

The words of the statute, "subject of the action," should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and grounds of the plaintiff's right to recover or obtain the relief asked. *Collier v. Ervin*, 3 M 142, 145; *Potter v. Lohse*, 31 M 91, 97, 77 P 419; *Osmer v. Furey*, 32 M 581, 593, 81 P 345; *Pittsment Copper Co. v. O'Rourke*, 49 M 281, 293, 141 P 849.

"Transaction" Defined

"Transaction" is not synonymous with "contract"; it is broader than "contract," and broader than "tort," although it may include either or both; it is "that combination of acts and events, circumstances, and defaults, which, viewed in one aspect, results in the plaintiff's right of action, and viewed in another aspect, results in the defendant's right of action"; and it "applies to any dealings of the parties resulting in wrong, without regard to whether the wrong be done by violence, neglect, or breach of contract." *Scott v. Waggoner*, 48 M 536, 545, 139 P 454.

The "transaction" set forth in the complaint out of which a cause of action must arise to be pleadable as a counterclaim, is that combination of acts and events, circumstances and defaults, which, viewed in one aspect, results in the plaintiff's right of action, and, when viewed in another aspect, results in defendant's right of action, the rule being the same whether the action be *ex contractu* or *ex delicto*. *Mulcahy v. Duggan*, 67 M 9, 12 et seq., 214 P 1106.

What is Not a Proper Counterclaim

An answer, in an action of replevin, to the effect that the defendant took possession of the chattels as the assignee of one who had been in possession thereof for a long time, that plaintiff knowingly allowed the defendant to sell the same, and that by reason thereof plaintiff was estopped from maintaining the action, does not state a counterclaim as the same is defined in this section. *Babcock v. Maxwell*, 21 M 507, 512, 54 P 943.

A defendant's claim for damages from the wrongful seizure and detention of property, in an action of claim and delivery, is

not a counterclaim within this section. *Hammond v. Thompson*, 54 M 609, 611, 173 P 229.

In an action against an individual defendant to recover the price of livestock sold to him, a counterclaim for services rendered to plaintiff by a copartnership of which defendant was a member could not be set up even though the other partner consented thereto. *Heinrich v. Kirby*, 64 M 1, 5, 6, 208 P 897.

When a Judgment May Be Set Off

A judgment cannot be set off against an action of conversion, but defendants' remedy is by bill in equity or other proceeding to offset one judgment against the other. *Potter v. Lohse*, 31 M 91, 97, 77 P 419.

When Counterclaim Must Exist to be Available

A counterclaim must be in existence and matured for action at the time of the commencement of the suit in which it is pleaded. *McGuire v. Edsall*, 14 M 359, 360, 36 P 453; *Boucher v. Powers*, 29 M 342, 345, 74 P 942; *Scott v. Waggoner*, 48 M 536, 549, 139 P 454; *Hammond v. Thompson*, 54 M 609, 611, 173 P 229.

A demand against the assignor of a non-negotiable contract cannot be set off against the assignee, unless due and payable when the assignment was made, and notice was unnecessary to prevent set-off of a demand becoming payable subsequently. *Stadler v. First National Bank*, 22 M 190, 210, 56 P 111; *Cornish v. Woolverton*, 32 M 456, 473, 81 P 4.

If the plaintiff has a cause of action against the defendant, at the time of filing his complaint, and no counterclaim is filed, he ought to recover. *Isman v. Altenbrand*, 42 M 188, 195, 111 P 849.

To constitute a counterclaim, the facts must disclose a cause of action in favor of the defendant and against the plaintiff, existing at the time of the commencement of the action. *First National Bank v. Silver*, 45 M 231, 236, 122 P 584.

A counterclaim may be pleaded in an action on a contract if in existence at the time the action was commenced (this section); hence where a deficiency judgment in a foreclosure suit was not obtained by defendant until long after the action was commenced, a counterclaim based upon it was not permissible. *Dreidlein v. Manger*, 69 M 155, 165, 220 P 1107.

A counterclaim must be in existence and matured at the time of the commencement of the action in which it is pleaded; therefore, where a counterclaim was based upon a contract which had been superseded by a subsequent one, the court properly excluded testimony offered in support of it. *Dick v. King*, 73 M 456, 461, 236 P 1093.

A counterclaim in an action for the foreclosure of a mortgage on rooming-house furniture and furnishings, for damages based upon occurrences growing out of the institution of the action and therefore non-existent at the time of its commencement, was properly demurrable. *Griffiths v. Thrasher*, 94 M 210, 218, 26 P 2d 995.

When Tort May Be Set Off Against Contract

A counterclaim sounding in tort may be pleaded as against a demand upon contract, provided it arises out of the trans-

action which gave rise to plaintiff's cause of action. *Scott v. Waggoner*, 48 M 536, 545, 139 P 454.

References

Cited or applied as section 691, Code of Civil Procedure, in *Spellman v. Rhode*, 33 M 21, 28, 81 P 395; *Erbes v. Smith*, 35 M 38, 46, 88 P 568; as section 6541, Revised Codes, in *Doichinoff v. Chicago, Milwaukee & St. Paul Ry. Co.*, 51 M 582, 587, 154 P 924; *Stockgrowers' Finance Corp. v. Nett*, 91 M 334, 343, 7 P 2d 540; *Flatt v. Norman et al.*, 91 M 543, 552, 11 P 2d 798.

9139. Counterclaim—rules thereof. But the counterclaim, specified in subdivision 2 of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand, existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of the plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

History: En. Sec. 692, C. Civ. Proc. 1895; re-en. Sec. 6542, Rev. C. 1907; re-en. Sec. 9129, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 438.

Operation and Effect

Stipulation entered into between the parties in an action arising out of the drilling of a gas-well under a lease, that the amount of a judgment which defendant might obtain on reversal of a judgment against a third person in a companion suit should be allowed as an offset or counterclaim to any judgment awarded the plaintiff, construed and held binding. *Nepstad*

v. East Chicago Oil Assn., Inc., 91 M 366, 369, 9 P 2d 1074.

References

Cited or applied as section 692, Code of Civil Procedure, in *Stadler v. First National Bank*, 22 M 190, 206, 56 P 111; *Cornish v. Woolverton*, 32 M 456, 473, 81 P 4; *Spellman v. Rhode*, 33 M 21, 28, 81 P 395; *Northwestern Improvement Co. v. Rhoades*, 52 M 428, 434, 158 P 832; *Heinrick v. Kirby*, 64 M 1, 7, 208 P 897; *Stockgrowers' Finance Corp. v. Nett*, 91 M 334, 343, 7 P 2d 540.

9140. Judgment on same. Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must

have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover from another person so much thereof as the judgment does not cancel.

History: En. Sec. 693, C. Civ. Proc. 1895; re-en. Sec. 6543, Rev. C. 1907; re-en. Sec. 9140, R. C. M. 1921.

References
Friedrichsen v. Cobb, 84 M 238, 252, 275 P 267.

9141. Affirmative relief. In a case not specified in the last section, where a counterclaim is established, which entitled the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.

History: En. Sec. 694, C. Civ. Proc. 1895; re-en. Sec. 6544, Rev. C. 1907; re-en. Sec. 9141, R. C. M. 1921.

9142. Counterclaim by executor or administrator, or other person sued in representative capacity. In an action against an executor or administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same in an action against him.

History: En. Sec. 695, C. Civ. Proc. 1895; re-en. Sec. 6545, Rev. C. 1907; re-en. Sec. 9142, R. C. M. 1921.

9143. When plaintiff is executor, etc. In an action brought by an executor or an administrator, in his representative capacity, a demand against the decedent, belonging at the time of his death to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due the defendant, judgment must be rendered therefor against the plaintiff in his representative capacity. Execution can be issued upon such a judgment only in a case where it could be issued upon a judgment in an action against the executor or administrator.

History: En. Sec. 696, C. Civ. Proc. 1895; re-en. Sec. 6546, Rev. C. 1907; re-en. Sec. 9143, R. C. M. 1921.

9144. When defendant omits to set up counterclaim. If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of section 9138, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

History: En. Sec. 89, p. 61, L. 1877; re-en. Sec. 89, 1st Div. Rev. Stat. 1879; re-en. Sec. 91, 1st Div. Comp. Stat. 1887; re-en. Sec. 697, C. Civ. Proc. 1895; re-en. Sec. 6547, Rev. C. 1907; re-en. Sec. 9144, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 439.

maintaining an action therefor; it must appear affirmatively from the pleadings that the cause of action asserted is one which falls within the class mentioned in the subdivision named. Kaufman v. Cooper, 39 M 146, 155, 101 P 969.

Operation and Effect

It is only such a counterclaim as is mentioned in subdivision 1 of section 9138 that a party must assert in a pending action, or be forever barred from thereafter

The purpose of the statute permitting the filing of a counterclaim is to enable and require the parties to adjust, in one action, their differences growing out of any given transaction; hence where defendant fails to set up a counterclaim

he may have, he is, under this section, thereafter barred from maintaining an action thereon against the plaintiff in the action in which it should have been interposed. *Friedrichsen v. Cobb*, 84 M 238, 250, 252, 275 P 267.

References

Cited or applied as section 6547, Revised Codes, in *Scott v. Waggoner*, 48 M 536, 544, 139 P 454, L. R. A. 1916C, 491; *Stock-growers' Finance Corp. v. Nett*, 91 M 334, 343, 7 P 2d 540.

9145. Counterclaim not barred by death or assignment. When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

History: En. Sec. 48, p. 52, *Bannack Stat.*; re-en. Sec. 48, p. 143, L. 1867; re-en. Sec. 58, p. 39, *Cod. Stat.* 1871; re-en. Sec. 89, p. 61, L. 1877; re-en. Sec. 89, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 91, 1st Div. *Comp. Stat.* 1887; amd. Sec. 698, C. Civ. Proc. 1895; re-en. Sec. 6548, *Rev. C.* 1907; re-en. Sec. 9145, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 440.

References

Cited or applied as section 698, Code of Civil Procedure, in *Stadler v. First National Bank*, 22 M 190, 207, 56 P 111; *Cornish v. Woolverton*, 32 M 456, 473, 81 P 4.

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9146. Defendant may set forth all his defenses and counterclaims. A defendant may set forth, in his answer, as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counterclaim must be separately stated and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.

History: Ap. p. Sec. 49, p. 52, *Bannack Stat.*; re-en. Sec. 49, p. 143, L. 1867; re-en. Sec. 59, p. 39, *Cod. Stat.* 1871; re-en. Sec. 89, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 91, 1st Div. *Comp. Stat.* 1887; en. Sec. 699, C. Civ. Proc. 1895; re-en. Sec. 6549, *Rev. C.* 1907; re-en. Sec. 9146, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 441.

Defendant Need Not Elect in Advance Between Defenses Interposed

Since under this section, a defendant in a civil action may in his answer set forth as many defenses as he has, he may introduce evidence to sustain them, and therefore may not be required to elect in advance upon which of them he will rely. *Howard v. Fraser*, 83 M 194, 197, 271 P 444.

Plea of Contributory Negligence Does Not Admit Truth of Allegations of Complaint

A plea of contributory negligence does not admit the truth of particular allegations stated in the complaint, although the answer also contains a general or specific denial of those allegations. *Day v. Kelly*, 50 M 306, 311, 146 P 930. See also *Nelson v. Northern Pacific Ry. Co.*, 50 M 516, 531, 148 P 338; *Lewis v. Steele*, 52 M 300, 307, 157 P 575.

Scope of Inconsistent Defenses

Although the defendant may interpose inconsistent defenses, they must not be so far inconsistent that if the allegations of one are true, the allegations of the other must of necessity be false. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 165, 108 P 1057; *O'Donnell v. City of Butte*, 44 M 97, 101, 119 P 281; *Day v. Kelly*, 50 M 306, 312, 146 P 930; *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330; *White v. Hagbery*, 54 M 593, 596, 172 P 1034.

Since a defendant may, under this section, interpose illogical or inconsistent defenses, it is error to exclude evidence offered in support thereof. *St. Paul Mach. Mfg. Co. v. Bruce*, 54 M 549, 556, 172 P 330.

Under the rule of practice (this section) that defendant may set up as many defenses as he may have, even though inconsistent, provided they are not so far inconsistent with each other that if the allegations of one are true those of the other must of necessity be false, defendant insurance company's denial of liability on grounds other than failure of proof of loss did not constitute a waiver of notice and proof of loss. *Johnson v. Rocky Mountain Fire Ins. Co.*, 70 M 411, 424, 226 P 515.

Under this section, a defendant may set up two or more inconsistent defenses so long as they are not so far inconsistent that, if one be true, the other must necessarily be false; hence where defendant in an action for foreclosure of mortgage brought by the assignee thereof alleged payment to the payee bank without knowledge of the assignment of the note and mortgage and believing it to be the owner or that it had authority to receive payment as agent of the assignee, the two allegations were not so repugnant as to offend against the provision of the section, and refusal to compel defendant to elect upon which one of the defenses he would rely was not error. *Minnesota L. & T. Co. v. Busby et al.*, 84 M 373, 378, 275 P 761.

Inconsistent defenses may be pleaded, provided they are not so incompatible as to render the one or the other absolutely false; the test of inconsistency of defenses

is whether or not the proof of one necessarily disproves the other; when one admits a fact and the other denies it, the admission must prevail over the denial. *Downs v. Nihill*, 87 M 145, 150, 286 P 410; *Stagg v. Stagg*, 96 M 573, 588 et seq., 32 P 2d 856.

Admission of a paragraph of the complaint in defendant's answer is not, strictly speaking, a defense within the rule relating to pleading inconsistent defenses. *Stagg v. Stagg*, 96 M 573, 588 et seq., 32 P 2d 856; *State ex rel. Nagle v. Stafford et al.*, 97 M 275, 285, 34 P 2d 372.

References

Cited or applied as section 699, Code of Civil Procedure, in *Erbes v. Smith*, 35 M 38, 47, 88 P 568; as section 6549, Revised Codes, in *McKim v. Beiseker*, 56 M 330, 335, 185 P 153; *Nelson v. Young et al.*, 70 M 112, 116, 224 P 237.

9147. Partial defenses. A partial defense may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth. Upon a demurrer thereto, the question is whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of this section.

History: En. Sec. 700, C. Civ. Proc. 1895; re-en. Sec. 6550, Rev. C. 1907; re-en. Sec. 9147, R. C. M. 1921.

Must Be Specially Pleaded

Under a general denial in a husband's action for criminal conversation, evidence as to the general bad reputation of plaintiff's wife, being matter tending to mitigation or reduction of damages, and hence a partial defense, was not admissible,

since partial defenses must be specially pleaded under this section. *McKim v. Beiseker*, 56 M 330, 336, 185 P 153.

References

Cited or applied as section 6550, Revised Codes, in *Cornell v. Great Northern Ry. Co.*, et al., 57 M 177, 195, 187 P 902; *Hill v. Chappel Bros. of Montana, Inc.*, 93 M 92, 100, 18 P 2d 1106.

9148. When defendant may demand affirmative judgment. Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer.

History: En. Sec. 701, C. Civ. Proc. 1895; re-en. Sec. 6551, Rev. C. 1907; re-en. Sec. 9148, R. C. M. 1921.

Operation and Effect

It is a contradiction in terms to say that a defendant may have affirmative relief without pleading a counterclaim or counteraction against the plaintiff, because there is nothing upon which to base the judgment or decree. *Erbes v. Smith*, 35 M 38, 47, 88 P 568.

Id. The demand made by the defendant in his answer, filed in an action for waste, that his title be quieted, which demand was not based upon a properly pleaded cause of action or counterclaim, should have been disregarded.

References

Galliger et al. v. McNulty et al., 80 M 339, 360, 260 P 401.

9149. When answer admits part of plaintiff's claim. Where the answer of the defendant, expressly or by not denying, admits a part of the

plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and, if the plaintiff so elects, that the action be continued, with like effect, as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment is the same as if it was taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded, as upon final judgment in any other case.

History: En. Sec. 702, C. Civ. Proc. 1895; re-en. Sec. 6552, Rev. C. 1907; re-en. Sec. 9149, R. C. M. 1921.

9150. Judgment for excess. In an action upon contract, where the complaint demands judgment for a sum of money only, if the defendant, by his answer, does not deny the plaintiff's claim, but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an answer. The admission must be made a part of the judgment-roll.

History: En. Sec. 703, C. Civ. Proc. 1895; re-en. Sec. 6553, Rev. C. 1907; re-en. Sec. 9150, R. C. M. 1921.

9151. Cross-complaint—filing—service. Whenever any defendant to an action desires any relief against any party relating to or dependent upon the contract, transaction, or subject-matter upon which the action is brought, or affecting the property to which the action relates, or whenever the judgment in such action may determine the ultimate rights of defendants to an action as between themselves, any defendant may, in addition to and in his answer, file at the same time, or subsequently by permission of court, a cross-complaint against all parties to such action, and may make as additional parties to such action, and ask relief against, any person, firm, association, or corporation, necessary or required to permit the court to make a full determination of and to adjudicate all rights of any person, firm, association, or corporation, relating to or dependent upon the contract, transaction, or subject-matter, or affecting the property to which the action relates.

The service of a copy of the answer and cross-complaint upon the attorney of record for any party who has appeared in the action shall be and constitute service of process upon such appearing party.

Any person, firm, association, or corporation who has not appeared in such action, or who may be made an additional party to such action, may be served with summons on such cross-complaint, in the way now provided by law for the service of summons issued upon a complaint in an action, except that in a summons issued upon a cross-complaint the word "cross-complaint" shall be used instead of the word "complaint," and any party so served with summons upon a cross-complaint may appear in such action, within the time and in the manner provided by law for the appearance of a defendant in an action.

History: En. Sec. 1, Ch. 177, L. 1919; re-en. Sec. 9151, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 442.

Essentials

To constitute a pleading a cross-complaint the right to file which is given by this section, on permission by the court, the relief sought must to some extent overcome or affect plaintiff's cause of action, or lessen, modify or interfere with the relief sought by him; it must be distinct and separate from the answer and must state facts sufficient to entitle defendant to affirmative relief and also all facts essential to show that the demand is a proper subject of cross-complaint. *Callender v. Crossfield Oil Syndicate*, 84 M 263, 273, 275, 275 P 273.

Id. Whether a pleading is a cross-complaint must be determined from its allegations, not from the designation given it by the pleader, i. e., "a further and separate defense."

Under this section, the filing of cross-complaint is authorized if the relief sought by defendant depends upon the subject matter upon which the action is brought or affects the property to which the action relates, and to some effect defeats or affects plaintiff's cause of action or lessens, modifies, or interferes with, the relief sought by plaintiff. *Mills v. Pope et al.*, 90 M 569, 4 P 2d 485.

Not in Conflict With 9087

Held, that section 9087, authorizing defendant who has money in his possession to which others make conflicting claims, to bring an action to compel the claimants to interplead and litigate their several claims among themselves, and this section, under which a defendant may make other claimants to the subject matter of the action parties thereto by filing a cross-complaint, are not in conflict, the latter rather supplementing the interpleader statute by providing for a class of cases not comprehended by the former, the purpose of each being to expedite litigation and afford protection to both persons and property involved in litigation. *Zunchich v. Security Building etc. Assn.*, 85 M 341, 278 P 1011.

Not Restricted to Cause of Action Existing at the Time of the Commencement of Original Action

The statute (this section), providing for the filing of a cross-complaint, not so declaring, a cross-complaint in an action based on contract, is not restricted (as the pleader would be in alleging a counterclaim) to a cause or causes of action existing at the time of the commencement of the action. *Callender v. Crossfield Oil Syndicate*, 84 M 263, 273, 275, 275 P 273.

Purpose

Under this section, enacted to supplement the interpleader statute by providing for a class of cases not comprehended within section 9087, a defendant may by cross-complaint make others (adverse claimants) parties to the action, so as to permit the court to fully adjudicate the rights of all parties in its subject matter, and under it defendant may, as he may not in an action of interpleader, contest with plaintiff the extent of his liability, and therefore an order striking the pleading from the files was error. *Security State Bank of Roy v. Melchert*, 67 M 535, 538, 539 et seq., 216 P 340.

When Defective

A cross-complaint is defective where the pleader runs his affirmative defenses together rather than stating them separately, and where it includes an assigned claim without showing that it arose out of the same transaction on which the complaint is based. *Flatt v. Norman et al.*, 91 M 543, 552, 11 P 2d 798.

When Proper

Under this section, defendant in an action by a mortgagor to quiet title may by cross-complaint seek foreclosure of the mortgage held by him on the property. *Skillen v. Harris*, 85 M 73, 277 P 803.

References

Ringling v. Biering et al., 83 M 391, 398, 272 P 688; *Stockgrowers' Finance Corp. v. Nett*, 91 M 334, 343, 7 P 2d 540; *State ex rel. Sands v. District Court*, 95 M 427, 432, 26 P 2d 970.

CHAPTER 36**DEMURRER TO ANSWER**

- Section 9152. When plaintiff may demur to answer.
 9153. Grounds of demurrer.
 9154. Plaintiff may demur to whole answer or to one or more defenses.
 9155. When plaintiff may demur to answer.
 9156. Demurrer to counterclaim.
 9157. Must specify grounds.

9152. When plaintiff may demur to answer. The plaintiff may, within the same length of time after service of the answer as the defendant is

allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counterclaims set up in the answer.

History: En. Sec. 90, p. 62, L. 1877; re-en. Sec. 90, 1st Div. Rev. Stat. 1879; re-en. Sec. 92, 1st Div. Comp. Stat. 1887; re-en. Sec. 710, C. Civ. Proc. 1895; re-en. Sec. 6554, Rev. C. 1907; re-en. Sec. 9152, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 443.

Operation and Effect

A demurrer cannot be interposed to a portion of a pleading only. *State ex rel. Lease v. Wilkinson et al.*, 59 M 327, 331, 196 P 878.

References

Cited or applied as section 92, First Division Compiled Statutes 1887, in *Sanford v. Gates*, 18 M 398, 45 P 559.

9153. Grounds of demurrer. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined;
2. That the answer does not state facts sufficient to constitute a defense or counterclaim;
3. That the answer is ambiguous, unintelligible, or uncertain.

History: En. Sec. 91, p. 62, L. 1877; re-en. Sec. 91, 1st Div. Rev. Stat. 1879; re-en. Sec. 93, 1st Div. Comp. Stat. 1887; re-en. Sec. 711, C. Civ. Proc. 1895; re-en. Sec. 6555, Rev. C. 1907; re-en. Sec. 9153, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 444.

References

Cited or applied as section 711, Code of Civil Procedure, in *Power v. Sla*, 24 M 243, 254, 61 P 468.

9154. Plaintiff may demur to whole answer or to one or more defenses. The plaintiff may demur to the whole answer, or to one or more separate defenses or counterclaims stated therein. In the latter case he may reply to the defenses or counterclaims not demurred to.

History: En. Sec. 712, C. Civ. Proc. 1895; re-en. Sec. 6556, Rev. C. 1907; re-en. Sec. 9154, R. C. M. 1921.

Operation and Effect

Under this section, plaintiff may demur to one or more separate defenses or reply to others, but he must challenge all by joining issue of law or fact within the

time allowed by section 9158, if he does not defendant may move for judgment on the pleadings under section 9160. *Mihelich v. Butte Electric Ry. Co. et al.*, 85 M 604, 613, 281 P 540.

References

State ex rel. Lease v. Wilkinson et al., 59 M 327, 331, 196 P 878.

9155. When plaintiff may demur to answer. The plaintiff may demur to a counterclaim or a defense consisting of new matter, contained in the answer, on the ground that it is insufficient in law upon the face thereof.

History: En. Sec. 713, C. Civ. Proc. 1895; re-en. Sec. 6557, Rev. C. 1907; re-en. Sec. 9155, R. C. M. 1921.

9156. Demurrer to counterclaim. The plaintiff may also demur to a counterclaim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto appear on the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof;
2. That the defendant has not legal capacity to recover upon the same;
3. That there is another action pending between the same parties for the same cause;
4. That the counterclaim is not of the character specified in section 9138 of this code;

5. That the counterclaim does not state facts sufficient to constitute a cause of action.

History: En. Sec. 714, C. Civ. Proc. 1895; re-en. Sec. 6558, Rev. C. 1907; re-en. Sec. 9156, R. C. M. 1921.

Operation and Effect

Where a demurrer is interposed to a counterclaim on the ground that it does

not state facts sufficient to constitute a cause of action, it is sufficient to state the objection in the language of subdivision 6 of section 9131. *Power v. Sla*, 24 M 243, 254, 61 P 468.

9157. Must specify grounds. A demurrer, taken under the last section, must distinctly specify the objections to the counterclaim; otherwise it may be disregarded. The mode of specifying the objections is the same as where a demurrer is taken to a complaint.

History: En. Sec. 715, C. Civ. Proc. 1895; re-en. Sec. 6559, Rev. C. 1907; re-en. Sec. 9157, R. C. M. 1921.

Operation and Effect

A demurrer interposed to a counterclaim on the ground that it was "not one of the character specified," in section 9138, was sufficient to raise the ques-

tion whether or not the counterclaim was one which could be set up in the particular action. *Mulcahy v. Duggan*, 67 M 9, 14, 214 P 1106.

References

Cited or applied as section 715, Code of Civil Procedure, in *Power v. Sla*, 24 M 243, 254, 61 P 468.

CHAPTER 37

REPLY

- Section 9158. What reply to contain—time for filing.
 9159. Same.
 9160. Failure to reply.
 9161. Demurrer to reply.

9158. What reply to contain—time for filing. Where the answer contains a counterclaim, or any new matter, the plaintiff, if he does not demur, shall, within twenty days after service and filing of the answer, reply to such counterclaim or new matter, denying, generally or specifically, each allegation controverted by him, or of any knowledge or information thereof sufficient to form a belief, and he may allege, in ordinary or concise language, and without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such counterclaim or new matter in the answer.

History: En. Sec. 720, C. Civ. Proc. 1895; amd. Sec. 1, p. 142, L. 1899; amd. Sec. 1, Ch. 5, L. 1905; re-en. Sec. 6560, Rev. C. 1907; re-en. Sec. 9158, R. C. M. 1921.

Answer of Contributory Negligence Must Be Denied

Allegations in the answer of contributory negligence, in an action for personal injuries, constitute new matter, the truth of which is admitted by failure of plaintiff to reply thereto, and any mere anticipatory denials in the complaint of the facts constituting such new matter are insufficient. *State ex rel. Mont. C. Ry. Co. v. District Court*, 32 M 37, 40, 79 P 546.

Cannot Amend or Be the Basis of Recovery Alone

The reply, being merely responsive to matters alleged affirmatively in the answer, cannot perform the office of amending the complaint, nor itself become the basis of recovery. *Thornton v. Kaufman*, 35 M 181, 184, 88 P 796; *Manuel v. Turner*, 36 M 512, 518, 93 P 808; *Waite v. Shoemaker & Co.*, 50 M 264, 275, 146 P 736; *Doorbos v. Turner*, 50 M 370, 378, 147 P 277; *Buhler v. Loftus*, 53 M 546, 561, 165 P 601.

Defense of Statute of Limitations May Be Made by Reply

The defense of the statute of limitations can be made available only by answer or

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reply. *Wastl v. Montana Union Ry. Co.*, 24 M 159, 172, 61 P 9.

Function of Reply—When Allegations Constitute Departure From Complaint

Under this section, prescribing the function of a reply, such pleading cannot aid the complaint by supplying omissions therein or broadening its scope by adding new grounds of relief, nor is plaintiff permitted to take a position inconsistent with that taken in the complaint; if such allegations are made in the reply they constitute a departure from the cause of action stated in the complaint. *McCarthy v. Employers' Fire Ins. Co.*, 97 M 540, 555, 37 P 2d 579.

Id. Plaintiff in an action to recover on an insurance policy covering an automobile against loss by fire alleged in his complaint that he had complied with all the conditions of the policy to be kept and performed by him. The answer set up the special defense that the policy had become void because the insured had mortgaged the car without the assent of the insurer contrary to the provisions of the policy. By reply plaintiff pleaded waiver and estoppel. As against the contention of defendant that the reply constituted a departure from the cause of action alleged in the complaint, held, that the averments in the complaint as to performance by plaintiff referred only to conditions precedent, while the reply dealt with a condition subsequent which defendant could waive if it saw fit, and that the reply did not conflict with the complaint.

"New Matter"

The "new matter" in an answer which, under this section, calls for a reply, is such only as calls for a defense or a counterclaim, anything else not being new matter. *Stephens v. Conley*, 48 M 352, 368, 138 P 189.

If the facts stated in the answer can be proved under a general denial, they do not constitute new matter, and failure to reply does not amount to an admission of the truth of the matters stated. *Stephens v. Conley*, 48 M 352, 369, 138 P 189; *Doichinoff v. Chicago, Milwaukee & St. Paul Ry. Co.*, 51 M 582, 587, 154 P 924.

Failure of plaintiff to reply to an averment in defendant's answer to the effect that decedent stepped upon the track immediately in front of the locomotive, where his presence could not be discovered in time to avoid striking him, did not amount to an admission that his death was the result of his own negligence or of an unavoidable accident, since such allegation did not constitute new matter which required a reply. *Doichinoff v. Chicago, Milwaukee & St. Paul Ry. Co.*, 51 M 582, 587, 154 P 924.

In an action by the purchaser of land to recover possession, the answer alleging that vendor's tenant was wrongfully in possession at the time of the conveyance and that plaintiff, after accepting the deed, had sued the tenant in an attempt to oust him, did not constitute new matter requiring a reply. *Adams v. Durfee et al.*, 67 M 315, 321, 215 P 664.

Where defendant in his answer sets up facts which could not be proved under a mere denial, his allegations in that respect constitute "new matter" which, under this section, requires a reply. *Mihelich v. Butte Electric Ry. Co. et al.*, 85 M 604, 612 et seq., 281 P 540.

Scope of New Matter in the Reply

The only pleading of facts by plaintiff to an answer is a reply, which may allege new matter, not inconsistent with the complaint, constituting a defense to the counterclaim or new matter in the answer. Every allegation of new matter in a reply is deemed denied. *Gilechrist v. Hore*, 34 M 443, 447, 87 P 443.

Time Limit for Filing Reply

Under this section, a reply to a counterclaim must be filed within twenty days after service and filing of the answer; hence where a reply was not filed until nineteen months after the expiration of the twenty-day period and fourteen months after default had been entered, the court did not err in disregarding the belated pleading on motion for judgment on the counterclaim. *Munger v. Nelson*, 61 M 104, 107, 108, 201 P 286.

When Reply Required

A reply is required only when the answer contains new matter which constitutes a defense or counterclaim, stated as such. *Rand v. Butte Electric Ry. Co.*, 40 M 398, 406, 107 P 87.

Where defendant in an action in conversion pleaded new matter by way of estoppel as well as a counterclaim, and plaintiff did not plead to either, and the estoppel completely avoided the cause of action alleged in the complaint, defendant was entitled to judgment on the pleadings. *Middle States O. Corp. v. Tanner-Jones Co.*, 73 M 180, 184, 235 P 770.

References

Cited or applied as section 720, Code of Civil Procedure, before amendment, in *Aikens v. Frank*, 21 M 192, 198, 53 P 538; *Babcock v. Maxwell*, 21 M 507, 510, 54 P 943; *Brophy v. Downey*, 26 M 252, 253, 67 P 312; *Briggs v. Collins*, 27 M 405, 406, 71 P 307; *Coleman v. Perry*, 28 M 1, 10, 72 P 42; *Flannery v. Campbell*, 30 M 172, 178, 75 P 1109; *Floyd-Jones v. Anderson*, 30 M 351, 356, 76 P 751.

9159. Same. A reply may contain two or more distinct avoidances of the same defense or counterclaim, but they must be separately stated and numbered.

History: En. Sec. 721, C. Civ. Proc. 1895; re-en. Sec. 6561, Rev. C. 1907; re-en. Sec. 9159, R. C. M. 1921.

References

Cited or applied as section 721, Code of Civil Procedure, in *Babcock v. Maxwell*,

21 M 507, 511, 54 P 943; *Brophy v. Downey*, 26 M 252, 253, 67 P 312; *Munger v. Nelson*, 61 M 104, 107, 201 P 286; *Micheli v. Butte Electric Ry. Co. et al.*, 85 M 604, 614, 218 P 540.

9160. Failure to reply. If the plaintiff fails to reply or demur to the counterclaim, the defendant shall be entitled to the same relief as a plaintiff upon the failure of defendant to demur or answer the complaint. If the answer contains new matter, and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on notice, for such judgment as he may be entitled to upon such statement, and the court may thereupon render judgment or order a reference or assessment for damages by jury, as the case may require.

History: En. Sec. 722, C. Civ. Proc. 1895; amd. Sec. 2, p. 143, L. 1899; re-en. Sec. 6562, Rev. C. 1907; re-en. Sec. 9160, R. C. M. 1921.

Operation and Effect

A plaintiff may have judgment without a replication if the new matter states no defense, or only such as might have been raised under a general denial in the answer. *Babcock v. Maxwell*, 29 M 31, 33, 74 P 64.

Where a motion for a judgment on the pleadings has been made by defendant under this section, on plaintiff's failure to reply to an answer setting up new matter, which motion has been argued and submitted to the court for decision, the application of plaintiff for dismissal of his action without prejudice comes too late, such argument and submission constituting a "trial" within the meaning of subdivision 1 of section 9317. *State ex rel. Mont. C. Ry. Co. v. District Court*, 32 M 37, 41, 79 P 546.

9161. Demurrer to reply. The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defense or counterclaim, contained in the reply, on the ground that it is insufficient in law upon the face thereof.

History: En. Sec. 723, C. Civ. Proc. 1895; re-en. Sec. 6563, Rev. C. 1907; re-en. Sec. 9161, R. C. M. 1921.

References

Cited or applied as section 723, Code of Civil Procedure, in *Babcock v. Maxwell*, 21 M 507, 511, 54 P 943; *Brophy v. Downey*, 26 M 252, 253, 67 P 312.

CHAPTER 38

VERIFICATION OF PLEADINGS

Section 9162. Pleadings must be subscribed.

9163. Verification of pleadings.

9162. Pleadings must be subscribed. Every pleading must be subscribed by the party or his attorney.

History: En. Sec. 51, p. 53, Bannack Stat.; amd. Sec. 51, p. 144, L. 1867; re-en. Sec. 61, p. 39, Cod. Stat. 1871; amd. Sec. 93, p. 62, L. 1877; re-en. Sec. 93, 1st Div. Rev. Stat. 1879; re-en. Sec. 95, 1st Div.

Comp. Stat. 1887; re-en. Sec. 730, C. Civ. Proc. 1895; re-en. Sec. 6564, Rev. C. 1907; re-en. Sec. 9162, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 446.

9163. Verification of pleadings. All complaints, answers, and replies must be verified as provided in this section, except that when an admission of the truth of the allegation might subject the party to a prosecution for felony or misdemeanor, or when the action or defense is in behalf of the state, county, or a subdivision thereof, or a municipal corporation, the verification may be omitted. The affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated on information and belief, and that as to those he believes it to be true. Such verification must be made by the party, or, if there are several parties united in interest or pleading, by one at least of such parties acquainted with the facts, if such party is in the county and capable of making the affidavit. The verification may also be made by the agent or attorney of the party, if the party is absent from the county where the attorney resides, or is from any other cause unable to verify the pleading, and in such case the verification must state that the deponent is the agent or attorney of the party, and the reason why such verification is made by such agent or attorney, and that the matters stated in the pleading are true to the best knowledge, information and belief of such agent or attorney. When a corporation is a party, the verification may be made by any officer thereof, and must state what officer he is, and that the matters stated therein are true to the best knowledge, information, and belief of such officer. If there is no officer of the corporation within the county, the verification may be made by its attorney.

History: Ap. p. Sec. 55, p. 144, L. 1867; amd. Sec. 9, p. 64, L. 1869; amd. Sec. 63, p. 39, Cod. Stat. 1871; re-en. Sec. 94, p. 62, L. 1877; re-en. Sec. 94, 1st Div. Rev. Stat. 1879; re-en. Sec. 96, 1st Div. Comp. Stat. 1887; en. Sec. 731, C. Civ. Proc. 1895; re-en. Sec. 6565, Rev. C. 1907; re-en. Sec. 9163, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 446.

Effect of Failure to Verify

Plaintiff is not entitled to judgment on the pleadings merely because the verification of the answer is defective. Bryant v. Davis, 22 M 534, 537, 57 P 143.

Verification of pleadings is not necessary to vest jurisdiction in courts; therefore, since entire absence of it does not affect jurisdiction, a mere defect in verification which might have been taken advantage of by timely objection but was not, the objection being thus waived, cannot affect it, and the judgment-roll in an action in which the verification to the complaint was defective was not rendered inadmissible in evidence by such defect.

Commercial Bank & Trust Co. v. Jordan, 85 M 375, 384, 278 P 832.

In General

No reason is apparent why the rule concerning affidavits in certiorari should be more strict regarding the proper affiant than is required by this section of the plaintiff in an action. An affidavit by the duly authorized agent or attorney of the party beneficially interested, in which the material averments are stated as true, to the knowledge of the affiant, is sufficient. State ex rel. Allen v. Napton, 24 M 450, 454, 62 P 686.

An ex parte order appointing a feeceiver cannot be based on the complaint alone, unless it satisfies the requirements of an evidential affidavit by a verification on affiant's own personal knowledge. A verification upon "knowledge, information, and belief" is insufficient. Benepe-Owenhouse Co. v. Scheidegger, 32 M 424, 431, 80 P 1024.

Pleadings in general must be verified, but, in permitting a defendant to set forth

in his answer as many defenses as he has, it was never intended to sanction perjury. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 165, 108 P 1057.

Not Part of Pleadings

Verifications are no part of the pleadings. *Johnson v. Puritan Min. Co.*, 19 M 30, 45, 47 P 337; *Bryant v. Davis*, 22 M 534, 537, 57 P 143.

Permits Pleadings to be Introduced Into Evidence

Since, under this section, pleadings must be verified, admissions in an answer may properly be offered in evidence; and the plaintiff in doing so need not embrace in his offer the entire answer, nor is he estopped from denying or disproving statements contained in the pleading. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 165, 108 P 1057.

Verification by One Party Sufficient

Under this section, the verification to an answer in an action against several de-

fendants may be made by one of them in behalf of all. *State ex rel. Ingersoll v. Clapp et al.*, 81 M 200, 210, 263 P 433.

When Verification on Best Knowledge and Belief Admissible

Where there are two defendants to an action, and one of them is absent from the county and the other is a corporation, answers verified on the best knowledge, information, and belief of the persons making them are correct. *Bryant v. Davis*, 22 M 534, 537, 57 P 143.

References

Cited or applied as section 731, Code of Civil Procedure, in *Butte & B. Co. v. Montana O. P. Co.*, 24 M 125, 127, 60 P 1039; *Lane v. Bailey*, 29 M 548, 551, 75 P 191; as section 6465, Revised Codes, in *State ex rel. Kolbow v. District Court*, 38 M 415, 418, 100 P 207; *Thedin et al. v. First Nat. Bank*, 67 M 65, 71, 214 P 956; *Clausen v. Chapin*, 69 M 205, 209, 221 P 1073.

CHAPTER 39

GENERAL RULES OF PLEADING

- Section 9164. Pleadings to be liberally construed.
 9165. Frivolous pleadings—how disposed of.
 9166. Sham or irrelevant pleadings.
 9167. Account—how pleaded.
 9168. Description of real property.
 9169. Judgments, etc.—how pleaded.
 9170. Condition precedent.
 9171. Instrument for the payment of money only.
 9172. Copy of written instrument in pleading.
 9173. Pleading statute of limitations.
 9174. Pleading private statutes.
 9175. Libel and slander—how stated in complaint.
 9176. Answer in such cases.
 9177. Judgment determining rights between codefendants—demand for relief.
 9178. Allegations not denied—when deemed true.
 9179. Construction of “not sufficient knowledge,” etc.
 9180. Material allegation defined.
 9181. Supplemental pleading.
 9182. Pleadings subsequent to complaint must be filed and served.

9164. Pleadings to be liberally construed. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

History: En. Sec. 69, p. 55, *Bannack Stat.*; re-en. Sec. 70, p. 147, *L. 1867*; re-en. Sec. 78, p. 42, *Cod. Stat. 1871*; re-en. Sec. 98, 1st Div. Rev. Stat. 1879; re-en. Sec. 98, 1st Div. Comp. Stat. 1887; re-en. Sec. 740, *C. Civ. Proc. 1895*; re-en. Sec. 6566, *Rev. C. 1907*; re-en. Sec. 9164, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 452*.

Abolishes Rigorous Rules of the Common Law

The effect of this section and section 9191 is to abolish the rigorous rule of the

common law requiring the pleading to be construed most unfavorably to the pleader. *Daniels v. Andes Ins. Co.*, 2 M 78, 84; *Becker v. Board of Commissioners*, 11 M 490, 495, 28 P 1116; *Conrad National Bank v. Great Northern Ry. Co.*, 24 M 178, 182, 61 P 1.

Operation and Effect

Although this section and section 9191 have abolished the rigorous rules of the common law requiring the pleading to be construed most unfavorably to the pleader,

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they do not require such a liberal construction as will read into the pleading a substantial allegation which has been omitted therefrom. *Conrad National Bank v. Great Northern Ry. Co.*, 24 M 178, 182, 61 P 1; *Kosonen v. Waara*, 87 M 24, 31, 285 P 668.

Mere matters of form or defective statement, not affecting the substance, will not be held fatal if the pleading, as a whole, shows its general intent and purpose. *Conrad National Bank v. Great Northern Ry. Co.*, 24 M 178, 182, 61 P 1.

Whatever is necessarily implied in, or reasonably to be inferred from, an allegation, is to be taken as directly averred. *Harmon v. Fox*, 31 M 324, 326, 78 P 517; *County of Silver Bow v. Davies*, 40 M 418, 424, 107 P 81; *Allen v. Bear Creek Coal Co.*, 43 M 269, 278, 115 P 673; *Daily v. Marshall*, 47 M 377, 391, 133 P 681; *Gauss v. Trump*, 48 M 92, 98, 135 P 910; *Stokes v. Long*, 52 M 470, 478, 159 P 28; *Buhler v. Loftus*, 53 M 546, 557, 165 P 601; *Doane v. Marquisee*, 63 M 166, 170, 206 P 420; *Grant v. Nihill*, 64 M 420, 435 et seq., 210 P 914; *Connelly Co. v. Schlueter Bros. et al.*, 69 M 65, 74, 220 P 103; *Ray et al. v. Divers et al.*, 72 M 513, 516, 234 P 246; *Cramer v. Deschler Broom Factory*, 79 M 220, 223, 255 P 346; *Gotzian & Co. v. Norris et al.*, 89 M 307, 312, 297 P 489.

Where the subject of denial, on information and belief, is certain specified allegations of the complaint, the omission of the word "thereof," in denying that the defendant has any knowledge or information sufficient to form a belief, is immaterial; the pleading is to be liberally construed. *Pengelly v. Peeler*, 39 M 26, 31, 101 P 147.

An allegation that the chief deputy of a clerk of the district court issued jurors' and witnesses' certificates as chief deputy implies that he issued them in the form and under the requirements prescribed by the statute. *County of Silver Bow v. Davies*, 40 M 418, 425, 107 P 81.

This section does not permit the reading into the pleading of a statement of a necessary, substantial fact which has been omitted, so as to make it state a cause of action where none is stated; but it does require that whatever is necessarily implied by a statement directly made, or is reasonably to be inferred therefrom, is to be taken as directly averred. *Allen v. Bear Creek Coal Co.*, 43 M 269, 278, 115 P 673.

As against an attack for lack of substance, the allegations of a pleading are to be liberally construed, with a view to substantial justice between the parties; and whatever is necessarily implied in, or

is reasonably to be inferred from, an allegation is to be taken as directly averred. *Gauss v. Trump*, 48 M 92, 98, 135 P 910.

Before the rule that whatever is implied in or reasonably to be inferred from allegations of a pleading is to be taken as directly averred may be invoked, it must appear that sufficient facts are stated to furnish a basis for the implication or inference. *Smallhorn v. Freeman*, 61 M 137, 143, 201 P 567; *Grover v. Hines*, 66 M 230, 233, 213 P 250.

Where defendant was not misled by any allegations or lack of allegations in the complaint but was fully prepared to defend the action upon the merits, the judgment in favor of the plaintiff will not be reversed for mere technical defect in the pleading raised by general demurrer. *Davis v. Freisheimer*, 68 M 322, 331, 219 P 236.

Under the more modern doctrine of liberal construction of pleadings, held, that the complaint in an action for damages arising out of an automobile accident, alleging that defendant operated his machine "in such a negligent, careless and unlawful manner" as to run into a child lawfully in an alley, was sufficient as against the objection that the particular acts of negligence relied upon were not alleged. *Johnson v. Herring et al.*, 89 M 156, 173, 295 P 1100.

The allegations of a complaint must be liberally construed, and a complaint attacked by general demurrer, although defective in many particulars, will be held sufficient, if it alleges, directly or by necessary inference, facts showing plaintiff's primary right and its infringement by defendant, and is sufficiently certain to enable the latter to prepare his evidence to meet the alleged facts. *Johnson et al. v. Johnson et al.*, 92 M 512, 516, 15 P 2d 842.

Use of Participial Phrase Permitted Under

While the use of the participial phrase in pleading under the common law was not permissible, it does not vitiate a pleading under Code pleading. *Cook v. Galen*, 83 M 334, 340 et seq., 272 P 250.

References

Cited or applied as section 98, p. 64, Laws of 1877, in *Conklin v. Fox*, 3 M 208; *O'Brien v. School District No. 1*, 68 M 432, 434, 219 P 1113; *Robinson v. F. W. Woolworth Co.*, 80 M 431, 442, 261 P 253; *Boyd v. Great Northern Ry. Co. et al.*, 84 M 84, 92, 274 P 293; *Custer v. Missoula Public Service Co.*, 91 M 136, 141, 6 P 2d 131; *Brown v. Columbia Amusement Co.*, 91 M 174, 187, 6 P 2d 874; *Stagg v. Stagg*, 96 M 573, 590 et seq., 32 P 2d 856.

9165. Frivolous pleadings—how disposed of. If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs may be awarded in the discretion of the court.

History: En. Sec. 741, C. Civ. Proc. 1895; re-en. Sec. 6567, Rev. C. 1907; re-en. Sec. 9165, R. C. M. 1921.

Operation and Effect

It was proper for the court to enter judgment for defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion made.

Moore v. Murray, 30 M 13, 17, 75 P 515.

Under this section an appeal does not lie from an order denying a motion for judgment on the pleadings. Corey v. Sunburst Oil & Gas Co., 72 M 383, 393, 233 P 909.

References

Cited or applied as section 6567, Revised Codes, in Union Bank & Trust Co. v. Himmelbauer, 57 M 438, 188 P 940.

9166. Sham or irrelevant pleadings. Sham and irrelevant answers and replies, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

History: Ap. p. Sec. 50, p. 52, Bannack Stat.; re-en. Sec. 60, p. 39, Cod. Stat. 1871; amd. Sec. 99, 1st Div. Rev. Stat. 1879; amd. Sec. 101, 1st Div. Comp. Stat. 1887; amd. Sec. 742, C. Civ. Proc. 1895; re-en. Sec. 6568, Rev. C. 1907; re-en. Sec. 9166, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 453.

Effect of Sham and Irrelevant Pleadings

Sham and irrelevant matter, when not stricken out on motion, will be wholly disregarded. Power v. Gum, 6 M 5, 9, 9 P 575.

What is a Sham Pleading

The sham pleading, or portion thereof to be eliminated on motion, is such as appears manifestly and inherently sham by reason of its incompatibility with the law, or the nature and condition of things within the judicial knowledge, or appears to be false by comparison with other declarations of the pleading; and these conditions should appear upon a consideration of the pleading alone. McDonald v. Pincus, 13 M 83, 86, 32 P 283.

A "sham" pleading within the meaning of this section, is one which appears to be false by comparison with other declarations of the pleading, or appears manifestly and inherently so by reason of its incompatibility with the law or the nature and condition of things within the judicial knowledge; "irrelevant" matter is such as has no connection with the cause of action, and "redundant" matter is that which is unnecessary or superfluous. Flatt v. Norman et al., 91 M 543, 549, 11 P 2d 798.

When Motion to Strike is Proper and When a Demurrer is Proper

For the purpose of purging a pleading of irrelevant and redundant matter, a motion to strike must be resorted to; this may be, in effect, a demurrer to that portion of the pleading to which objection is made; nevertheless, its office cannot be performed by a demurrer; a demurrer and a motion each has its own separate and distinct office. Plymouth Gold Min. Co. v. United States Fidelity Co., 35 M 23, 27, 88 P 565.

Where the plea of another action pending is open to the objection of being sham, irrelevant and redundant, it may, under this section, be stricken on motion; where, however, the sufficiency of the plea is sought to be tested, the proper practice is to demur. McCormick et al. v. Shields, 63 M 9, 12, 205 P 831.

If a pleading is open to the objection of being sham, irrelevant or redundant, it may be stricken on motion, under this section; but where it is the purpose of the party to test the sufficiency of a pleading in matter of form or substance, the proper practice is to demur. Flatt v. Norman et al., 91 M 543, 549, 11 P 2d 798.

When it is Proper to Strike a Pleading as Sham

Where, after a general demurrer to certain affirmative defenses in an action on a surety company's bond had been sustained as not presenting a defense, de-

fendant in an amended answer repleaded them, the court, under this section, properly ordered them stricken as sham. *State v. American Surety Co. of New York*, 78 M 504, 512, 255 P 1063.

References

Cited or applied as section 101, First Division Compiled Statutes 1887, in *City of Butte v. Peasley*, 18 M 303, 45 P 210.

9167. Account—how pleaded. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days, or such further time as the court may allow, or may be agreed to by the parties, after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.

History: En. Sec. 55, p. 53, Bannack Stat.; amd. Sec. 56, p. 145, L. 1867; re-en. Sec. 64, p. 40, Cod. Stat. 1871; re-en. Sec. 99, p. 64, L. 1877; re-en. Sec. 99, 1st Div. Rev. Stat. 1879; re-en. Sec. 101, 1st Div. Comp. Stat. 1887; amd. Sec. 743, C. Civ. Proc. 1895; re-en. Sec. 6569, Rev. C. 1907; re-en. Sec. 9167, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 454.

Applies Only to Open, Unsettled Accounts

This section applies only to actions upon open, unsettled accounts, and not to actions upon accounts stated, and the court may order an additional statement, the penalty for refusal to furnish the same being punishment as for a contempt. *Martin v. Heinze*, 31 M 73, 74, 77 P 427. See also *Cohen v. Clark*, 44 M 151, 157, 119 P 775.

The term "account," in this section, is not used in the same sense as it is in sec-

tion 9640. *Moran v. Ebey*, 39 M 517, 519, 104 P 522.

The provision of this section, that if plaintiff in an action on an account does not within five days after demand by defendant for a copy of the account (or items of account) furnish it, he shall be precluded from giving evidence thereof, has no application to an action on an account stated. *Fowlis v. Heinecke*, 87 M 117, 119, 287 P 169.

Effect of Failure to Furnish

Failure to furnish a bill of particulars in a cause where a bill may properly be demanded bars the delinquent party from being heard at the trial. *Munger v. Nelson*, 61 M 104, 111, 201 P 286.

References

Cited or applied as section 743, Code of Civil Procedure, in *Martin v. Heinze*, 31 M 68, 72, 77 P 427.

9168. Description of real property. In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

History: En. Sec. 100, p. 64, L. 1877; re-en. Sec. 100, 1st Div. Rev. Stat. 1879; re-en. Sec. 102, 1st Div. Comp. Stat. 1887; re-en. Sec. 744, C. Civ. Proc. 1895; re-en. Sec. 6570, Rev. C. 1907; re-en. Sec. 9168, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 455.

9169. Judgments, etc.—how pleaded. In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts concerning jurisdiction.

History: En. Sec. 58, p. 53, Bannack Stat.; re-en. Sec. 59, p. 145, L. 1867; re-en. Sec. 67, p. 40, Cod. Stat. 1871; re-en. Sec. 101, p. 64, L. 1877; re-en. Sec. 101, 1st Div. Rev. Stat. 1879; re-en. Sec. 103, 1st Div. Comp. Stat. 1887; re-en. Sec. 745, C. Civ. Proc. 1895; re-en. Sec. 6571, Rev. C. 1907; re-en. Sec. 9169, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 456.

Judgments of Inferior Courts

In pleading the judgment of a court of inferior jurisdiction, and the issuance of an attachment therefrom, the complaint must allege the facts which gave such inferior court jurisdiction over the defendant therein, and authorized it to issue the writ. *Harmon v. Comstock Horse & Cattle Co.*, 9 M 243, 247, 23 P 470.

In pleading a judgment of a justices' court, the pleader must either aver that the judgment was "duly given or made," or the facts conferring jurisdiction upon the justice's court must be alleged and proved. *Weaver v. English*, 11 M 84, 85, 27 P 396.

This section applies to proceedings in justices' courts. *State v. Lagoni*, 30 M 472, 476, 76 P 1044.

The reason for the rule that the jurisdictional facts must be pleaded, either directly or by the statutory method, is that neither the inferior court's jurisdiction nor the regularity of the proceedings is presumed. *State v. Lagoni*, 30 M 472, 477, 76 P 1044.

One whose asserted claim depends upon the validity of a justice's judgment may plead simply that such judgment was "duly given or made"; but, if such allegation is controverted, he must show affirmatively that the court which rendered the judgment had jurisdiction. *Miller v. Miller*, 47 M 150, 154, 131 P 23.

No presumptions are indulged in favor of the regularity of the proceedings of a justice's court; hence where the validity of a judgment of that court is called in question, the proceedings had therein must be incorporated in the record on appeal. *Beck v. Felenzer et al.*, 69 M 592, 598, 223 P 499.

In pleading a judgment of a court of record and of general jurisdiction the jurisdictional facts need not be alleged, the presumption being in favor of jurisdiction and of all things requisite to the validity of the judgment; as to a judgment of an inferior court, the pleader may, under this section, simply allege that the judgment had been duly given or made, or set out the facts conferring jurisdiction, the provision of said section not being exclusive. *Thelen v. Vogel et al.*, 86 M 33, 37, 281 P 753.

Operation in General

An averment that letters testamentary were "duly revoked" by a court of competent jurisdiction is sufficient, without setting forth the facts conferring jurisdiction. *Territory v. Cox*, 3 M 197, 205.

In a complaint by an administrator, it is not necessary to state the facts showing jurisdiction of the court to grant letters; it is sufficient to state that letters were duly given and made; but the better practice is to state the facts. *Knight v. Le Beau*, 19 M 223, 225, 47 P 952.

A complaint alleging that an insane person was "so declared by a court of competent jurisdiction," and "was duly committed to the insane asylum," does not show the duty of the keeper of the asylum to receive and keep him, since the alle-

gation does not show the name of the court, or that any order was made or delivered to such keeper. *Walter v. Mitchell*, 25 M 385, 388, 65 P 5.

Stating that an order was "duly given and made" is no more than the statement of a conclusion of law, but it is made sufficient by this section, and is for the purpose of obviating the necessity of pleading the jurisdictional facts as the common law requires. *State v. Lagoni*, 30 M 472, 476, 76 P 1044.

This section was adopted to avoid the necessity of pleading the various steps taken in the course of litigation. *Mears v. Shaw*, 32 M 575, 577, 81 P 338.

A complaint alleging that on a certain date certain parties were adjudged bankrupts by the district court of the United States at a term of the court held in a certain city, in proceedings then pending in that court, under the provisions of the bankruptcy act of 1898, was an insufficient allegation of the rendition of the adjudication, in that it failed to allege that it was "duly given or made." *Mears v. Shaw*, 32 M 575, 578, 81 P 338.

In a suit on a judgment, an allegation in a complaint that the judgment was "made, filed, and entered," while not strictly in the words of the statute, is cured by the averment of a proposed answer that said judgment "was duly given and made." *Storer v. Graham*, 43 M 344, 350, 116 P 1011.

Allegation of the complaint in an action for malicious prosecution for grand larceny in a justice's court, to the effect that the justice dismissed the charge "in due manner, in due course of law," held sufficient to show determination of the prosecution in plaintiff's favor, and not open to the objection that it was fatally defective because not in conformity with this section, providing that where a judgment or other determination of a court is pleaded it may be stated as having been "duly given or made," the statute applying only where the pleader chooses to allege the jurisdiction of the court in the abbreviated form in a cause where the right of action depends upon the validity of the judgment or order pleaded. *Robinson v. Gordon*, 61 M 124, 126, 201 P 573.

Plaintiff's allegations that there existed an encumbrance on land within an irrigation district by virtue of a bond issue and that such issue had been regularly made, levied and issued were mere legal conclusions; to show the validity of the bond issue, proper pleading required a showing that the district court had made an order of confirmation, which, if made, may be alleged as "having been duly given and made," under this section. *Clark v. Demers*, 78 M 287, 291, 254 P 162.

Pleading Order of Appointment as Executor or Administrator

An allegation that H. "is now the duly appointed, qualified and acting administrator" of an estate was insufficient as a pleading that the administrator had been appointed by an order "duly given or made," as permitted under this section,

to show the jurisdictional fact of his appointment, and admission of evidence in support of it was therefore error. *Henderson et al. v. Daniels*, 62 M 363, 376, 205 P 964.

References

Grasswick v. Miller, 82 M 364, 372, 267 P 299.

9170. Condition precedent. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the fact showing such performance.

History: En. Sec. 59, p. 53, *Bannack Stat.*; re-en. Sec. 60, p. 145, L. 1867; re-en. Sec. 68, p. 40, *Cod. Stat.* 1871; re-en. Sec. 102, p. 64, L. 1877; re-en. Sec. 102, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 104, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 746, *C. Civ. Proc.* 1895; re-en. Sec. 6572, *Rev. C.* 1907; re-en. Sec. 9170, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 457.

Operation and Effect

A complaint in an action on a fire policy sufficiently alleges performance of a condition precedent in the policy, requiring loss to be ascertained by arbitrators in case of disagreement, when it alleges generally that plaintiff has duly performed all the conditions of the policy on his part. *Ackley v. Phenix Ins. Co.*, 25 M 272, 277, 64 P 665.

An allegation that the plaintiff actually completed all of the work and labor to be by him performed under his contract, and did all of the things to be by him performed under said contract, and did all of the things in said contract of him required to be done, is a sufficient allegation of performance of the contract, and meets the

requirements of this section. *Ivanhoff v. Teale*, 47 M 115, 117, 130 P 972.

In declaring upon a contract containing conditions precedent, a party may, under this section, allege generally that he has performed all the conditions on his part, provided he couch the allegations in the terms of the statute or in terms equivalent thereto. *Enterprise Sheet Metal Works v. Schendel*, 55 M 42, 50, 173 P 1059.

The lapse of sixty days mentioned, not being a condition precedent which plaintiff could perform before commencing suit, the general allegation, permissible under this section that she had performed all conditions precedent to be performed by her under the contract, did not supply the necessary allegation that the period had elapsed before filing complaint. *Smith v. Franklin Fire Ins. Co.*, 61 M 441, 446, 202 P 751.

References

Cited or applied as section 68, p. 40, *Codified Statutes* 1871, in *Hibour v. Reedling*, 3 M 13, 18.

9171. Instrument for the payment of money only. Where a cause of action, defense, or counterclaim is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument according to its legal effect.

History: En. Sec. 747, *C. Civ. Proc.* 1895; re-en. Sec. 6573, *Rev. C.* 1907; re-en. Sec. 9171, *R. C. M.* 1921.

References

Cited or applied as section 6573, *Revised Codes*, in *J. I. Case Threshing Machine Co. v. Simpson*, 54 M 316, 318, 170 P 12.

9172. Copy of written instrument in pleading. The insertion in a pleading of a copy of a written instrument is equivalent to setting forth the instrument according to its legal effect.

History: En. Sec. 748, *C. Civ. Proc.* 1895; re-en. Sec. 6574, *Rev. C.* 1907; re-en. Sec. 9172, *R. C. M.* 1921.

9173. Pleading statute of limitations. In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

History: En. Sec. 103, p. 64, L. 1877; re-en. Sec. 103, 1st Div. Rev. Stat. 1879; re-en. Sec. 105, 1st Div. Comp. Stat. 1887; re-en. Sec. 749, C. Civ. Proc. 1895; re-en. Sec. 6575, Rev. C. 1907; re-en. Sec. 9173, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 458.

Operation and Effect

Where the answer alleges that a cause of action is barred by the statute of limitations, it must specifically point out the particular section under which the action is barred. *Stewart v. Budd*, 7 M 573, 579, 19 P 221.

The recording of a deed, containing a mistake, is to be considered with other facts and circumstances in determining whether the party affected by such mistake is to be charged with notice, either

actual or constructive; the fact of recording alone will not so charge him; and an action brought by such party for the reformation of such an instrument, was held not to be barred by the statute of limitations because of the mere fact that more than five years had elapsed between the date of the recording and the date of the commencement of such action. *American Min. Co. v. Basin & Bay State Min. Co.*, 39 M 476, 482, 104 P 525.

In pleading the statute of limitations, it is not necessary to state the facts showing the defense, a statement that the cause of action is barred by the provisions of the section of the codes relied upon being sufficient. *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 89, 10 P 2d 1061.

9174. Pleading private statutes. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court thereupon shall take judicial notice thereof.

History: En. Sec. 60, p. 54, Bannack Stat.; re-en. Sec. 61, p. 145, L. 1867; re-en. Sec. 69, p. 40, Cod. Stat. 1871; re-en. Sec. 104, p. 65, L. 1877; re-en. Sec. 104, 1st Div. Rev. Stat. 1879; re-en. Sec. 106, 1st Div. Comp. Stat. 1887; re-en. Sec. 750, C. Civ. Proc. 1895; re-en. Sec. 6576, Rev. C. 1907; re-en. Sec. 9174, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 459.

Operation and Effect

One who bases his action against a city for compensation for services rendered, upon an ordinance, must plead it, either, under this section, by giving the date of passage and the title thereof, or by setting out in *haec verba* the whole or so much of it as relates to the action, or by giving the substance of its contents, so stated as to enable the court to judge from the provision of the ordinance itself. *Dineen v. City of Butte*, 83 M 370, 272 P 243.

9175. Libel and slander—how stated in complaint. In an action for libel and slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken.

History: En. Sec. 61, p. 54, Bannack Stat.; re-en. Sec. 62, p. 145, L. 1867; re-en. Sec. 70, p. 40, Cod. Stat. 1871; re-en. Sec. 105, p. 65, L. 1877; re-en. Sec. 105, 1st Div. Rev. Stat. 1879; re-en. Sec. 107, 1st Div. Comp. Stat. 1887; re-en. Sec. 751, C. Civ. Proc. 1895; re-en. Sec. 6577, Rev. C. 1907; re-en. Sec. 9175, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 460.

Operation and Effect

When the words are unequivocal in their import and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary

to allege the meaning intended, or set forth such extraneous facts by proper averments. *Paxton v. Woodward*, 31 M 195, 209, 78 P 215.

In an action for libel founded on an article in a newspaper concerning a certain class of attorneys styled as "shysters" and referring to incidents occurring at a certain inquest, without, however, naming plaintiff or mentioning any individual in particular, which article was libelous per se, the complaint alleging that the matter printed was published "of and concerning the plaintiff" and that readers of the paper understood that plaintiff was the person alluded to, was sufficient under this section to permit of proof showing that plain-

tiff was the person concerning whom the article was published, and was not demurrable. *Nolan v. Standard Publishing Co. et al.*, 67 M 212, 222 et seq., 216 P 571.

While, before recovery of damages in a slander action is permissible, it must appear that at least one person of those who heard the defamatory statement knew that plaintiff was meant, since otherwise there would be no publication and therefore no slander, plaintiff is not required to so allege in the complaint but may prove such fact under the general allegation authorized by this section, that the statement was made of and concerning plaintiff. *Kosonen v. Waara*, 87 M 24, 31 et seq., 285 P 668.

9176. Answer in such cases. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

History: En. Sec. 62, p. 54, Bannack Stat.; re-en. Sec. 63, p. 145, L. 1867; re-en. Sec. 71, p. 40, Cod. Stat. 1871; re-en. Sec. 106, p. 65, L. 1877; re-en. Sec. 106, 1st Div. Rev. Stat. 1879; re-en. Sec. 108, 1st

Div. Comp. Stat. 1887; re-en. Sec. 752, C. Civ. Proc. 1895; re-en. Sec. 6578, Rev. C. 1907; re-en. Sec. 9176, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 461.

9177. Judgment determining rights between codefendants—demand for relief. Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer. The controversy between the defendants must not delay a judgment, to which the plaintiff is entitled, unless the court otherwise directs.

History: En. Sec. 753, C. Civ. Proc. 1895; re-en. Sec. 6579, Rev. C. 1907; re-en. Sec. 9177, R. C. M. 1921.

Operation and Effect

This section, which confers upon district courts the power to adjust the rights of codefendants inter sese, does not permit the adjustment of such rights in a case in which their claims are wholly independent of, and not in any way connected with, those of plaintiff, nor give the defendants

the right to file new or amended pleadings irrespective of the requirements of section 9187. *Meredith v. Roman*, 49 M 204, 211, 141 P 643.

Id. This section is nothing more than a declaration, in statutory form, of the familiar rule that a court of equity, when all the parties to a controversy are before it, will adjust the rights of all and leave nothing open for future litigation, if it can be helped.

9178. Allegations not denied—when deemed true. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party.

History: Ap. p. Sec. 64, p. 54, Bannack Stat.; amd. Sec. 65, p. 146, L. 1867; amd. Sec. 73, p. 41, Cod. Stat. 1871; re-en. Sec. 107, p. 65, L. 1877; re-en. Sec. 107, 1st Div. Rev. Stat. 1879; re-en. Sec. 109, 1st

Div. Comp. Stat. 1887; en. Sec. 754, C. Civ. Proc. 1895; re-en. Sec. 6580, Rev. C. 1907; re-en. Sec. 9178, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 462.

Operation and Effect

Where plaintiff admitted the execution of a bond pleaded by defendant, his denial of its plain and specific provisions is unavailing. *Aiken v. Frank*, 21 M 192, 198, 53 P 538.

Judgment on the pleadings is proper when the complaint is sufficient, and none of its material allegations are denied, and no affirmative matter is alleged to defeat the action. *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 23 M 311, 318, 58 P 870.

Id. Where judgment is rendered on the pleadings, it is not necessary, under this section, for the trial court to hear proof to determine the amount of damages.

9179. Construction of "not sufficient knowledge," etc. An allegation that the party has not sufficient knowledge or information to form a belief, with respect to a matter, must, for all purposes, including a criminal prosecution, be regarded as an allegation that the persons verifying the pleading has not such knowledge or information.

History: En. Sec. 755, C. Civ. Proc. 1895; re-en. Sec. 6581, Rev. C. 1907; re-en. Sec. 9179, R. C. M. 1921.

References

Cited or applied as section 754, Code of Civil Procedure, in *Babcock v. Maxwell*, 21 M 507, 510, 54 P 943; *Swain v. McMillan*, 30 M 433, 438, 76 P 943; *Gilchrist v. Hore*, 34 M 443, 447, 87 P 443; *Hogan v. Thrasher*, 72 M 318, 330, 233 P 607.

References

Cited or applied as section 755, Code of Civil Procedure, in *Milwaukee Gold Extraction Co. v. Gordon*, 37 M 209, 215, 95 P 995.

9180. Material allegation defined. A material allegation in pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

History: En. Sec. 65, p. 55, Bannack Stat.; re-en. Sec. 66, p. 146, L. 1867; re-en. Sec. 74, p. 41, Cod. Stat. 1871; re-en. Sec. 108, p. 65, L. 1877; re-en. Sec. 108, 1st Div. Rev. Stat. 1879; re-en. Sec. 110, 1st Div.

Comp. Stat. 1887; re-en. Sec. 756, C. Civ. Proc. 1895; re-en. Sec. 6582, Rev. C. 1907; re-en. Sec. 9180, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 463.

9181. Supplemental pleading. The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the cause occurring after the former complaint, answer, or reply.

History: En. Sec. 109, p. 65, L. 1877; re-en. Sec. 109, 1st Div. Rev. Stat. 1879; re-en. Sec. 111, 1st Div. Comp. Stat. 1887; re-en. Sec. 757, C. Civ. Proc. 1895; re-en. Sec. 6583, Rev. C. 1907; re-en. Sec. 9181, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 464.

Operation and Effect

Where, in an action on the defendant's guaranty for the payment of rent, the plaintiff makes out a prima facie case of nonpayment of the rent, by means of his deposition read in evidence, but a new trial is had, the burden is upon the defendant, on the second trial, in which the same deposition is put in evidence, to overcome such prima facie case, though the plaintiff has filed no supplemental pleading. *Isman v. Altenbrand*, 42 M 188, 196, 111 P 849.

The filing of an amended and supplemental complaint in one pleading is permissible under this section and 9186, and the relief asked therein may be different from that prayed in the original complaint. *National Bank of Montana v. Bingham*, 83 M 21, 33, 269 P 162.

Right is Discretionary With Court

The matter of filing a supplemental pleading is not one which a party may demand as of right, but is addressed to the discretion of the trial court, and in order to entitle the movant to favorable action the motion must be made within a reasonable time after the facts material to the cause come to his knowledge. *Pue v. Bushnell*, 72 M 265, 267, 233 P 124.

9181
64 P (2d) 621

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Id. Where defendant in an action on an open account did not move for leave to file a supplemental answer for the purpose of setting up his discharge in bankruptcy, until twenty months after he

had been adjudged a bankrupt and six months after his final discharge, and did not offer any excuse for the delay, refusal to grant the motion was not an abuse of discretion.

9182. Pleadings subsequent to complaint must be filed and served. All pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney.

History: En. Sec. 758, C. Civ. Proc. 1895; re-en. Sec. 6584, Rev. C. 1907; re-en. Sec. 9182, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 465.

CHAPTER 40

VARIANCES—AMENDMENTS—MISTAKES IN PLEADING

Section 9183. Material variances—how provided for.

9184. Immaterial variances—how provided for.

9185. When not to be deemed a variance—failure of proof.

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9190. Suing a party by a fictitious name—when allowed—use of initials.

9191. No error or defect to be regarded unless it affects substantial rights.

9192. Time for amendment, answer or reply after voting on demurrer.

9183. Material variances—how provided for. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just.

History: En. Sec. 110, p. 66, L. 1877; re-en. Sec. 110, 1st Div. Rev. Stat. 1879; re-en. Sec. 112, 1st Div. Comp. Stat. 1887; re-en. Sec. 770, C. Civ. Proc. 1895; re-en. Sec. 6585, Rev. C. 1907; re-en. Sec. 9183, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 469.

Applicable to Cases of Libel and Slander

This section applies as well to cases of libel and slander as to all others. *Fowlie v. Cruse*, 52 M 222, 237, 157 P 958.

Fatal Variance

Held, in an action against a sheriff for the conversion of a mortgaged crop of grain, that there was a fatal variance between pleading and proof where the complaint of plaintiff mortgagee alleged that his right of possession to the crop was by virtue of the lien growing out of the mortgage, whereas the proof showed that he went into possession under an agreement entered into between him and the mortgagor after the execution of the mortgage. *Torgerson v. Stocke*, 72 M 7, 11, 230 P 1096.

Where there is such a divergence between the issues tendered by plaintiff and the evidence that it cannot be said that

plaintiff has proved in substance the cause of action alleged, there is a variance which amounts to a failure of proof. *Kakos v. Byram et al.*, 88 M 309, 318, 292 P 909.

How Objected to

Defendant is not precluded from moving for a nonsuit upon the ground of a fatal variance between the allegations of the complaint and the proof, by his failure to object to the introduction of testimony by plaintiff. *Kalispell Liquor & Tobacco Co. v. McGovern*, 33 M 394, 398, 84 P 709.

While a variance which amounts to a failure of proof is subject to a motion for nonsuit, one which is immaterial and could not have misled defendant to his prejudice in making his defense upon the merits is immaterial under this section, and insufficient to warrant a reversal of the judgment. *St. George v. Boucher*, 84 M 158, 168, 274 P 489.

Requirement That It Misled Adverse Party

The judgment in favor of plaintiff in a water-right suit will not be reversed because of an alleged variance between the proof introduced to establish his right and

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an allegation in his replication, as indicated by a finding of the court, where the record does not disclose that appellants were misled to their prejudice. The variance will be deemed immaterial. *Vreeland v. Edens*, 35 M 413, 423, 89 P 735.

A party will not be heard to complain that he was misled to his prejudice, by a variance, unless he was surprised at the trial by having to meet issues not pleaded. *Frederick v. Hale*, 42 M 153, 161, 112 P 70.

A variance which does not mislead the defendant to his prejudice is insufficient under this section to warrant the granting of a nonsuit. *Wilcox v. Newman*, 58 M 54, 58, 190 P 138.

Where an alleged variance between the allegations of the complaint and proof is so slight that it could not have misled defendant or prejudiced his defense, and it does not appear that his counsel was surprised or did not have present witnesses whom they could otherwise have had, it will be deemed immaterial. *Peabody v. Northern Pacific Ry. Co.*, 80 M 492, 501, 261 P 261.

Where appellant does not claim that he was misled to his prejudice in making his defense or surprised by having to meet issues at the trial which were not pleaded, and especially where his motion for a directed verdict on the ground of variance appears contrary to the theory of the defense pleaded in his answer, the motion was properly denied. *Webber v. Massachusetts Bonding etc. Co.*, 81 M 351, 357, 263 P 101.

What is an Immaterial Variance

Where the complaint alleged that a railroad company so negligently managed its locomotive and cars as to kill an animal, and the proof showed that the animal had been fatally injured and was killed by a section boss of defendant to end its sufferings, defendant was not misled by the variance, and, substantial justice having been done, a judgment in favor of plaintiff should not be reversed. *Poindexter & Orr Live Stock Co. v. Oregon Short Line R. R. Co.*, 33 M 338, 342, 83 P 886.

Where, in a personal injury action against a street railway company, the complaint alleged that plaintiff, in attempting to board a street-car, was injured by the car suddenly moving forward, and the evidence revealed the fact that he was thrown from the car by a backward movement, and it did not appear that defendant was misled or its counsel surprised by this technical departure in the proof, the court properly overruled a motion for a new trial on the alleged ground of variance. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 239, 99 P 837.

If plaintiff's proof follows substantially the allegations of the complaint, a slight, technical variance is immaterial. *Wertz v. Lamb*, 43 M 477, 481, 117 P 89.

An immaterial variance will not work a reversal. *Stewart v. Stone & Webster Eng. Corp.*, 44 M 160, 173, 119 P 568.

Mere divergencies in detail in the proof from the allegation of a pleading are immaterial. *American L. & L. Co. v. Great Northern Ry. Co.*, 48 M 495, 502, 138 P 1102; *Milwaukee Land Co. v. Ruesink*, 50 M 489, 505, 148 P 396.

Where the plaintiff brought an action for services rendered, consisting of cooking, washing, and caring for the defendant, and for groceries, fuel, and other supplies furnished to the defendant, there was no variance where the evidence showed that the plaintiff "boarded" the defendant, and that the cooking and the furnishing of the food and fuel for that purpose were part of the "boarding"; but, even if there were a variance, it would be immaterial, as the defendant was not misled to his prejudice in making his defense upon the merits. *Matoole v. Sullivan*, 55 M 363, 367, 177 P 254.

Held, that the variance between plaintiff's allegation asserting ownership of a claim for damages to livestock, by reason of an assignment of it to him by the owner thereof, and evidence to the effect that such owner had merely assigned the claim to plaintiff for the purpose of suit and collection, reserving in himself the beneficiary interest in the result of the action, was immaterial and not one of substance, the defendant not having been prejudiced in its defense by the fact that plaintiff held only a limited and not the actual ownership of the thing in action. *Rice v. Chicago etc. Ry. Co.*, 59 M 571, 582, 197 P 999.

In an action for personal injuries the complaint in which alleged that while plaintiff, a section foreman, was assisting in moving a rail, his coemployees negligently permitted it to drop and strike an iron bar plaintiff was using, causing the bar to strike plaintiff, etc., whereas plaintiff's evidence showed that the bar was inserted in a hole in the rail which in turning carried with it the bar, striking plaintiff, the variance between pleading and proof was immaterial within the meaning of this section. *Stevens v. Hines et al.*, 63 M 94, 103, 206 P 441.

Plaintiff alleged one contract in his complaint under which defendant employed him as a farm-hand at a specified wage; his evidence disclosed that he worked under a number of different agreements as to the kind of work to be performed and wages to be paid. Held, that in view of the matters alleged in the answer which

required defendant to go into the entire matter of his employment of plaintiff and the wages to be paid at different times and for different periods, defendant could not have been misled to his prejudice in maintaining his defense on the merits, and that therefore the variance was immaterial under this section. *Wasley v. Dryden*, 66 M 17, 22, 212 P 491.

Where plaintiff sued on a guaranty of a note and the guaranty in terms showed that it was a guaranty of an account due plaintiff for which the note was given, the variance between the pleading and the proof held immaterial. *Schauer v. Morgan et al.*, 67 M 455, 467, 216 P 347.

If there was a variance or failure of proof between plaintiff's allegation in the complaint that one of the banks of defendant's irrigating canal was not sufficient to withstand the pressure of the water in the canal (according to defendant's contention referring to lateral pressure), and his proof indicating cutting away of the bank by overflow, it was immaterial, the record showing that defendant was neither surprised nor prejudiced thereby. *Watts v. Billings Bench Water Assn.*, 78 M 199, 218, 253 P 260.

Held that where the complaint in a personal injury action charged that plaintiff was injured by the act of defendants in suddenly and without warning lowering and dropping upon plaintiff a gate arm while the latter was passing over a crossing in an automobile, while plaintiff's testimony showed that instead of the gate being dropped upon plaintiff, the driver saw it descending but was unable to stop the automobile, with the result that the end of the gate arm scraped by the windshield and struck plaintiff, an instruction that the jury should find for defendants because of a fatal variance was properly refused. *Peabody v. Northern Pacific Ry. Co.*, 80 M 492, 501, 261 P 261.

In an action brought under the federal Employers' Liability Act against a railway company by a section-hand, for personal injuries alleged in the complaint to have been sustained while unloading ties from a gondola car, through the negligence of a fellow-servant in dislodging a tie from the top of a pile which struck plaintiff, causing the injury, his proof on the contrary showing that the tie was pried loose by the fellow-servant from another tie to which it was frozen, the two standing against the side of the car, held, that the variance was immaterial and that the court in holding it fatal and granting a nonsuit committed error, particularly so in the absence of any suggestion that defendant was surprised or misled in maintaining its defense by having to meet issues not pleaded. *Kakos v. Byram et al.*, 88 M 309, 318, 292 P 909.

When the purpose of an action by a tenant was merely to recover an advance payment of rent because of refusal of defendant to deliver possession of the premises, and not one for damages for breach of contract, the fact that the complaint alleged the renting of two rooms while plaintiff's evidence referred to the renting of but one, the variance was immaterial. *Rhule v. Thrasher*, 88 M 468, 476, 295 P 266.

When an Objection to a Variance Should be Raised

The question of variance will not be considered when raised for the first time on appeal. *Southmayd v. Southmayd*, 4 M 100, 107, 5 P 318; *First National Bank v. McAndrews*, 7 M 150, 158, 14 P 763; *Kalispell Liquor & Tobacco Co. v. McGovern*, 33 M 394, 398, 84 P 709.

An appellate court will not sustain an objection to findings of a court below on the ground of variance between the proof and pleadings, raised therein for the first time, and when it does not appear that the complaining party has been misled thereby. *Southmayd v. Southmayd*, 4 M 100, 107, 5 P 318.

The losing party will not be heard to assert on appeal, for the first time, that there was a fatal variance. *Mosher v. Sutton's New Theater Co.*, 48 M 137, 149, 137 P 534.

Immaterial variances not affecting the substantial rights of the parties will be disregarded on appeal. *Willoburn Ranch Co. v. Yegen*, 49 M 101, 112, 140 P 231.

When an Amendment May be Made to Avoid a Variance

It is not error for the court to allow an amendment to a pleading after the evidence is in, in order that the allegations may correspond with the proofs adduced, where such amendment does not change the nature of the action or mislead the adverse party to his prejudice. *Williston v. Camp*, 9 M 88, 94, 22 P 501.

Where it is disclosed by proof upon the trial of a cause that the plaintiff is a minor, and the complaint is then amended to show the minority and emancipation of plaintiff, it is error for the court to sustain a demurrer to the complaint on the ground of want of legal capacity to sue, but the court, upon the suggestion of plaintiff's minority, should clothe him with capacity to sue by the appointment of a guardian, and allow amendment of his complaint by inserting the name of such guardian. *Hoskins v. White*, 13 M 70, 75, 32 P 163.

If, in the opinion of the court, the evidence presents a material variance, it may direct an amendment, upon proper terms, but it cannot submit the case to the jury upon evidence tending to establish a cause

of action wholly outside the issues, without according to the defendant full opportunity to controvert it with his proof. *McCrimmon v. Murray*, 43 M 457, 470, 117 P 73.

Where the plaintiff has given notice in his complaint that he relies on a written contract pleaded therein, and that the defendant must be prepared to meet the claim of a breach of it, he may not, at the trial, prove the pleaded contract as materially modified, unless the court has, on request, allowed him to amend, and given time to the defendant to plead to the amended complaint. *Ryan Co. v. Russell*, 52 M 596, 598, 161 P 307.

The giving of the notice prescribed by section 5080 is a necessary prerequisite to

the right of action against a city for an injury, and an indispensable part of the statement of the cause of action; hence, a notice that the injury was sustained on January 22d cannot be amended to show that the injury was sustained on January 24th, upon the plea of the right to amend, under this section, an immaterial variance. *Berry v. City of Helena*, 56 M 122, 128, 182 P 117.

References

Cited or applied as section 770, Code of Civil Procedure, in *Patten v. Hyde*, 23 M 23, 26, 57 P 407; as section 6585, Revised Codes, in *Cassidy v. Slemmons & Booth*, 41 M 426, 432, 109 P 976; *Armitage v. Chicago, Milwaukee & St. Paul Ry. Co.*, 54 M 38, 45, 166 P 301.

9184. Immaterial variances—how provided for. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

History: En. Sec. 111, p. 66, L. 1877; re-en. Sec. 111, 1st Div. Rev. Stat. 1879; re-en. Sec. 113, 1st Div. Comp. Stat. 1887; re-en. Sec. 771, C. Civ. Proc. 1895; re-en. Sec. 6586, Rev. C. 1907; re-en. Sec. 9184, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 470.

Operation and Effect

When the amendment is merely formal, such, for instance, as to correct a clerical error, the name of the court, a party, or a date, it need not be served or any delay allowed for answering. *Barber v. Briscoe*, 8 M 214, 219, 19 P 589.

Where, in an action in ejectment, defendants relying upon a contract for the sale of the premises, the evidence though not technically corresponding to the allegations of the answer, did support them in their general scope and meaning, the

divergence relating to the mode and time of payment of the final instalment of the purchase-money only, a finding in favor of plaintiff on the ground of variance was error. *Milwaukee Land Co. v. Ruesink*, 50 M 489, 504, 148 P 396.

References

Cited or applied as section 771, Code of Civil Procedure, in *Kalispell Liquor & Tobacco Co. v. McGovern*, 33 M 394, 399, 84 P 709; as section 6586, Revised Codes, in *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 239, 99 P 837; *Ryan Co. v. Russell*, 52 M 596, 598, 161 P 307; *Rice v. Chicago etc. Ry. Co.*, 59 M 570, 582, 197 P 999; *St. George v. Boucher*, 84 M 158, 168, 274 P 489; *Kakos v. Byram et al.*, 88 M 309, 319, 292 P 909.

9185. When not to be deemed a variance—failure of proof. Where, however, the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

History: En. Sec. 112, p. 66, L. 1877; re-en. Sec. 112, 1st Div. Rev. Stat. 1879; re-en. Sec. 114, 1st Div. Comp. Stat. 1887; re-en. Sec. 772, C. Civ. Proc. 1895; re-en. Sec. 6587, Rev. C. 1907; re-en. Sec. 9185, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 471.

Failure of Proof

The fact that a complaint in an action on a contract alleges a joint contract with several defendants, and the evidence discloses a separate contract with some of them, is not a variance amounting to a

failure of proof within the meaning of this section. *Chealey v. Purdy*, 54 M 489, 494, 171 P 926.

Held under section 11987, R. C. M. 1921, that where defendant was charged with obtaining money by a false pretense that he had credit at a certain bank and could borrow the money there, testified to by one witness only, there was a total failure of proof, in the absence of any false token or writing employed by the defendant or corroborating circumstances. *State v. Brantingham*, 66 M 1, 12, 212 P 499.

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Where, in an action for a forcible entry under subdivision 1 of section 9887, the evidence showed a peaceable entry, and a subsequent forcible turning out of plaintiff, which conduct is made a forcible entry by subdivision 2 of said section, the variance was such as to constitute a failure of proof. *Spellman v. Rhode*, 33 M 21, 26, 81 P 395. See *Forsell v. Pittsburgh & Montana Copper Co.*, 38 M 403, 413, 100 P 218.

Where the contract upon which recovery is had is wholly different from the one set forth in the complaint, the case is brought within this section, and the variance is not to be deemed immaterial, but must be considered a failure of proof. *Kalispell Liquor & Tobacco Co. v. McGovern*, 33 M 394, 399, 84 P 709.

When the cause of action pleaded is unproved, it is not a mere variance, but a failure of proof. *Knuckey v. Butte Electric Ry. Co.*, 41 M 314, 325, 109 P 979.

Where one contract is pleaded and another is proved, or where the complaint alleges one breach of duty, and the evidence establishes a different one, the

variance amounts to a failure of proof, upon the occurrence of which a nonsuit is proper. *American L. & L. Co. v. Great Northern Ry. Co.*, 48 M 495, 502, 138 P 1102.

The fact that the complaint alleges a joint contract (an account stated) with two or more defendants, and the evidence discloses a separate contract with one of them, is not a variance amounting to a failure of proof within the meaning of this section. See *Lee et al. v. Hayden*, 63 M 589, 597, 208 P 596.

References

Cited or applied as section 772, Code of Civil Procedure, in *Patten v. Hyde*, 23 M 23, 26, 57 P 407; *Finlen v. Heinze*, 32 M 354, 393, 80 P 918; as section 6587, Revised Codes, in *Logan v. Billings & Northern R. Co.*, 40 M 467, 471, 107 P 415; *Ryan Co. v. Russell*, 52 M 596, 598, 161 P 307; *Armitage v. Chicago, Milwaukee & St. Paul Ry. Co.*, 54 M 38, 45, 166 P 301; *Rice v. Chicago etc. Ry. Co.*, 59 M 579, 582, 197 P 999; *Kakos v. Byram et al.*, 88 M 309, 292 P 909.

9186. Amendments of course, and effect of demurrer. Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or twenty days after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have twenty days thereafter in which to answer, reply, or demur to the amended pleading.

History: En. Sec. 113, p. 66, L. 1877; re-en. Sec. 113, 1st Div. Rev. Stat. 1879; re-en. Sec. 115, 1st Div. Comp. Stat. 1887; amd. Sec. 773, C. Civ. Proc. 1895; re-en. Sec. 6588, Rev. C. 1907; re-en. Sec. 9186, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 472.

Applicable Only to Amendments as of Right

This section has reference to amendments which may be made as of right, and not to those which may be made only by permission of the court. *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 M 184, 192, 61 P 3; *Meredith v. Roman*, 49 M 204, 211, 141 P 643.

Effect of an Amendment on an Original Pleading

Upon the filing of an amended complaint, the original pleading is superseded and becomes functus officio. *Raymond v. Thexton*, 7 M 299, 303, 17 P 258; *Newell v. Meyendorff*, 9 M 254, 261, 23 P 333, 8 L. R. A. 440; *Gettings v. Buchanan*, 17 M 581, 585, 44 P 77; *Butte Butchering Co. v. Clarke*, 19 M 306, 310, 48 P 303; *Bordeaux v. Bordeaux*, 43 M 102, 107, 115 P 25; *Ben Kress Nursery Co. v. Oregon Nursery Co.*, 45 M 494, 496, 124 P 475;

American Surety Co. v. Kartowitz, 54 M 92, 94, 166 P 685; *Hansen v. Goodrich*, 56 M 140, 142, 181 P 739.

Motion to Strike is the Remedy to Test Amendment

The only method of determining whether an amended pleading has been improperly filed, i. e., filed without leave of court when such leave is necessary under this section and the following section, is by motion to strike. *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 344, 345, 19 P 2d 223.

Must Serve All Adverse Parties

An amended complaint must be served on all the adverse parties who are to be bound by the judgment, whether it materially affects them or not; if the amended complaint is not served upon a defendant, there is no pleading upon which a judgment against him can be sustained. *Ben Kress Nursery Co. v. Oregon Nursery Co.*, 45 M 494, 497, 124 P 475.

This section, requiring service of amended pleadings upon the adverse party, applies only to amendments made as a matter of right, and not to amendments which can

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that application therefor be made within reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action.

History: Ap. p. Sec. 67, p. 55, Bannack Stat.; re-en. Sec. 68, p. 146, L. 1867; re-en. Sec. 76, p. 42, Cod. Stat. 1871; re-en. Sec. 114, p. 66, L. 1877; re-en. Sec. 114, 1st Div. Rev. Stat. 1879; re-en. Sec. 116, 1st Div. Comp. Stat. 1887; en. Sec. 774, C. Civ. Proc. 1895; re-en. Sec. 6589, Rev. C. 1907; re-en. Sec. 9187, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 473.

Amendments by Leave of Court

Affirmative Showing of Abuse of Discretion Must be Made to Reverse Lower Court

The matter of the amendment of a pleading, at any time, rests within the sound discretion of the trial court, and its action is not cause for reversal of the judgment in the absence of an affirmative showing of abuse of discretion resulting in prejudice. Callan v. Hample, 73 M 321, 326, 236 P 550; Sellers v. Montana-Dakota Power Co., 99 M 39, 41 P 2d 44.

Whether the court, after a demurrer to the complaint has been sustained, will permit plaintiff to amend his pleading is a matter of grace, not of right, unless the circumstances are such that it would be an abuse of discretion to refuse permission to amend; therefore refusal to grant permission will not be disturbed on appeal in the absence of a showing of abuse of discretion. Champagne v. Keplinger, 78 M 114, 120, 252 P 803.

Id. Where the record did not disclose that plaintiff asked leave to amend her complaint after a demurrer thereto had been sustained or that permission to do so was denied her by the trial court, the court's failure to give her time to amend cannot be said to have been in abuse of its discretion.

Applicable to Probate Proceedings

This court has held that this section has application to probate proceedings. State ex rel. Hahn v. District Court, 83 M 400, 272 P 525; State v. District Court et al., 90 M 281, 293, 1 P 2d 335.

Amendments Allowed

To Alter Affidavit in Support of an Attachment to Conform to Facts

Where the affidavit for a writ of attachment originally recited that the debt sued on had not been secured, the court properly permitted the affiant to amend to the effect

that while the debt had originally been secured, the security had become valueless without any fault of his, and refusal to dissolve the attachment was proper. Hetrick v. Renwald, 73 M 426, 428, 236 P 1089.

To Amend Complaint by Adding Parcel of Land at Opening of Trial

In a mortgage foreclosure suit, the court's action in permitting plaintiff to amend his complaint at the opening of the trial, by inserting therein a description of a tract of land inadvertently omitted by the scrivener from both mortgage and pleading, held not an abuse of discretion, where appellant neither asked for a continuance on the ground of surprise nor suggested that she was not prepared to proceed to trial on the facts presented by the amendment. Clack v. Clack et al., 98 M 552, 41 P 2d 32.

To Amend at Conclusion of Evidence

In an action for rent by the lessor of farm lands the complaint mistakenly described the land as located south of the Montana meridian instead of north. At the conclusion of all the evidence, and after the instructions had been settled, plaintiff asked for leave to amend the complaint in the particular mentioned and reopen the case for the purpose of introducing evidence in support of the amended description. Leave was granted, the case reopened, defendant being given permission to introduce any evidence he desired; he declined to introduce any. Held, that the mistake in the description was a mere clerical one; that defendant under the circumstances could not have been misled to his prejudice by the amendment, and that the court properly allowed it to be made. Besse v. McHenry, 89 M 520, 525, 300 P 199.

To Amend Pending Determination of a Motion

Permission to amend the complaint pending determination of a motion to discharge an attachment procured in the action was proper. Muth v. Erwin, 14 M 227, 228, 36 P 43; Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 89, 181 P 332.

To Correct a Mistake in Original

The court may permit an amendment of a complaint, which amounts to nothing more than the correction of a mistake made in the pleading as originally drawn. Downs v. Cassidy, 47 M 471, 474, 133 P 106.

To Correct a Misnomer

Where there is a misnomer of the name of the defendant in the complaint, the court should allow the plaintiff to correct the name of the defendant upon his request to do so under this section. *Clark v. Oregon Short Line R. R. Co.*, 29 M 317, 320, 74 P 734.

To Permit an Amended Memorandum of Costs

The district court should have permitted an amended memorandum of costs to be filed, in which no new items were sought to be added to the original, but the sole purpose of which was to furnish the objecting party with information relative to alleged expenditures, the absence of which from the original was claimed to be prejudicial; and it is not necessary to make a preliminary showing that such information was omitted by inadvertence, surprise, or excusable neglect. *Nearly v. Northern Pac. Ry. Co.*, 41 M 480, 508, 110 P 226.

To Permit an Amendment of Petition by Affidavit of Third Party

Under the preceding section and this section, the district court, in an action between banks to recover on a cashier's check, issued by defendant, in which the latter petitioned for an order requiring conflicting claimants to interplead, properly allowed amendment of the application by the filing of an affidavit of one of the claimants. *State v. District Court et al.*, 94 M 551, 558, 25 P 2d 396.

To Substitute Real Party in Interest

Where it appeared from an application for certiorari that the application was not made by the one beneficially interested, but by another on his behalf, and the defendant had not been misled or jeopardized by reason of the error, an amendment substituting the real party in interest as plaintiff should be allowed. *State ex rel. Allen v. Napton*, 24 M 450, 453, 62 P 686.

Effect of Refusal to Impose Terms

This section, providing that the trial court may allow an amendment of any pleading upon such terms as may be just, does not under all circumstances require the imposition of terms as a condition to granting leave, the matter being left to the discretion of the court; and where it does not appear that the implication to amend was untimely, or that the adversary of the applicant was placed at any disadvantage or incurred any expense by reason of the amendment having been allowed, the action of the court granting leave without imposing terms will not be held an abuse of discretion. *Wandel v. Wandel*, 76 M 160, 163, 248 P 864.

How to Test Validity of an Amendment

The only method of determining whether an amended pleading has been improperly filed, i. e., filed without leave of court when such leave is necessary under the preceding and this section, is by motion to strike. *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 344, 345, 19 P 2d 223.

Limit of Review on Appeal as to Amendments

A pleading may be amended so as to correspond with the proof; the application to amend is addressed to the sound discretion of the trial court, and, in the absence of any abuse of such discretion, the action of the trial court will be approved on appeal. *Sandeen v. Russell Lumber Co.*, 45 M 273, 279, 122 P 913.

After issue is joined, the matter of permitting amendments to pleadings is one addressed to the sound judicial discretion of the trial court, and before the supreme court will hold a refusal of leave to amend to have been in error, appellant must show an abuse of such discretion. *Cullen v. Western Mortgage & Warranty Title Co.*, 47 M 513, 529, 134 P 302.

The power to allow or disallow amendments at any stage of the trial is within the discretion of the court; and, if no abuse is shown, the court's action will be approved on appeal. *De Celles v. Casey*, 48 M 568, 573, 139 P 586.

The matter of permitting amendments of pleadings lies within the sound discretion of the district court, and the rule is to allow and the exception to deny them. *Fowles v. Heinecke*, 87 M 117, 120, 287 P 169.

The power conferred by this section upon the district court to permit parties to amend pleadings by correcting a mistake therein, is discretionary and the supreme court will not revise its exercise except for a clear abuse of discretion. *Besse v. McHenry*, 89 M 520, 525, 300 P 199; *Sellers v. Montana-Dakota Power Co.*, 99 M 39, 41 P 2d 44.

Objection to an Amendment is Waived by Answering

Where no objection is made to the filing of an amended complaint and no motion interposed to strike it from the files, any objection is waived by answering. *Fowles v. Heinecke*, 87 M 117, 120, 287 P 169.

Service of Amended Pleading Not Necessary

The preceding section, requiring service of amended pleadings upon the adverse party, applies only to amendments made as a matter of right, and not to amendments which can only be made by permission of the court. *Price et al. v. Skylstead*, 69 M 453, 461, 222 P 1059.

Id. While as a general rule an amendment of the complaint made after default operates to open the default, provided it introduces a new cause of action or goes to the substance of the pleading, an amendment which goes no further than to substitute a new party plaintiff for the original one because of transfer of interest, is merely formal and has not that effect; it could be made only by leave of court and therefore defendant was not entitled to service of the complaint as thus amended.

What May Be Amended

The procuring of an attachment, and the steps necessary therefor, is a proceeding within the spirit of the code, and, if such proceeding is defective, the same may be amended in furtherance of justice, like any other proceeding. *Pierse v. Miles*, 5 M 549, 552, 6 P 347; *Langstaff v. Miles*, 5 M 554, 555, 6 P 356; *Magee v. Fogerty*, 6 M 237, 239, 11 P 668; *Joseph v. Mady Clothing Co.*, 13 M 195, 200, 33 P 1; *Muth v. Erwin*, 14 M 227, 228, 36 P 43; *Newell v. Whitwell*, 16 M 243, 258, 40 P 866; *Herbst Importing Co. v. Hogan*, 16 M 384, 388, 41 P 135; *Wilson v. Barbour*, 21 M 176, 183, 53 P 315.

This section does not confer power upon the court to amend a void jurisdictional writ or process. *Choate v. Spencer*, 13 M 127, 136, 32 P 651; *Sharman v. Huot*, 20 M 555, 559, 52 P 558.

Delay in filing an amended answer, though entirely excusable, does not justify a change of the issues without permission of the court. *Meredith v. Roman*, 49 M 204, 212, 141 P 643.

While the word "proceeding" in its more general sense comprehends every step taken or measure adopted in the prosecution or defense of an action, in its more restricted sense as employed in this section, allowing a party to amend any pleading or proceeding, it refers to every paper which may be properly employed in an action other than the pleadings. *Claussen v. Chapin*, 69 M 205, 209, 210, 221 P 1073.

Id. Under the rule above, held, that an affidavit, made on information and belief, in support of an application for an injunction, was a "proceeding," within the meaning of this section, and therefore amendable, before demurrer or answer, by substituting a verification may be determined.

Under this section, the district court may and should, on motion to discharge a writ of attachment because of a defective affidavit, in furtherance of justice permit amendment of the affidavit and deny the motion, where the defect is readily amendable. *Jenkins v. First Nat. Bank et al.*, 73 M 110, 117, 236 P 1085.

What Party Must Show to be Permitted to Amend

It was within the court's discretion to permit an amendment to a complaint after the cause had been called for trial, and deny a motion for postponement, where it did not appear that movant was surprised by the presentation of an issue which he was not prepared to meet, or that he did not meet it with all the evidence available in any event. *Dorais v. Doll*, 33 M 314, 317, 83 P 884.

Application to amend the complaint after issue joined is addressed to the sound legal discretion of the trial court, and the showing made in support of it must be sufficient to move that discretion, amendments being allowable in furtherance of justice but not where the applicant has been guilty of indifference or neglect. *Barrett v. Shipley*, 63 M 152, 156, 206 P 430.

When an Amendment May be Made

The amendment of "any pleading or proceeding" permissible under this section, upon notice to the adverse party, may be made at any time, but should not in any case go further than to supply formal defects; the limitation of six months mentioned in said section applying only to the court's power to relieve a party from a default judgment taken against him through his mistake, inadvertence, etc. *Eadie v. Eadie*, 44 M 391, 395, 120 P 239.

In a divorce suit, where the plaintiff inadvertently alleges that the defendant, instead of the plaintiff, has been a resident of the state for more than one year prior to the commencement of the action, a mistake apparently affecting the question of jurisdiction, he will be allowed, after a default judgment has been entered, and after the expiration of the six months' limitation, to amend his complaint by substituting the word "plaintiff" for the word "defendant." *Eadie v. Eadie*, 44 M 391, 396, 120 P 239. See *Ivanhoff v. Teale*, 47 M 115, 117, 130 P 972.

The power to allow amendments at any stage of the trial is within the discretion of the trial court, and its action in this behalf is not subject to review by the supreme court, unless it is affirmatively shown that it abused its discretion to the prejudice of the adverse party. *Buhler v. Loftus*, 53 M 546, 559, 165 P 601; *Clack v. Clack et al.*, 98 M 552, 41 P 2d 32.

The matter of allowing amendments to pleadings during trial rests in the discretion of the court, permission to make them being the rule, refusal of permission the exception; hence, in the absence of a showing of abuse of discretion, permission to amend the complaint to conform to the proof, given at the close of the testimony,

may not be held error. *Berthelote et al. v. Long Oil Co. et al.*, 95 M 434, 456, 28 P 2d 187.

When Court May Direct an Amendment to be Made

In proper cases, the court may, even on its own motion, direct an amendment if, in its opinion, a nonsuit or mistrial may be avoided. *De Celles v. Casey*, 48 M 568, 573, 139 P 586.

When Power to Amend a Judgment Ceases

Under this section, the power of the district court to modify a judgment fair on its face, ceases at the expiration of six months after its entry. *Edgar State Bank v. Long et al.*, 85 M 225, 228, 287 P 108.

Id. A mortgage on real property provided that if the mortgagor should default in payment of principal or interest on the note secured thereby, the whole debt should become due and collectible and all the rents and profits of the property should immediately accrue to the mortgagee. The judgment of foreclosure was in conformity with the latter clause. Nine months after its entry the trial court granted the mortgagor's motion to strike the clause relating to rents and profits. Held, that the order did not correct a mere clerical mistake but operated as a change of substantial rights adjudicated by the judgment; that, when made, the court had lost jurisdiction to amend or modify it (see above paragraph), and hence that the order was void.

When the Action of the Court on an Amendment is Not an Abuse of Discretion

Where the sufficiency of the complaint in a claim and delivery action had been challenged in the justice court and no effort to amend was made by plaintiff for fifteen months thereafter or until the trial in the district court on appeal had commenced and no showing was made or any excuse offered for the delay, refusal to permit the amendment then held not an abuse of discretion. *Barrett v. Shipley*, 63 M 152, 156, 206 P 430.

Where defendant in a cause appealed to the district court from a justice's court did not ask for leave to amend his answer until a jury had been sworn to try the cause, although the transcript from the justice's court had been on file with the clerk of court for over two months thus giving him ample time to seek permission to amend, and the amendment sought to be made changed the issues entirely, the court did not abuse its discretion in granting leave on condition that he pay plaintiff's costs. *Apple v. Seaver*, 70 M 65, 223 P 830.

An application for leave to amend a pleading is addressed to the sound legal

discretion of the trial court, the order allowing it being subject to review only upon a showing of abuse of that discretion; and where an amendment to an answer in a divorce proceeding was permitted fifteen days prior to trial and plaintiff did not apply for a continuance under a claim of surprise, he was in no position to urge abuse of discretion. *Wandel v. Wandel*, 76 M 160, 163, 248 P 864.

Application to amend a pleading at commencement of trial is addressed to the sound discretion of the trial court, its discretion in that respect not being limited to the imposition of terms (this section), and it will not be held to have abused it in denying defendant's motion for permission to amend the answer by inserting an entirely new defense based upon matters of record for many months in the court in which the action was pending. *Parsons v. Rice*, 81 M 509, 520, 264 P 396.

The amendment of pleadings, at any time, rests within the sound discretion of the trial court, and its action, in the absence of an affirmative showing of abuse of its discretion resulting in prejudice, will not be reversed; and where defendant, without any showing in excuse of delay in asking for leave to amend, took no action until four weeks had expired after conclusion of the taking of the testimony, the court may not be held to have abused its discretion in refusing leave to amend. *Sawyer v. Somers Lumber Co.*, 86 M 169, 174, 282 P 852.

In an action on an open account defendant demanded an itemized statement of the account under section 9167, which was not furnished, but instead plaintiff asked for and obtained leave to amend; the amended complaint was based upon an account stated. The cause was tried more than a year thereafter. Held, as against the contention of defendant that the amendment stated a cause of action differing from the original pleading and had been improperly allowed, that, both the original and the amended pleadings having referred to the same transaction and each cause of action having been for the recovery of the same indebtedness arising therefrom, the court did not abuse its discretion in permitting the amendment to be made. *Fowlis v. Heinecke*, 87 M 117, 120, 287 P 169.

Held, in a negligence action, that where a motion to amend the complaint, made two days after commencement of trial and more than six months after the filing of the complaint, by addition an allegation of negligence which would have changed the whole theory on which the action was brought, the court may not be held to have abused its discretion in denying the motion. *Sellers v. Montana-Dakota Power Co.*, 99 M 39, 52, 41 P 2d 44.

When the Refusal to Allow an Amendment is an Abuse of Discretion

Under this section, the matter of permitting amendments of pleadings after issue joined lies within the sound legal discretion of the trial court, the rule being to allow, and the exception to deny, them; but refusal to permit an amendment offered at an opportune time and which should be made in furtherance of justice is an abuse of discretion. *State v. District Court et al.*, 99 M 33, 36, 43 P 2d 249.

Id. Where, in an action for services rendered, defendant company two weeks before trial applied for permission to amend its answer by the insertion of a counterclaim, acting promptly after its existence became known to it and presenting a reasonable showing why it had failed to include it in the original answer, refusal to grant permission was an abuse of discretion.

Relief From Judgments, Orders, or Other Proceedings

Applicable to Probate Proceedings

Held, under section 10365, that the provisions of this section authorizing the district court to relieve a party from a default under conditions prescribed are applicable to probate proceedings, and that under the second clause of that section the court may, in a proceeding to determine heirship, permit an heir who from any cause was not personally served with the notice required by section 10324, to answer to the merits of the proceeding at any time within one year from the rendition of the judgment, and that the technical objection that such notice is not a "summons" and the proceeding not "an action" and that, therefore, this section is inapplicable, cannot be sustained. *State v. District Court et al.*, 83 M 400, 410 et seq. 272 P 525.

Decree of Final Distribution of Estate—Modification for Mistake and Inadvertence

Notwithstanding the provision of section 10328, that a decree directing the distribution of the property of an estate is conclusive unless reversed, set aside or modified on appeal, the district court may set it aside under this section on a showing by an aggrieved party that it had been taken against him through his mistake, surprise, inadvertence or excusable neglect. *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 396 et seq., 30 P 2d 815.

Default Judgments Not Favored

Judgments by default are not favored, it being the policy of the law to have every case tried upon its merits; trial courts in passing upon motions for opening default judgments should exercise the same liberal

spirit which prompted the legislature in enacting this section, and where a court refuses to grant such a motion no great abuse of discretion need be shown to warrant a reversal. *Reynolds v. Gladys Belle Oil Co.*, 75 M 332, 340, 243 P 576.

Each Case to be Determined on Own Facts

Each case wherein it is sought to have a default judgment set aside must be determined on its own facts, and where the showing made leaves the court in doubt or is one upon which reasonable men might reach different conclusions, the doubt should be resolved in favor of the motion. *Brothers v. Brothers*, 71 M 378, 383, 230 P 60.

Effect of Failure of Court to Impose Terms in an Order Vacating a Default

An order vacating a default judgment will not be set aside merely because the court failed to impose terms. *Nash v. Treat*, 45 M 250, 254, 122 P 745.

Ignorance of Law is No Excuse for Setting Aside a Default

Assuming this section to be applicable to the default of a party in failing to present his bill of exceptions in time for settlement, ignorance of the law governing such time, as prescribed in sections 9390 and 9823 is no excuse for a default. *Canning v. Fried*, 48 M 560, 562, 139 P 448.

The provision of this section that the court may relieve a party from a judgment or other proceeding taken against him through his mistake, excusable neglect, etc., if application be made within a reasonable time, but in no case exceeding six months after the judgment or proceeding was taken, has no application to mistakes of law or ignorance thereof. *Federal Land Bk. of Spokane v. Gallatin Co.*, 84 M 98, 111 et seq., 274 P 288.

Judgment May be Set Aside Even After Satisfaction

A judgment may be set aside on motion under this section, even after it has been satisfied by sale under execution, under proper circumstances. *Meyer v. Lemley et al.*, 86 M 83, 92 et seq., 282 P 268.

Legal Remedy Under This Section as Affecting Right to Equitable Relief

Motion, under this section, informal in character, to have a default judgment procured by fraud set aside, is not so adequate a remedy as a suit in equity where the matter can be thoroughly investigated, and therefore failure of plaintiff to make such a motion did not bar recourse to equity. *Bullard v. Zimmerman et al.*, 82 M 434, 444, et seq., 268 P 512.

Where a party seeking relief from a judgment has an adequate remedy at law by motion in the original case, equity will not interpose in his favor while that remedy is available, nor thereafter if he does not show a sufficient excuse for not having resorted to it at the proper time, and where he has once resorted to the legal remedy and was denied it because of his own fault he is barred from relief by equity on grounds which were then available or which might have been urged. *Meyer v. Lemley et al.*, 86 M 83, 92 et seq., 282 P 268.

Id. Where fraud entered into the rendition of a judgment or it was brought about by the misconduct of the one in whose favor it was rendered, or, though fair on its face, there was a want of jurisdiction, or the statutory remedy for setting it aside is inadequate, or the aggrieved party has been deprived of his legal remedy without any fault of his own, equity will assume jurisdiction and set it aside, under such circumstances the statutory remedy (this section) being deemed cumulative or concurrent.

Id. Plaintiff mortgage company, holding a first mortgage upon a tract of land, by inadvertence omitted from its complaint for foreclosure a description of the most valuable part of the tract, had judgment and bought the property as described on execution sale. Subsequently it discovered the error and moved to have the decree vacated under this section; the motion was granted, a new decree filed and a new order of sale issued, but on appeal the new decree was set aside for failure of plaintiff to pursue properly the remedy afforded by the above section. Thereafter the holder of the second mortgage brought suit to foreclose and plaintiff therein filed a cross-complaint in which, appealing to the equity arm of the court, it sought the same relief afforded by this section. Held, under above rules, that plaintiff had an adequate remedy by motion, lost it through its own fault and could not thereafter invoke the equity power of the court to obtain the relief it might have had under its motion. (Mr. Justice Angstrom dissenting.)

Mistake, Inadvertence, Surprise or Excusable Neglect of the Court Not Contemplated by This Section

Where an order taxing costs in favor of plaintiff, included in a judgment for him, omitted certain items claimed by him, which judgment had been affirmed on appeal by defendant, the trial court had no authority, after affirmance, to make an order taxing such costs, though the failure to tax them originally was an oversight on the part of the court. This section applies only to the mistake, inadvertence, surprise, or excusable neglect of the party litigant, and not of the court. *State ex rel. Boston & M.*

Min. Co. v. District Court, 32 M 20, 25, 79 P 410.

Necessity That Defendant be Able to Show a Meritorious Defense

The defaulted party must show that he has a defense; otherwise the court cannot determine whether justice will be promoted or retarded by setting aside the default. *Vadnais v. East Butte E. C. Min. Co.*, 42 M 543, 546, 113 P 747.

On the hearing of a motion to set aside a default judgment, defendant's showing that he has a meritorious defense may not be controverted by evidence. *Eder v. Berelos*, 63 M 363, 367, 207 P 471.

Neglect Alone Not Sufficient to Deny Relief

The power granted to the district court under this section to set aside a default judgment is predicated upon the neglect of the movant, coupled with a showing of facts and circumstances which will reasonably excuse it; hence the presence of neglect alone is not sufficient to deny relief. *Reynolds v. Gladys Belle Oil Co.*, 75 M 332, 340, 243 P 576.

Neglect of Attorney is Neglect of Client

The neglect of an attorney to make timely appearance is the neglect of the client and the latter can be relieved from the consequences of the attorney's neglect only on a showing which would excuse the client under like circumstances. *First State Bank v. Larsen*, 72 M 401, 404, 233 P 960.

Not Applicable to Default Judgment Entered Prematurely

A default judgment entered prematurely is not void, but voidable, and therefore requires a motion to set it aside; such a motion, however, is one of right, not one of grace on the part of the trial court, and hence it is immaterial whether movant makes a showing sufficient to appeal to its discretion under this section relative to the setting aside of a default judgment asked for on the ground of mistake or excusable neglect of movant. *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 344, 345, 19 P 2d 223.

Notice to Plaintiff Necessary to Set Aside a Default

In the absence of notice to the plaintiff, the court is without authority to set aside a default. *State v. District Court*, 58 M 114, 190 P 982.

Orders, How Set Aside

To have an order overruling a demurrer set aside, the defendant should have applied

to the court by motion, after notice to opposing counsel, in the manner provided in this section. *Crawford v. Pierse*, 56 M 371, 374, 185 P 315.

Proceedings in Which It Seems Just to Permit a Default to be Set Aside

Where, after the default of all persons claiming as heirs of a deceased person, who did not appear on a certain date to establish their heirship, had been entered, foreign claimants filed a verified petition to set it aside, alleging that they did not become aware of decedent's death until after the default had been entered and that their interests would be lost to them if it was permitted to stand, and making a prima facie showing that they were heirs at law of the decedent, and where it appeared that they exercised the utmost diligence in getting their claims before the court, such heirs should be allowed to appear in the proceedings, and it was error to refuse to set aside the default. *State ex rel. Kolbow v. District Court*, 38 M 415, 419, 100 P 207.

Purpose of Act

The legal remedy provided by this section for the vacation of a judgment (or decree) taken against a party through his mistake, inadvertence, surprise or excusable neglect, is designed to afford speedy relief in the action itself rather than to subject the movant to the delay and expense incident to a separate suit to secure vacation, and is as available to one in whose favor judgment was rendered as to him against whom it went, providing diligence is exercised in asserting the right. *Meyer v. Lemley et al.*, 86 M 83, 92 et seq., 282 P 268.

Requisites of Application to Set Aside a Default Judgment

A party defendant, on application to set aside his default, must, in addition to excusing his delinquency, support the motion by an affidavit of merits setting forth the facts constituting his defense, or tender with the motion and affidavit a copy of his proposed answer. *Donnelly v. Clark*, 6 M 135, 137, 9 P 837; *Bowen v. Webb*, 34 M 61, 65, 85 P 739; *Schaeffer v. Gold Cord Min. Co.*, 36 M 410, 412, 93 P 344; *Pearce v. Butte Electric Ry. Co.*, 40 M 321, 324, 106 P 563; *Donlan v. Thompson Falls C. & M. Co.*, 42 M 257, 271, 112 P 445; *Vadnais v. East Butte E. C. Min. Co.*, 42 M 543, 546, 113 P 747; *State ex rel. Stephens v. District Court*, 43 M 571, 575, 118 P 268.

An affidavit of merits, on motion to set aside a default judgment, may be made by the attorney of an absent party, and the verification may be made upon information and belief. *State ex rel. Kolbow v. District Court*, 38 M 415, 418, 100 P 207.

Assuming that an answer may supply the place of an affidavit of merits in aid of a

motion to vacate a default judgment, such a pleading, which was in effect a general denial, and did not set forth the facts upon which the defendant relied to defeat plaintiff's claim, so as to enable the court to determine whether he had a prima facie defense upon the merits, and that the granting of the relief would be in furtherance of justice, was insufficient to warrant the granting of the motion. *Pearce v. Butte Electric Ry. Co.*, 40 M 321, 323, 106 P 563; *Donlan v. Thompson Falls C. & M. Co.*, 42 M 257, 271, 112 P 445; *Vadnais v. East Butte E. C. Min. Co.*, 42 M 543, 546, 113 P 747.

When one who is in default applies to the court for relief, it is incumbent upon him to show affirmatively that the default resulted from mistake, inadvertence, or excusable neglect, and even when such showing is made, relief may be granted as a matter of grace, but cannot be demanded as a matter of right; in other words, the statute refers the subject to the sound legal discretion of the trial court. *Kersten v. Coleman*, 50 M 82, 85, 144 P 1092.

To warrant the vacation of a default, it is necessary that the party in default show affirmatively that he proceeded with diligence, that the neglect was excusable, that the judgment if permitted to stand will affect him injuriously, and that he has a good defense on the merits. *Delaney v. Cook et al.*, 59 M 92, 96, 97, 195 P 833; *Eder v. Bereolos*, 63 M 363, 367, 207 P 471.

On motion to set aside a default, the applicant must make a statement of facts from which the court can determine whether or not the mistake, inadvertence, surprise or excusable neglect urged in support of it is within the contemplation of this section, the bare statement of the conclusion that the default occurred by mistake, etc., being insufficient to move the discretion of the court. *Robinson v. Petersen*, 63 M 247, 250, 206 P 1092.

One desiring to be relieved from a default must bring his case within one of the grounds mentioned in this section, and even then relief may not be demanded as a matter of right, the application being addressed to the sound legal discretion of the court, with the exercise of which the supreme court will not interfere except upon a showing of manifest abuse thereof. *Mihelich v. Butte Electric Ry. Co. et al.*, 85 M 604, 622, 281 P 540.

Slight Abuse of Discretion Sufficient to Reverse

Since courts universally favor trial on the merits, slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order. *Brothers v. Brothers*, 71 M 378, 383, 230 P 60.

Time Limit as to Application for Relief From Judgment

Though a judgment void on its face may be set aside on motion at any time, this may not be done where the judgment is fair on its face, the infirmity of which must be made to appear by evidence dehors the record. *State ex rel. Happel v. District Court*, 38 M 166, 171, 99 P 291.

Under this section, the application for relief must be made within a reasonable time after the date of the entry of judgment, but in no case exceeding six months, and the statute is the limit of the court's power in such cases. After the expiration of the time limit fixed therein the power of the court over the judgment absolutely ceases, and it is without jurisdiction to vacate or modify it. *State ex rel. Happel v. District Court*, 38 M 166, 171, 99 P 291; *State ex rel. Smotherman v. District Court*, 51 M 495, 496, 153 P 1019; *Smith v. McCormick*, 52 M 324, 325, 157 P 1010.

Where a decree of divorce against an insane husband was procured without personal service of summons, and is therefore void for want of jurisdiction, there can be no relief, after the expiration of the time limit fixed in this section, except by an action in equity to set aside the decree, as it is fair upon its face, and the defect of jurisdiction must be made to appear by evidence dehors the record; and the defendant is not to be denied relief in equity because he did not proceed under this section within the six months, where no lack or want of diligence is imputed to him. *State ex rel. Happel v. District Court*, 38 M 166, 172, 99 P 291.

Id. There being no distinction between judgments at law and decrees in equity, except as to the character of relief granted by them, this section, authorizing vacation of judgments fair on their face, within a reasonable time not exceeding six months, applies to both, subject to the rule that a court of equity will not interfere so long as there is another subsisting adequate remedy.

Where the owner of land who had conveyed it with an agreement that the grantee should reconvey to him upon payment of a debt owed by him to the grantee, permitted his default to be entered in an action by the grantee to have the agreement to reconvey canceled because of the failure of the grantor to make payment, and thereafter neither he nor his guardian, subsequently appointed, asked to have the default set aside, the decree in favor of plaintiff became final, and could not be set aside except for fraud, knowledge of which was ascertained after the time had expired within which such legal remedy might have been invoked. *Dunne v. Yund*, 52 M 24, 31, 155 P 273.

Vacation of a decree of divorce, rendered upon default after publication of summons, on the ground of fraud on the part of plaintiff, after a lapse of more than fifteen months from its rendition, held error, defendant's remedy being an action in equity to set the decree aside on the ground stated. *State ex rel. Thompson v. District Court*, 57 M 432, 188 P 902.

Held, that the district court is without power to relieve a party from his default after the expiration of the six months' period mentioned in the first part of this section, or of the twelve months' period referred to in the second, and that the holding of the court in *State ex rel. Kolbow v. District Court*, 38 M 415, intimating that a party may be relieved from an order or judgment after the expiration of the time limits fixed by the statute, on a showing merely of due diligence, must be overruled. *State v. District Court et al*, 83 M 400, 410 et seq., 272 P 525.

Showing in support of a motion to set aside a default made eleven months after entry, to the effect that defendant in an action for slander had been informed by a third person that plaintiff did not intend to do anything with the action and intended to let the matter drop, with the result that she did not think anything more about it and did not consult anyone until she learned of the entry of judgment by default, held insufficient to warrant setting aside of the default, and the court abused its discretion in granting the motion after expiration of the six months' period referred to above. *Kosonen v. Waara*, 87 M 24, 29 et seq., 285 P 668.

Time Limit—When It Starts to Run

Though this section, granting discretion to the district court to relieve a party from a judgment, order or other proceeding taken against him, if application therefor is made within six months after the judgment, order or proceeding was taken, does not mention defaults, a default entered by the clerk at the instance of the adverse party is a "proceeding taken against" the defaulting party, and its entry, not that of the judgment, fixes the beginning of the six months' period, which period is inflexible until changed by legislative action. *Kosonen v. Waara*, 87 M 24, 29 et seq., 285 P 668.

To Whom Time Limit for Application to Set Aside a Default is Applicable

The period of six months mentioned in this section, within which a motion to vacate a judgment must be presented, applies in terms only to the case of one who seeks relief from the consequences of his mistake, inadvertence, surprise, or excusable neglect. It cannot apply to one who has never been served with summons, and who has not appeared, but whose default has been entered

through the inadvertence of someone else. *Morehouse v. Bynum*, 51 M 289, 292, 152 P 477.

The limitation of six months prescribed by this section, within which a default judgment may be vacated, refers to defaults entered through mistake, inadvertence or excusable neglect only, and therefore has no application to a case where lack of power in the court to enter the judgment appears upon the face of the judgment-roll and the default is sought to be set aside for that reason. *Hodson et al. v. O'Keeffe*, 71 M 322, 325, 229 P 722.

Waiver of Right to Set Aside an Order

On the contention that the defendant was given no opportunity to present its side of the case, and therefore the order was the result of inadvertence, mistake and surprise, it is true that this section authorizes the district court to relieve a party from a judgment or order under such circumstances, but, if, in fact, the county attorney joined with the plaintiff in submitting the matter to the court without further notice and without argument, he waived the county's right to its day in court and the court was justified in disposing of the matter without a hearing; by denying the motion, the court impliedly found that the county attorney did so waive a hearing. *Huntington v. Yellowstone County*, 80 M 20, 24, 257 P 1041.

What is a Sufficient Mistake, Inadvertence, Surprise or Excusable Neglect

The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general appearance and answer is not such surprise or excusable neglect as is contemplated by this section. *Mantle v. Casey*, 31 M 408, 415, 78 P 591.

A mistake as to the law is not the mistake contemplated by this section; and ignorance of the law is not an excuse for a default. *Mantle v. Casey*, 31 M 408, 416, 78 P 591; *Donlan v. Thompson Falls C. & M. Co.*, 42 M 257, 266, 112 P 445; *Willoburn Ranch Co. v. Yegen*, 45 M 254, 257, 122 P 915; *Canning v. Fried*, 48 M 560, 563, 139 P 448.

Where, in an action against eight defendants, the one most vitally interested in the result was not served with summons and did not know that it had been brought until several days after default and the others relied upon him to make appearance and defend the action, and one of them was under the impression that the summons served upon him meant simply that he was to appear as a witness, etc., refusal to open the default was error. *Delaney v. Cook et al.*, 59 M 92, 96, 97, 195 P 833.

Held, that in setting aside a default judgment for neglect of counsel for defendant

in an action for trespass, the court did not abuse its discretion where counsel had been for some time prior to, and was at, the date for appearance engaged as counsel for defendant in a homicide case of unusual importance and in the conduct of which his attention was so absorbed as to cause him to overlook making appearance, it further appeared that he acted promptly and had a meritorious defense. *Eder v. Bereolos*, 63 M 363, 367, 207 P 471.

Where affidavits in support of a motion to vacate a default judgment disclosed that defendant had been restored to capacity about eight months before summons was served on her, that at that time she was still of doubtful mentality and was under the impression that by appearing before a notary public to give her deposition at the instance of plaintiff she had made appearance in the cause, a case of excusable neglect was made under this section, and the court abused its discretion in refusing to grant the motion. *Brothers v. Brothers*, 71 M 378, 383, 230 P 60.

Where the resident agent of a foreign corporation had been served with summons, his act in mailing it to the general counsel of defendant without knowledge that the latter had been discharged and who failed to transmit it to his former client, and the failure of defendant company to advise its agent of his discharge, resulting in the entry of a judgment by default, were excusable under the circumstances of the case. *Reynolds v. Gladys Belle Oil Co.*, 75 M 332, 340, 243 P 576.

Id. Miscarriage of a letter sent by defendant to his attorney, asking him to take care of a case pending against him, receipt of which would have avoided an entry of default, is a sufficient showing of excusable neglect to warrant the setting aside of the default.

Held, on application for writ of supervisory control, that the district court erred in refusing to take jurisdiction of a petition to set aside a decree of distribution based upon this section, authorizing vacation of a judgment for mistake, inadvertence, etc., within six months after its rendition. *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 396 et seq., 30 P 2d 815.

What is Not an Abuse of Discretion in Setting Aside a Default Judgment

It is no abuse of discretion to set aside a default judgment, entered through a mistake of counsel, as to the date when an amended complaint was to have been filed. *Voelker v. Golden Curry Con. Min. Co.*, 40 M 466, 467, 107 P 414.

Where affidavits accompanying a motion to set aside a judgment by default, filed within ten days after its entry, showed that defendants' attorney had prepared a demurrer and intended to file it within the

time allowed by statute, but on account of important business engagements elsewhere failed to do so; that during his absence and upon recalling the fact that he had not filed it, he advised one of defendants by letter where the demurrer could be found in his office, with directions to file it, etc., an answer being tendered with the affidavits, the district court did not abuse its discretion in granting the motion. *Farmers' Co-Operative Assn. v. Roper et al.*, 57 M 42, 188 P 141.

Where counsel for plaintiff for forty days after defendant filed its answer requiring a reply failed to file it, and then upon decision of a motion to strike were granted twenty days in which to further plead but omitted to do so, the court may not be said to have abused its discretion in refusing to set aside the consequent default, even though counsel may have been excusable in that, while in court at the time the order resulting in the granting of the additional time in which to plead, they did not hear the announcement of the order. (See Sec. 9192.) *Mihelich v. Butte Electric Ry. Co. et al.*, 85 M 604, 622, 281 P 540.

What is Not a Sufficient Showing to Set Aside a Judgment

Where, after a case had been set for trial, the attorney for the defendants wrote to the opposing attorney requesting a continuance, but before receiving an answer to his letter he left the place of his residence, and his whereabouts were unknown to the attorney for the plaintiff until it was too late for the latter to inform him that he could not consent to the continuance, and judgment was rendered for the plaintiffs upon the day set for the trial, the facts did not show any surprise, mistake, or excusable neglect authorizing the court to set aside the judgment. *Lowell v. Ames*, 6 M 187, 188, 9 P 826. See *Whiteside v. Logan*, 7 M 373, 382, 17 P 34.

Mere forgetfulness is not a sufficient excuse for setting aside a default judgment. *Lovell v. Willis*, 46 M 581, 583, 129 P 1052.

Where defendant knew of the pendency of an action against him five months before judgment by default was entered but took no steps looking to a defense on the merits until seven months after its entry, when he moved to set it aside, asking leave to file his answer, and thereafter for three years more neglected to bring his motion on for hearing, denial of the motion on the ground of inexcusable delay was proper. *Hinderager v. MacGinniss*, 61 M 312, 321, 202 P 200.

Held, that an affidavit of counsel for defendant in support of his application for vacation of default, that he misunder-

stood the date upon which the appearance of his client was due and mistakenly supposed it to be at a date ten days later than it actually was, without a statement of any fact or circumstance out of which the misunderstanding arose, was insufficient to move the discretion of the court, and that therefore an order granting the motion was error. *Robinson v. Petersen*, 63 M 247, 250, 206 P 1092.

Held, that the showing made by defendant in aid of his motion to set aside a default judgment, to the effect that he intended to appear on the last day but forgot because of a headache, was insufficient to invoke judicial discretion in his favor, and that the court in setting aside the judgment committed error. *Pacific Acceptance Corp. v. McCue*, 71 M 99, 103, 228 P 761.

Where defendant, after writing a letter to an attorney relative to the action against him, failed to have a consultation with the attorney as he had promised to do and to ascertain whether he would appear for him, and on his application to vacate the resultant default judgment did not attempt to excuse his own or the attorney's neglect, refusal of the motion to vacate was not an abuse of discretion. *First State Bank v. Larsen*, 72 M 400, 404, 233 P 960.

A decree of distribution of property of an estate may not be set aside on the ground of fraud or other irregularity under this section; the remedy of the aggrieved party being by suit in equity. *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 396 et seq., 30 P 2d 815.

What Judgments Were Comprehended by This Act for Relief

Wrongdoing on the part of a referee, which in nowise affects the integrity of the judgment entered in accordance with his report, is not ground for a new trial under this section, it having reference to cases where a party has, for one or more of the reasons mentioned, been prevented from having a proper hearing in the first instance, and is in default. *Ogle v. Potter*, 24 M 501, 505, 62 P 920.

Where a defendant's demurrer to an amended complaint has been overruled, and he has failed to file his answer within the time set by the court, and a judgment by default has been entered, the court may, in its discretion and upon a proper showing, set the judgment aside and permit the defendant to file an answer. *State ex rel. Smotherman v. District Court*, 50 M 119, 121, 145 P 724.

Where a decree of divorce was nominally in favor of plaintiff wife but was in fact in favor of the defendant, and the plaintiff was induced to procure it through fraud

perpetrated upon her by defendant to enable him to marry another woman, she could properly proceed in the original action by motion to have it vacated, under this section. *Hall v. Hall*, 70 M 460, 465 et seq., 226 P 469.

When Remedy Runs Against Third Parties

Obiter: Where third parties take property under execution sale with full knowledge of all the facts with relation to rendition of the judgment which is sought to be set aside under this section, supra, as having been taken against movant through his mistake, surprise or excusable neglect, and the facts warrant the relief, the remedy should also run against the third parties. *Meyer v. Lemley et al.*, 86 M 83, 92 et seq., 282 P 268.

When Supreme Court Will Interfere on Application to Set Aside a Judgment

Applications to set aside default judgments are addressed to the discretion of the trial court, and its action thereon will not be interfered with unless a manifest abuse of discretion is shown. *Hegaas v. Hegaas*, 28 M 266, 267, 72 P 656.

An order refusing a motion to vacate a judgment on the ground of mistake, surprise, or excusable neglect will not be reversed on appeal, if no complaint is made that the lower court abused its discretion. *Ferguson v. Parrott*, 36 M 352, 354, 92 P 965.

An application to set aside a default is addressed to the sound discretion of the trial court and its action will not be disturbed on appeal unless it is manifest that its discretion has been abused, each case being decided upon its own facts. *Robinson v. Petersen*, 63 M 247, 250, 206 P 1092.

The setting aside of a default judgment is a matter within the sound legal discretion of the trial court, and its action will not be disturbed on appeal unless manifest abuse of such discretion is shown. *Eder v. Bereolos*, 63 M 363, 367, 207 P 471.

Id. A stronger showing of abuse of discretion must be made to warrant a reversal of an order granting a motion to set aside a default than of one refusing it.

Every application to have a default judgment set aside must be determined by its own facts, and it is only in case of abuse of judicial discretion that the court's ruling thereon will be disturbed. *Pacific Acceptance Corp. v. McCue*, 71 M 99, 103, 228 P 761.

The matter of setting aside default judgments lies within the sound legal discretion of the trial court and reversal may be had only on a showing of manifest abuse, such judgments not being favored and it being the policy of the law to have cases tried on

their merits; courts in applying the statute granting discretion in this behalf should exercise the same liberal spirit which prompted its enactment, and the supreme court requires a stronger showing of abuse to warrant a reversal of an order granting relief than is required in case the court refuses to do so; and if an order setting aside a judgment may be justified on any ground it will be sustained. *Kosonen v. Waara*, 87 M 24, 29 et seq., 285 P 668.

Relief From Judgments Where Defendant Has Not Been Personally Served

Power to Set Aside a Default Impliedly Granted Under This Subdivision

While that portion of this section authorizing the district court to permit a party in default to answer to the merits within twelve months after entry of judgment if not personally served with summons (or notice), does not provide for the setting aside of the default, the court may order it set aside under the power impliedly granted for the effective exercise of the powers expressly conferred upon it. *State v. District Court et al.*, 83 M 400, 410 et seq., 272 P 525.

Requisites of Application to Have Default Judgment Set Aside

The application of a defaulting non-resident defendant not personally served with summons, like that of one who has been personally served, but who, through mistake, inadvertence, surprise, or excusable neglect, suffered default to be taken against him, to have the judgment set aside, is addressed to the sound legal discretion of the district court, and the movant must show that he did not have actual notice of the pendency of the action in time to make a defense, that he proceeded promptly to have the default set aside, that he has prima facie a defense upon the merits, and that the judgment, if permitted to stand, will affect him injuriously. *Smith v. Collis*, 42 M 350, 365, 112 P 1070.

In an action brought for the purpose of clearing the record of clouds on title to real property by the recordation of oil and gas leases, service of process was made upon non-resident defendants by publication; their default was entered and they moved to have the decree vacated, not, however, filing any affidavit in support of the motion but relying upon the final clause of this section, providing that where from any cause summons has not been personally served on a defendant, the court may on terms allow him to answer within one year after rendition of the judgment. The motion was denied. Held, that the contention of defendants (appellants) that the district court under the provision of the section above quoted was bound to grant the motion without any further showing on

their part and that the court's discretion extended only to the imposition of terms, has no merit; that the application was addressed to its discretion and the applicants were required to make a showing that they did not have actual notice of the pendency of the action, and not having done so, the motion was properly denied. *Skinner v. Carlisle Oil Development Co.*, 80 M 464, 466, 260 P 1038.

When Time Limit Begins to Run

The twelve months' period after rendition of judgment within which a defaulting party not personally served with summons (or notice in a probate proceeding) may be permitted to answer to the merits begins to run from the date of such rendition, and the limitation applies to the time when the motion is made, and not to when it is heard. *State v. District Court et al.*, 83 M 400, 410 et seq., 272 P 525.

Id. Where a probate proceeding was of a dual nature, by one portion of which determination of heirship was sought, and by the other the will of decedent was attacked, and an appeal was taken only from that portion declaring the will invalid, which appeal was decided five days before the expiration of the twelve months' period within which non-resident heirs not personally served with notice could under this section, petition for a reopening of the proceeding with relation to heirship, and they did petition in time, the jurisdiction of the trial court was not destroyed by the decision on appeal relating to the validity of the will, and it therefore could properly permit claimants to answer.

Provision Relating to the Section as a Whole or in General

Design and Purpose of Statute

The design and purpose of the statute is to further the administration of justice, so that the very right upon the merits may be determined, and to that end to grant relief from excusable neglect in cases where diligence is shown in applying promptly for the relief sought, provided the opposite party be not deprived of any advantage to

which he may properly be entitled. *Collier v. Fitzpatrick*, 22 M 553, 558, 57 P 181; *Greene v. Montana Brewing Co.*, 32 M 102, 108, 79 P 693; *Lovell v. Willis*, 46 M 581, 584, 129 P 1052.

How Construed

Statutes of the character of this section are remedial in their nature, and are to be liberally construed. *Greene v. Montana Brewing Co.*, 32 M 102, 109, 79 P 693.

What Orders Can be Considered to Have Been Based on This Section

It cannot be claimed that an order was based upon this section, when the application for the order was not made for relief on the grounds therein specified. *Beach v. Spokane Ranch & Water Co.*, 21 M 184, 187, 53 P 493.

When Supreme Court Will Reverse Action Done Under This Section

The power conferred on the court by this section is discretionary, and its exercise will not be revised except for an abuse thereof. *Greene v. Rowan*, 29 M 263, 264, 74 P 456.

References

Cited or applied as section 774, Code of Civil Procedure, in *Butte Consolidated Min. Co. v. Frank*, 24 M 506, 510, 62 P 922, *In re Farrell*, 36 M 254, 263, 92 P 785; *Schaeffer v. Gold Cord Min. Co.*, 36 M 410, 412, 93 P 344; as section 6589, Revised Codes, in *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 187, 99 P 298; *State ex rel. Grogan v. District Court*, 44 M 72, 76, 119 P 174; *American Surety Co. v. Kartowitz*, 54 M 92, 96, 166 P 685; *State v. District Court et al.*, 66 M 496, 506, 214 P 85; *Rowan v. Gazette Printing Co. et al.*, 69 M 170, 175, 220 P 1104; *Vassau v. Northern Pac. Ry. Co.*, 69 M 305, 315, 221 P 1069; *Home State Bank v. Swartz*, 72 M 425, 430, 234 P 281; *State ex rel. Matt v. District Court et al.*, 86 M 193, 198, 282 P 1042; *Downs v. Nihill*, 87 M 145, 150, 286 P 410; *Kakos v. Bryan et al.*, 88 M 309, 319, 292 P 909.

9188. Sureties in answer may state true value of property. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, are sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, whereupon the court must disregard the value as stated in the affidavit.

History: En. Sec. 115, p. 67, L. 1877; re-en. Sec. 115, 1st Div. Rev. Stat. 1879; re-en. Sec. 117, 1st Div. Comp. Stat. 1887;

amd. Sec. 775, C. Civ. Proc. 1895; re-en. Sec. 6590, Rev. C. 1907; re-en. Sec. 9188, E. C. M. 1921.

9189. Amendment in certain cases. Upon the decision of a demurrer, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just. If a demurrer to a complaint is allowed, because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action therein stated.

History: En. Sec. 776, C. Civ. Proc. 1895; re-en. Sec. 6591, Rev. C. 1907; re-en. Sec. 9189, R. C. M. 1921.

Operation and Effect

This section is a legislative declaration that a pleading which is in fact a complaint may be amended, even though it fails to state facts sufficient to constitute a cause of action; that such a pleading is not a mere nullity, but is something which may be amended. *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 187, 99 P 298.

The effect of sustaining a demurrer to the complaint is not to terminate the action; the court may allow the pleader in fault to amend, and when the amended complaint is filed, it supersedes the original; all issues are then determinable as of the date of the commencement of the original action, in absence of supplemental pleadings. *American Surety Co. v. Kartowitz*, 54 M 92, 94, 166 P 685.

References

Shampagne v. Keplinger, 78 M 114, 120, 252 P 803.

9190. Suing a party by a fictitious name—when allowed—use of initials. When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleadings or proceedings may be amended accordingly. It is sufficient in all actions, papers, pleadings, or proceedings to designate any party or person by the initial letter or letters, or some contraction of the Christian or first name or names, instead of stating the Christian or first name in full.

History: Ap. p. Sec. 68, p. 55, Bannack Stat.; re-en. Sec. 69, p. 147, L. 1867; re-en. Sec. 77, p. 42, Cod. Stat. 1871; re-en. Sec. 116, p. 67, L. 1877; re-en. Sec. 116, 1st Div. Rev. Stat. 1879; en. Sec. 1, p. 55, L. 1885; re-en. Sec. 118, 1st Div. Comp. Stat. 1887; re-en. Sec. 777, C. Civ. Proc. 1895; re-en. Sec. 6592, Rev. C. 1907; re-en. Sec. 9190, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 474.

Operation and Effect

If plaintiff was ignorant of defendant's true name when the action was commenced, he knew of it after the answer was filed, and should have amended his complaint under the terms of this section. *Clark v. Oregon Short Line R. R. Co.*, 29 M 317, 321, 74 P 734. See also *Ramsey v. Cortland Cattle Co.*, 6 M 498, 499, 13 P 247.

9191. No error or defect to be regarded unless it affects substantial rights. The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

History: En. Sec. 70, p. 56, Bannack Stat.; re-en. Sec. 71, p. 147, L. 1867; re-en. Sec. 79, p. 42, Cod. Stat. 1871; re-en. Sec. 117, p. 67, L. 1877; re-en. Sec. 117, 1st Div. Rev. Stat. 1879; re-en. Sec. 119, 1st Div. Comp. Stat. 1887; re-en. Sec. 778, C. Civ. Proc. 1895; re-en. Sec. 6593, Rev. C. 1907; re-en. Sec. 9191, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 475.

Error Not Presumed

On appeal prejudice is not presumed, and in order to work a reversal it must be affirmatively made to appear that substan-

tial rights have been affected by the errors assigned. *Lindeberg v. Howe*, 67 M 195, 199, 215 P 230.

Imperative Provision

The provisions of this section are of as commanding authority as section 9417 and are as imperative in their directions. *Kipp v. Burton*, 29 M 96, 104, 74 P 85.

Not Applicable to Substantial Errors

This section has no application to substantial errors; as, where the verdict in claim and delivery fails to find that there

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L. 41 c. 105
secs. 1-4
pp. 170-172

9191
71 P (2d) 903
Mont.

9191
74 P (2d) 448
Mont.

9191
97 P.(2d) 589

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124 P.(2d) 586

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145 P.(2d) 828

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151 P. 2d 178

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157 P. 2d 107
160 P. 2d 489

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186 P. (2) 220

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194 P.(2d) 254

was an unlawful taking or detention. *Olcott v. Gebo*, 54 M 35, 37, 166 P 300.

Not Applicable Where Jurisdiction Has Not Been Acquired

This section does not apply to an action where jurisdiction has not been properly acquired. *Choate v. Spencer*, 13 M 127, 136, 32 P 651.

Not Applicable Where Pleading Does Not State Facts Sufficient to State a Cause of Action

The rule enunciated in this section, that courts must at every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, in so far as pleadings are concerned has reference only to nonessential allegations or formative defects, and may not be relied upon by a plaintiff who failed to allege all facts in his complaint necessary to be proved in order to make out a cause of action, on the alleged ground that after trial on the merits the judgment should not be reversed for technical objections to the complaint. *Dickason v. Dickason*, 84 M 52, 57, 274 P 145.

Operation in General

It is not error for the trial court to permit an attachment plaintiff to amend his complaint and affidavit on attachment, without an affidavit showing ground therefor, and pending a motion to dissolve, where the amendment does not affect the substantial rights of the parties. *Muth v. Erwin*, 14 M 227, 228, 36 P 43. See also *Union Bank & Trust Co. v. Himmelbauer*, 56 M 82, 89, 181 P 332.

An order confirming a receiver's sale of partnership property will not be set aside on an appeal therefrom, where it is not shown that the property was not sold at its full value, or that the appellant was prejudiced thereby. *Murphy v. Patterson*, 24 M 591, 594, 63 P 380.

Where defendant rightly demurred on the ground that two causes of action had been improperly united in the complaint, and the court, at the instance of the plaintiff, without objection by the defendant, dismissed the complaint as to the second cause of action, at the same time overruling the demurrer, and no costs being taxed to defendant, the overruling of the demurrer, when considered with the dismissal, did not affect any substantial right of the defendant requiring the judgment to be reversed. *Caplice Commercial Co. v. Cassidy*, 25 M 81, 82, 63 P 799.

A technical objection to a complaint in a suit for specific performance not affecting the substantial rights of the parties is not available after judgment. *Christiansen v. Aldrich*, 30 M 446, 452, 76 P 1007.

Id. Where, after a trial amendment, the case proceeded and was tried upon the issues formed by the amended complaint and answer, and it appeared that defendants were afforded every opportunity to present their entire case, the judgment should not be reversed upon the purely technical irregularity in the proceedings of the court with reference to the amendment.

Where, in an action to recover for services alleged to have been performed as brokers to sell real estate, plaintiffs at the opening of the trial abandoned a count in their complaint based upon a quantum meruit, introduced no proof in support of it, and the trial proceeded upon the issues presented by the answer to a count based on a written contract, and the instructions of the court were formulated accordingly, the error of the court in overruling a special demurrer to the count based upon the quantum meruit, if error, was harmless. *Blankenship v. Decker*, 34 M 292, 299, 85 P 1035.

A variance between the evidence introduced by a plaintiff to establish his contention in a water-right suit and an allegation in his replication is deemed immaterial on appeal, where the record contains nothing to show that the appellants were misled by it to their prejudice. *Vreeland v. Edens*, 35 M 413, 423, 89 P 735.

A defendant is not entitled to a new trial on the ground of variance where he was not misled. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 239, 99 P 837.

Error in refusing to grant a motion, in an action in conversion, to strike out a portion of the replication which, referring to proceedings on attachment had in a justice's court, was said to contain allegations argumentative in character and charging defendants with gross wrongdoing, was harmless, where, during the trial, the entire record of the proceedings had in the justice's court was on plaintiff's motion excluded, and where the court in its instructions submitted only the issues presented by the complaint and the denials in the answer. *Shandy v. McDonald*, 38 M 393, 397, 100 P 203.

It is not important whether the court directs the jury to render a verdict for either party, or discharges the jury and renders judgment. In either case the result is the decision of the court. If the court pursues the latter course, it is at most a mere irregularity, which will be disregarded by the supreme court. *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 573, 111 P 152.

Notwithstanding there may be some question as to whether causes of action in tort and in contract have not been improperly joined, the supreme court will not

too closely scrutinize the complaint to determine this fact, where the case has been tried on its merits and substantial justice appears to have been done. *Ivey v. La France Copper Co.*, 45 M 71, 75, 121 P 1061.

A judgment for the defendant will not be reversed for error committed during the trial, where the plaintiff is not, in any view of the case, entitled to a judgment. *Howell v. Bent*, 48 M 268, 273, 137 P 49.

Technical error in the admission of evidence is not ground for reversal unless it appears that the rights of the party complaining have been prejudiced by it. *White v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 49 M 419, 426, 143 P 561.

A failure to question the sufficiency of a complaint by demurrer, in the trial court, does not amount to a waiver of the right to question it afterward; the raising of the point for the first time on appeal, however, causes the objection to be regarded with disfavor. *Ellinghouse v. Ajax Live Stock Co.*, 51 M 275, 282, 152 P 481.

Where the issuing of a writ of mandamus, restoring a policeman to office, has been manifestly just and the rights of the municipality, against which the writ is directed, are not prejudicially affected, any errors committed at the hearing are to be disregarded on appeal. *State ex rel. McDonald v. Getchell*, 51 M 323, 326, 152 P 480.

Error committed during a trial which is rendered harmless during its progress, and therefore cannot prejudice the complaining party, is insufficient to impeach a judgment. *Fowlie v. Cruse*, 52 M 222, 230, 157 P 958.

Even though the defendant, in a proceeding to condemn land for a power-plant, had the right to open and close on the question of damages, which right, however, was given by the court to the plaintiff, he was not entitled to a new trial on this ground unless he could show that he had suffered some prejudice by reason of the court's action. *Interstate Power Co. v. Anaconda Copper Min. Co.*, 52 M 509, 513, 159 P 408.

Technical error in the reception of evidence as to facts admitted does not command a reversal. *Rea v. Alfalfa Products Co.*, 53 M 90, 93, 161 P 708.

Though the court permits a technical violation of the rule of cross-examination, the error is not prejudicial, where it is not shown that substantial rights have suffered, and it will therefore be disregarded. *Hanson Sheep Co. v. Farmers' & Traders' State Bank*, 53 M 324, 340, 163 P 1151.

Where an automobile collided with an engine at a railroad crossing, through the negligence of the driver of the machine,

and a minor, nearly twenty-one years of age, who was riding in the machine and who was injured at the time of the collision, brought suit against the railway company for his injuries, and there was a judgment for the company, such judgment will not be reversed where the plaintiff was himself negligent, because of an erroneous instruction that the driver's negligence could be imputed to the plaintiff, which did not affect the substantial rights of the parties. *Sherris v. Northern Pac. Ry. Co.*, 55 M 189, 199, 175 P 269.

Where the jury had been advised that every element essential to a recovery must be established by a preponderance of the evidence, error in an instruction that if they found the issues in favor of plaintiff, they might award damages in such amount as "they believed" would compensate her, etc., was non-prejudicial. *Kelly v. John R. Daily Co.*, 56 M 63, 77, 181 P 326.

Under this section district courts must, at every stage of a case, disregard procedural irregularities and omissions which do not affect the substantial rights of the parties. *State ex rel. Jerry v. District Court*, 57 M 328, 188 P 365.

Where evidence was admissible under the allegations of the complaint, and the bill of particulars furnished by plaintiff was to meet a definite request not affecting such evidence, the court properly overruled defendant's objection that plaintiff was barred from introducing any evidence upon matters not specifically mentioned in the bill. *Rogness v. Northern Pacific Ry. Co.*, 59 M 373, 382, 196 P 989.

Where it is apparent from the record that the jury intended to fix the damages in an action in conversion at the limit fixed in the court's instructions (\$158), but either by clerical error or inadvertence returned a verdict for a larger amount (\$258), and the evidence shows clearly that plaintiff is entitled to recover, the judgment will not be reversed, but the cause remanded with directions to modify the judgment to comport with the intention of the jury. *Kane v. Oehler et al.*, 62 M 417, 421, 205 P 245.

For technical errors not affecting prejudicially the substantial rights of appellant a judgment may not be reversed. *Puckett v. Hopkins et al.*, 63 M 137, 143, 206 P 422.

Since, in legal effect, a motion for a directed verdict is a demurrer to the evidence, where no evidence was introduced in a claim and delivery action, an order directing the jury to find in favor of defendant, was technical error (section 9317, subdivision 5, providing that in such a case a nonsuit or dismissal of the complaint is the proper remedy); held, however, that the error was harmless, the action taken by

the court having placed plaintiff in no worse position than he would have been if the statute had been strictly pursued. *Barrett v. Shipley*, 63 M 152, 158, 206 P 430.

Under the liberal rule of construction of pleadings provided by the codes (sections 9164 and 9191), in determining the issues of law presented by a general demurrer to the complaint or by objection to the introduction of evidence, matters of form as well as allegations which are irrelevant or redundant must be disregarded, and if the pleading warrants recovery in any amount and upon any admissible theory, it will be sustained. *Grant v. Nihill*, 64 M 420, 435 et seq., 210 P 914.

Where defendant was not misled by any allegations or lack of allegations in the complaint but was fully prepared to defend the action upon the merits, the judgment in favor of plaintiff will not be reversed for mere technical defect in the pleading raised by general demurrer. *Davis v. Freisheimer*, 68 M 322, 331, 219 P 236.

Technical error in making an immaterial finding does not warrant reversal of a judgment. *Averill Machinery Co. v. Taylor et al.*, 70 M 70, 81, 223 P 918.

Repeated failure of the trial court in a proceeding to vacate a decree of divorce to rule upon objections to offered evidence and its action in permitting it to be received "subject to the objections," thus depriving counsel of knowledge whether it was or was not before the court in arriving at its decision, if error, held non-prejudicial where the evidence in each instance was not of any substantial materiality and could not have affected the result whether the court did or did not consider it. *Hall v. Hall*, 70 M 460, 466, 226 P 469.

Under this section, courts must disregard any error in proceedings which does not affect the substantial rights of the parties. *Atkinson v. Roosevelt County et al.*, 71 M 165, 185, 227 P 811.

Where plaintiff is permitted, without objection by defendant, to introduce testimony not warranted by the allegations of his complaint, the pleading will on appeal be regarded as having been amended to admit the proof, if necessary to sustain the judgment. *Baker v. Union Assur. Soc. of London, Ltd.*, 81 M 281, 298, 264 P 132.

Unless error in the trial of a cause has materially affected appellant's rights, the judgment will not be reversed; hence error in admitting immaterial testimony which could not have prejudiced appellant will be treated as harmless. *Russell v. Sunburst Refining Co.*, 83 M 452, 466, 272 P 998.

Under the rule that error will not be presumed and that a judgment will not be reversed merely because error was committed, but to bring about that result it must be made to appear affirmatively that appellant's substantial rights on the merits of the case were prejudicially affected thereby, held in an action by a pedestrian based upon an accident on a city street in daytime, that while it was error to instruct the jury that defendant city was required to keep its sidewalks in a reasonably safe condition "by night as well as day," in the absence of an affirmative showing of prejudice to defendant's substantial rights, the error must be deemed harmless. *Olson v. City of Butte*, 86 M 240, 250, 283 P 222.

Where all evidence offered in a condemnation proceeding was admitted, failure of the court to rule on an objection to appellant's evidence could not have adversely affected his rights, and therefore, while a ruling should have been made in order to preserve a proper record, its failure so to do was harmless error. *State et al. v. Whitcomb et al.*, 94 M 415, 430, 22 P 2d 823.

Where the correct result was reached in the trial of a law action, the judgment should be affirmed even though the jury was incorrectly instructed, such a case falling within the rule (this section) forbidding the supreme court from reversing a judgment because of any error or defect in the proceedings not affecting the substantial rights of the parties. *Berthelote et al. v. Loy Oil Co. et al.*, 95 M 434, 452, 28 P 2d 187.

The trial court in a criminal prosecution may neither instruct the jury as though a disputed fact had been proved, nor comment upon the weight of the evidence; but if its charge as a whole leaves the disputed facts to the determination of the jury, and it does not appear that the jurors have been misled by the assumption of a fact as true, and it appears from the whole case that substantial justice has been done, the technical error committed will not work a reversal of the judgment of conviction. *State v. Daems*, 97 M 486, 500, 37 P 2d 322.

While it was error to admit evidence, in an action of the character of the above, as to the condition of a tractor two years after its alleged wrongful seizure and return to the owner, in view of further testimony that it had in the interim been extensively used and repairs had been made on it, it may not be held of sufficient force to prejudice defendant in the eyes of the jury. *Roper v. Caterpillar Tractor Co. et al.*, 98 M 76, 96, 37 P 2d 812.

Presumption of Non-Prejudice When Applicable

The rule that on appeal in an action at law tried without a jury (or in an equity case) it will be presumed that the trial court did not consider incompetent testimony in reaching its conclusion, applies only where nothing substantial appears in the record to the contrary, or where the testimony was trifling and of no import, and therefore where palpably incompetent testimony was of import and went to the very matter covered by the court's findings the presumption cannot be indulged and the judgment will be reversed. *State ex rel. Rankin v. Martin*, 68 M 392, 403, 219 P 632.

Purpose and Design of This Section

This section is intended to put a speedy end to litigation, when that object can be attained without injustice; its design is to prevent reversals of causes wherein substantial justice has already been done; and the supreme court is commanded by it to give judgment on appeal without regard to errors which do not affect the substantial rights of the parties. *Copenhaver v. Northern Pacific Ry. Co.*, 42 M 453, 467, 113 P 467.

Will Not Permit Court to Supply a Substantive Allegation

A liberal construction is not required which will read into a pleading a substantive allegation which has been omitted

therefrom. *Conrad National Bank v. Great Northern Ry. Co.*, 24 M 178, 182, 61 P 1; *Montana A. S. Co. v. Goldwyn Distributing Corp.*, 56 M 215, 224, 182 P 119.

While pleadings must be liberally construed, liberality of construction does not permit a court to read into a pleading a substantial allegation which has been omitted. *Kosonen v. Waara*, 87 M 24, 32, 285 P 668.

References

Cited or applied as section 778, Code of Civil Procedure, in *State ex rel. Allen v. Napton*, 24 M 450, 453, 62 P 686; *Poin-dexter & Orr Live Stock Co. v. Oregon Short Line R. R. Co.*, 33 M 338, 342, 83 P 886; in *State ex rel. Hall v. District Court*, 34 M 112, 120, 85 P 872; as section 6593, Revised Codes, in *Eadie v. Eadie*, 44 M 391, 394, 120 P 239; *Gauss v. Trump*, 48 M 92, 98, 135 P 910; *Mosher v. Sutton's New Theatre Co.*, 48 M 137, 148, 137 P 534; *Surman et al. v. Cruse et al.*, 57 M 253, 262, 187 P 890; *Galland v. Galland*, 70 M 513, 515, 226 P 511; *Rothrock v. Bauman et al.*, 73 M 401, 407, 236 P 1077; *O'Hanion v. Great Northern Ry. Co.*, 76 M 128, 245 P 518; *Cramer v. Deschler Broom Factory*, 79 M 220, 223, 255 P 346; *Boyd v. Great Northern Ry. Co. et al.*, 84 M 84, 92, 274 P 293; *St. George v. Boucher*, 84 M 153, 169, 274 P 489; *Croft v. Thurst*, 84 M 510, 520, 276 P 950; *Brown v. Columbia Amusement Co.*, 91 M 174, 187, 6 P 2d 874.

9192. Time for amendment, answer or reply after ruling on demurrer.

When a demurrer to any pleading is sustained or overruled, and time to amend, answer, or reply is given, the time so given runs from service of notice of the decision or order, except when the party against whom the decision is made is in court. In such case the time runs from the making of the decision or order.

History: En. Sec. 779, C. Civ. Proc. 1895; re-en. Sec. 6594, Rev. C. 1907; re-en. Sec. 9192, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 476.

Operation and Effect

Where the minutes of the court showed that counsel, who asked the vacation of a default judgment entered upon his failure to answer within a given time after the overruling of a demurrer to the complaint, was present when the demurrer was overruled, notice to him of the decision of the court was not required. *Pearce v. Butte Electric Ry. Co.*, 40 M 321, 323, 106 P 563.

A motion to strike a negligible portion of the answer in a personal injury action, which motion plaintiff claimed to have been in substance a demurrer to the answer, held insufficient to toll the time for reply to the affirmative defense of contributory negligence. *Mihelich v. Butte Electric Ry. Co. et al.*, 85 M 604, 613, 281 P 540.

References

Batchoff v. Butte Pacific Copper Co., 60 M 179, 186, 198 P 132.

CHAPTER 41

ARREST AND BAIL

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9193. No person to be arrested in civil action except as prescribed in this chapter. No person shall be arrested in a civil action, except as prescribed by this chapter.

History: En. Sec. 72, p. 148, L. 1867; re-en. Sec. 80, p. 44, Cod. Stat. 1871; re-en. Sec. 118, p. 68, L. 1877; re-en. Sec. 118, 1st Div. Rev. Stat. 1879; re-en. Sec. 120, 1st Div. Comp. Stat. 1887; re-en. Sec. 800, C. Civ. Proc. 1895; re-en. Sec. 6595, Rev. C. 1907; re-en. Sec. 9193, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 478.

References

Cited or applied as section 800, Code of Civil Procedure, in *State ex rel. Heinze v. District Court*, 28 M 227, 233, 72 P 613.

9194. When defendant may be arrested in a civil action. The defendant may be arrested in the following cases:

1. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors; or when the action is for wilful injury to person, to character, or to property, knowing the property to belong to another;

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment, or for a wilful violation of duty;

3. In an action to recover possession of personal property unjustly obtained, when the property, or any part thereof, has been concealed, removed, or disposed of so that it cannot be found, or taken by the sheriff;

4. When the defendant has been guilty of fraud in contracting the debt, incurring the obligation for which the action is brought, or in concealing or disposing of the property, or for taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

History: En. Sec. 73, L. 1867; re-en. Div. Comp. Stat. 1887; re-en. Sec. 801, Sec. 81, p. 44, Cod. Stat. 1871; re-en. Sec. C. Civ. Proc. 1895; re-en. Sec. 6598, Rev. 119, p. 68, L. 1877; re-en. Sec. 119, 1st C. 1907; re-en. Sec. 9194, R. C. M. 1921. Div. Rev. Stat. 1879; re-en. Sec. 121, 1st Cal. C. Civ. Proc. Sec. 479.

9195. Order of arrest. An order for the arrest of the defendant must be obtained from the judge of the court in which the action is brought.

History: En. Sec. 74, p. 148, L. 1867; 122, 1st Div. Comp. Stat. 1887; re-en. Sec. re-en. Sec. 82, p. 44, Cod. Stat. 1871; re-en. 803, C. Civ. Proc. 1895; re-en. Sec. 6597, Sec. 120, p. 68, L. 1877; re-en. Sec. Rev. C. 1907; re-en. Sec. 9195, R. C. M. 120, 1st Div. Rev. Stat. 1879; re-en. Sec. 1921. Cal. C. Civ. Proc. Sec. 480.

9196. When order made—undertaking therefor. The order must be made whenever it shall appear to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 9194. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with at least two sufficient sureties, to the effect that, if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an order of arrest, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars.

History: En. Secs. 75, 76, p. 148, L. 123, 1st Div. Comp. Stat. 1887; amd. Sec. 1867; re-en. Sec. 83, p. 44, Cod. Stat. 1871; 803, C. Civ. Proc. 1895; re-en. Sec. 6598, re-en. Sec. 121, p. 69, L. 1877; re-en. Sec. Rev. C. 1907; re-en. Sec. 9196, R. C. M. 121, 1st Div. Rev. Stat. 1879; re-en. Sec. 1921. Cal. C. Civ. Proc. Secs. 481, 482.

9197. Justification of sureties. Each of the sureties must annex to the undertaking an affidavit that he is a resident and householder, or freeholder, within the state, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking must be filed with the clerk of the court.

History: En. Sec. 76, p. 148, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 804, re-en. Sec. 84, p. 44, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6599, Rev. Sec. 122, p. 69, L. 1877; re-en. Sec. 122, C. 1907; re-en. Sec. 9197, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 124,

9198. Order—when made and what to require. The order may be made at the time of issuing the summons, or at any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him, and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.

History: En. Sec. 77, p. 148, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 805, re-en. Sec. 85, p. 44, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6600, Rev. Sec. 123, p. 69, L. 1877; re-en. Sec. 123, C. 1907; re-en. Sec. 9198, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 125, Cal. C. Civ. Proc. Sec. 483.

9199. How order to be served on defendant. The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy of the affidavit, and also, if defendant desires, a copy of the order of arrest.

History: En. Sec. 78, p. 149, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 806, re-en. Sec. 86, p. 45, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6601, Rev. Sec. 124, p. 69, L. 1877; re-en. Sec. 124, C. 1907; re-en. Sec. 9199, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 126, Cal. C. Civ. Proc. Sec. 484.

9200. How order executed—expense of keeping defendant. The sheriff must execute the order by arresting the defendant, and keeping him in custody until discharged by law. But the sheriff is not bound to keep such person under arrest more than twenty-four hours, unless the plaintiff advance each day the expense of keeping such person; which expense shall be taxed as costs in the action, and in no case shall be a charge against the county.

History: Ap. p. Sec. 79, p. 149, L. 1867; Div. Comp. Stat. 1887; re-en. Sec. 807, C. en. Sec. 87, p. 45, Cod. Stat. 1871; re-en. Civ. Proc. 1895; re-en. Sec. 6602, Rev. C. Sec. 125, p. 69, L. 1877; re-en. Sec. 125, 1st 1907; re-en. Sec. 9200, R. C. M. 1921. Cal. Div. Rev. Stat. 1879; re-en. Sec. 127, 1st C. Civ. Proc. Sec. 485.

9201. Defendant discharged upon giving bail. The defendant, at any time before execution, is discharged from arrest, either upon giving bail or upon depositing the amount mentioned in the order, as provided in this chapter.

History: En. Sec. 80, p. 149, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 808, re-en. Sec. 88, p. 45, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6603, Rev. Sec. 126, p. 70, L. 1877; re-en. Sec. 126, C. 1907; re-en. Sec. 9201, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 128, Cal. C. Civ. Proc. Sec. 486.

9202. Bail—form of undertaking. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residences and occupations, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

History: En. Sec. 81, p. 149, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 809, re-en. Sec. 89, p. 45, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6604, Rev. Sec. 127, p. 70, L. 1877; re-en. Sec. 127, C. 1907; re-en. Sec. 9202, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 129, Cal. C. Civ. Proc. Sec. 487.

9203. Bail may surrender defendant. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested.

History: En. Sec. 82, p. 149, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 810, re-en. Sec. 90, p. 45, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6605, Rev. Sec. 128, p. 70, L. 1877; re-en. Sec. 128, C. 1907; re-en. Sec. 9203, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 130, Cal. C. Civ. Proc. Sec. 488.

9204. When and how defendant may be surrendered. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff

to do so. Upon arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail shall be exonerated; provided, such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after the judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment within ten days thereafter.

History: En. Sec. 83, p. 149, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 811, re-en. Sec. 91, p. 45, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6606, Rev. Sec. 129, p. 70, L. 1877; re-en. Sec. 129, C. 1907; re-en. Sec. 9204, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 131, Cal. C. Civ. Proc. Sec. 489.

9205. Action against bail. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

History: En. Sec. 84, p. 149, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 812, re-en. Sec. 92, p. 45, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6607, Rev. Sec. 130, p. 70, L. 1877; re-en. Sec. 130, C. 1907; re-en. Sec. 9205, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 132, Cal. C. Civ. Proc. Sec. 490.

9206. Bail—how exonerated. The bail must also be exonerated by the death of the defendant, or his imprisonment in the state penitentiary or prison, or by his legal discharge from the obligation to render himself amenable to the process.

History: En. Sec. 85, p. 149, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 813, re-en. Sec. 93, p. 46, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6608, Rev. Sec. 131, p. 71, L. 1877; re-en. Sec. 131, C. 1907; re-en. Sec. 9206, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 133, Cal. C. Civ. Proc. Sec. 491.

9207. Filing of order of arrest—exception to bail. Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

History: En. Sec. 86, p. 150, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 814, re-en. Sec. 94, p. 46, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6609, Rev. Sec. 132, p. 71, L. 1877; re-en. Sec. 132, C. 1907; re-en. Sec. 9207, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 134, Cal. C. Civ. Proc. Sec. 492.

9208. Notice of justification of bail—new undertaking. Within five days after receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the place of residence and occupation of the latter), before a judge of the court, or clerk thereof, at a specified time and place; the time not to be less than five nor more than ten days thereafter, except by consent of parties. In case other bail is given, there shall be a new undertaking.

History: En. Sec. 87, p. 150, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 815, re-en. Sec. 95, p. 46, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6610, Rev. Sec. 133, p. 71, L. 1877; re-en. Sec. 133, C. 1907; re-en. Sec. 9208, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 135, Cal. C. Civ. Proc. Sec. 493.

9209. Qualifications of bail. The qualifications of bail shall be as follows:

1. Each of them must be a resident and householder, or freeholder, within the county.

2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

History: En. Sec. 88, p. 150, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 816, re-en. Sec. 96, p. 46, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6611, Rev. Sec. 134, p. 71, L. 1877; re-en. Sec. 134, C. 1907; re-en. Sec. 9209, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 136, Cal. C. Civ. Proc. Sec. 494.

9210. Justification of bail. For the purpose of justification, each of the bail must attend before the judge or clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

History: En. Sec. 89, p. 150, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 817, re-en. Sec. 97, p. 47, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6612, Rev. Sec. 135, p. 72, L. 1877; re-en. Sec. 135, C. 1907; re-en. Sec. 9210, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 137, Cal. C. Civ. Proc. Sec. 495.

9211. Allowance of bail. If the judge or clerk shall find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

History: En. Sec. 90, p. 150, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 818, re-en. Sec. 98, p. 47, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6613, Rev. Sec. 136, p. 72, L. 1877; re-en. Sec. 136, C. 1907; re-en. Sec. 9211, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 138, Cal. C. Civ. Proc. Sec. 496.

9212. Deposit of money instead of bail. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged from custody.

History: En. Sec. 91, p. 150, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 819, re-en. Sec. 99, p. 47, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6614, Rev. Sec. 137, p. 72, L. 1877; re-en. Sec. 137, C. 1907; re-en. Sec. 9212, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 139, Cal. C. Civ. Proc. Sec. 497.

9213. Payment of money into court by sheriff—certificates of payment. The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he must deliver or transmit to the plaintiff or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

History: En. Sec. 92, p. 151, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 820, re-en. Sec. 100, p. 47, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6615, Rev. Sec. 138, p. 72, L. 1877; re-en. Sec. 138, C. 1907; re-en. Sec. 9213, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 140, Cal. C. Civ. Proc. Sec. 498.

9214. Substituting bail for deposit. If money be deposited, as provided in the last two sections, bail may be given and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

History: En. Sec. 93, p. 151, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 821, re-en. Sec. 101, p. 47, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6616, Rev. Sec. 139, p. 72, L. 1877; re-en. Sec. 139, C. 1907; re-en. Sec. 9214, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 141, Cal. C. Civ. Proc. Sec. 499.

9215. Money deposited—how applied or disposed of. Where money shall have been deposited, if it remains on deposit at the time of recovery of a judgment in favor of the plaintiff, the clerk must, under direction of the court, apply the same in satisfaction thereof; and, after satisfying the judgment, must refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk must, under the direction of the court, refund him the whole sum deposited and remaining unapplied.

History: En. Sec. 94, p. 151, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 822, re-en. Sec. 102, p. 48, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6617, Rev. Sec. 140, p. 73, L. 1877; re-en. Sec. 140, C. 1907; re-en. Sec. 9215, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 142, Cal. C. Civ. Proc. Sec. 500.

9216. Sheriff liable for escape—discharge from liability. If, after being arrested, the defendant escape or be rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.

History: En. Sec. 95, p. 151, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 823, re-en. Sec. 103, p. 48, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6618, Rev. Sec. 141, p. 73, L. 1877; re-en. Sec. 141, C. 1907; re-en. Sec. 9216, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 143, Cal. C. Civ. Proc. Sec. 501.

9217. Official bond liable on judgment against sheriff. If a judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the same proceeding may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency.

History: En. Sec. 96, p. 151, L. 1867; Div. Comp. Stat. 1887; re-en. Sec. 824, re-en. Sec. 104, p. 48, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6619, Rev. Sec. 142, p. 73, L. 1877; re-en. Sec. 142, 1st C. 1907; re-en. Sec. 9217, R. C. M. 1921. Div. Rev. Stat. 1879; re-en. Sec. 144, 1st Cal. C. Civ. Proc. Sec. 502.

9218. Proceedings to vacate order or reduce bail. A defendant arrested may, at any time before justification of bail, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice to the plaintiff, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

History: En. Sec. 97, p. 151, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 825, re-en. Sec. 105, p. 48, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6620, Rev. Sec. 143, p. 73, L. 1877; re-en. Sec. 143, C. 1907; re-en. Sec. 9218, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 145, Cal. C. Civ. Proc. Sec. 503.

9219. When order vacated or bail reduced. If, upon such application, it satisfactorily appears that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appears that the bail was fixed too high, the amount shall be reduced.

History: En. Sec. 98, p. 151, L. 1867; 146, 1st Div. Comp. Stat. 1887; re-en. Sec. re-en. Sec. 106, p. 48, Cod. Stat. 1871; 826, C. Civ. Proc. 1895; re-en. Sec. 6621, re-en. Sec. 144, p. 73, L. 1877; re-en. Sec. Rev. C. 1907; re-en. Sec. 9219, R. C. M. 144, 1st Div. Rev. Stat. 1879; re-en. Sec. 1921. Cal. C. Civ. Proc. Sec. 504.

CHAPTER 42

CLAIM AND DELIVERY OF PERSONAL PROPERTY

- Section 9220.** Plaintiff may claim delivery.
9221. Affidavit and its requisites.
9222. Requisition to sheriff.
9223. Undertaking and duty of sheriff.
9224. Exception to sureties and proceedings thereon, or on failure to except.
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9220. Plaintiff may claim delivery. The plaintiff, in an action to recover possession of personal property, may, at the time of issuing summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

9220
200 P.(2d) 251

History: En. Sec. 71, p. 56, Bannack Stat.; re-en. Sec. 99, p. 151, L. 1867; re-en. Sec. 116, p. 49, Cod. Stat. 1871; re-en. Sec. 154, p. 75, L. 1877; re-en. Sec. 154, 1st Div. Rev. Stat. 1879; re-en. Sec. 156, 1st Div. Comp. Stat. 1887; re-en. Sec. 840, C. Civ. Proc. 1895; re-en. Sec. 6622, Rev. C. 1907; re-en. Sec. 9220, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 509.

Necessary Allegations

Where defendants in an action in claim and delivery obtained possession of household goods rightfully under an executory contract of purchase, plaintiff was required to plead a demand for them and a refusal thereof as prerequisites to a termination of their right of possession and the creation of the right to immediate possession in plaintiff. *Hennessy Co. v. Wagner et al.*, 69 M 46, 48, 220 P 101.

Judgment in the Alternative

In claim and delivery the judgment must be in the alternative, for the delivery of the possession of the property, or for its value in case delivery cannot be made. *Hennessy Co. v. Wagner et al.*, 69 M 46, 48, 220 P 101.

To state a cause of action in claim and delivery, the complaint must allege ownership or right of possession in plaintiff, that defendant is wrongfully in possession, and the value of the property. *Hennessy*

Co. v. Wagner et al., 69 M 46, 48, 220 P 101; Perham v. Putnam et al., 82 M 349, 355, 267 P 305.

Id. In a claim and delivery action by an automobile dealer to recover possession of a car sold to the purchaser under conditional sale contract and bought by defendants on delinquent tax sale before it had been fully paid for, plaintiff was not required to plead the contract and forfeiture thereof, nor, the purchaser having been in default and out of possession, was it necessary to show a demand upon him for possession.

Id. In an action of the nature of the above, an allegation in the complaint that the property sought to be recovered had not been taken for a tax was surplusage and hence plaintiff was not required to prove it.

When Action Does Not Lie Against an Officer

While claim and delivery does not lie to recover possession of personal property seized for a tax and in possession of an officer, unless the tax is absolutely void, it does lie against the purchaser at the tax sale for fatal irregularity in the sale. Perham v. Putnam et al., 82 M 349, 355, 267 P 305.

9221. Affidavit and its requisites. When a delivery is claimed, an affidavit must be made by the plaintiff, or some one in his behalf, stating:

1. That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof;
2. That the property is wrongfully detained by the defendant;
3. That the same has not been taken for a tax, assessment, or fine, pursuant to statute; or seized, under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from seizure; and,
4. The actual value of the property.

History: En. Sec. 72, p. 56, Bannack Stat.; amd. Sec. 100, p. 151, L. 1867; re-en. Sec. 117, p. 49, Cod. Stat. 1871; re-en. Sec. 155, p. 75, L. 1877; re-en. Sec. 155, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 103, L. 1885; re-en. Sec. 157, 1st Div. Comp. Stat. 1887; re-en. Sec. 841, C. Civ. Proc. 1895; re-en. Sec. 6623, Rev. C. 1907; re-en. Sec. 9221, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 510.

9222. Requisition to sheriff. The plaintiff or his attorney may thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.

History: En. Sec. 73, p. 56, Bannack Stat.; re-en. Sec. 101, p. 152, L. 1867; re-en. Sec. 118, p. 49, Cod. Stat. 1871; re-en. Sec.

When Right Exists

Where the buyer of an automobile under a conditional sale contract prior to its seizure for taxes had defaulted, the right to its possession was in the seller, and after its seizure resulting in a void sale that right again reverted to him, and therefore he could properly sue the purchaser at the tax sale in claim and delivery to recover its possession. Perham v. Putnam et al., 82 M 349, 355, 267 P 305.

Writ of Replevin Abrogated by This Section

The writ of replevin has been dispensed with in this state, and the proceedings provided for in this chapter, to gain possession of the property and to hold it pending the trial of the cause, have been substituted in its stead. State ex rel. Bruce v. District Court, 33 M 359, 363, 83 P 641.

References

First National Bank v. Middleton, 61 M 209, 201 P 683; Kalberg v. Greiner, 91 M 509, 510, 8 P 2d 799; Fergus Motor Co. v. Schott et al., 95 M 249, 259, 26 P 2d 365.

References

Hennessy Co. v. Wagner et al., 69 M 46, 48, 220 P 101; Perham v. Putnam et al., 82 M 349, 355, 267 P 305; Kalberg v. Greiner, 91 M 509, 510, 8 P 2d 799; Fergus Motor Co. v. Schott et al., 95 M 249, 259, 26 P 2d 365.

156, p. 76, L. 1877; re-en. Sec. 156, 1st Div. Rev. Stat. 1879; re-en. Sec. 158, 1st Div. Comp. Stat. 1887; re-en. Sec. 842,

C. Civ. Proc. 1895; re-en. Sec. 6624, Rev. C. 1907; re-en. Sec. 9222, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 511.

References

Clark v. National Surety Co., 81 M 113, 115, 261 P 618; Fergus Motor Co. v. Schott et al., 95 M 249, 259, 26 P 2d 365.

9223. Undertaking and duty of sheriff. Upon receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or, if neither have any known place of abode, by putting them in the nearest postoffice, directed to the defendant.

History: Ap. p. Sec. 74, p. 56, Bannack Stat.; en. Sec. 102, p. 152, L. 1867; re-en. Sec. 119, p. 49, Cod. Stat. 1871; re-en. Sec. 157, p. 76, L. 1877; re-en. Sec. 157, 1st Div. Rev. Stat. 1879; re-en. Sec. 159, 1st Div. Comp. Stat. 1887; re-en. Sec. 843, C. Civ. Proc. 1895; re-en. Sec. 6625, Rev. C. 1907; re-en. Sec. 9223, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 512.

Operation and Effect

Resistance of, or interference with, an officer while endeavoring to take property into his possession, pursuant to the provisions of this section, constitutes a contempt within the meaning of subdivision 7 of section 9908. State ex rel. Bruce v. District Court, 33 M 359, 362, 83 P 641.

The surety on an undertaking in an action in claim and delivery against a sheriff, conditioned for the return of the property if return be adjudged and for the payment of such sum as might from any cause be recovered against plaintiff, is liable for the costs incurred by the defendant sheriff on judgment in his favor. Clark v. National Surety Co., 81 M 113, 116, 261 P 618.

Id. Where an undertaking in a claim and delivery action had accomplished the purpose for which it was given, the surety thereon will not thereafter be permitted to free itself from the obligations

and disadvantages of its engagement, on the ground that the sheriff never relinquished possession of the property in question and that therefore there was no consideration for the undertaking, it appearing that the same surety company had furnished a redelivery bond to permit the sheriff to retain possession.

Id. The giving of a redelivery bond does not amount to a waiver or discharge of the undertaking in a claim and delivery action; nor does the fact that the property held under writ of attachment was subsequently sold under execution release the surety from liability for costs awarded in the claim and delivery action.

Under this section, providing that the sureties on an undertaking in claim and delivery are bound in "double the value of the property" retaken, plaintiff in an action thereon may recover the damages he is able to prove to the full amount of the penalty, and where no other damages are asked, the full recovery is the value of the property at the time it was taken, with costs, regardless of whether or not a return of the property had theretofore been adjudged. Fergus Motor Co. v. Schott et al., 95 M 249, 263, 26 P 2d 365.

References

First Nat. Bank v. Middleton, 61 M 209, 201 P 683.

9224. Exception to sureties and proceedings thereon, or on failure to except. The defendant may, within two days after service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to

9323
98 P.(2d) 338

9223
143 P.(2d) 902

have waived all objections to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot claim the property, as provided in section 9229.

History: En. Sec. 103, p. 152, L. 1867; re-en. Sec. 120, p. 50, Cod. Stat. 1871; re-en. Sec. 158, p. 76, L. 1877; re-en. Sec. 158, 1st Div. Rev. Stat. 1879; re-en. Sec. 160, 1st Div. Comp. Stat. 1887; re-en. Sec. 884, C. Civ. Proc. 1895; re-en. Sec. 6626, Rev. C. 1907; re-en. Sec. 9224, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 513.

Operation and Effect

Sureties are not required to justify unless the defendant excepts to their sufficiency and gives notice to the plaintiff. *State ex rel. Johnson v. Collins*, 41 M 526, 530, 110 P 526.

9225. Property to be returned in good condition. In all cases when a judgment is rendered in an action to recover the possession of personal property for the return thereof, or its value in case a return cannot be had, it is the duty of the party against whom such judgment shall be rendered to return the same in as good condition as the same was when possession thereof was taken by him.

History: En. Sec. 159, p. 77, L. 1877; re-en. Sec. 159, 1st Div. Rev. Stat. 1879; re-en. Sec. 161, 1st Div. Comp. Stat. 1887; re-en. Sec. 845, C. Civ. Proc. 1895; re-en. Sec. 6627, Rev. C. 1907; re-en. Sec. 9225, R. C. M. 1921.

Operation and Effect

Scanning the evidence above outlined, it will be seen that at the time of the alleged tender title to the property was clouded by a chattel mortgage and other

claims. This section declares that "it is the duty of the party against whom such judgment (in claim and delivery action) shall be rendered to return the same in as good condition as the same was when possession thereof was taken by him." Under this provision the owner would not be required to take over his property with a lawsuit to clear his title thereto. *Hoeh v. Kirby et al.*, 98 M 391, 398, 39 P 2d 657.

9226. Action if property injured. In case such property, while in the possession of the party against whom such judgment shall be rendered, or while the same is unlawfully detained from the party entitled to the possession thereof, be materially injured or lessened in value by use or otherwise, then a return or offer to return shall not be deemed a compliance with the undertaking given for its return, but an action may be maintained for the value thereof as assessed by the jury or court, and damages for its detention.

History: En. Sec. 160, p. 77, L. 1877; re-en. Sec. 160, 1st Div. Rev. Stat. 1879; re-en. Sec. 162, 1st Div. Comp. Stat. 1887; re-en. Sec. 846, C. Civ. Proc. 1895; re-en. Sec. 6628, Rev. C. 1907; re-en. Sec. 9226, R. C. M. 1921.

9227. Duty of officer involved in action—sale of property injured or decreased in value. In case such action to recover possession of personal property is brought against any sheriff or other officer who may have levied upon and seized the same under authority of any attachment or other process, and judgment shall be rendered in favor of such officer, for the return of the property, the party against whom such judgment is rendered may nevertheless make return of said property, notwithstanding the same may have been injured or lessened in value, and thereupon it is the duty of such officer to immediately advertise the same for sale as in

cases of sales of property under execution, and apply the proceeds of the sale thereof, after paying the costs, towards the payment and satisfaction of any judgment that may have been rendered.

History: En. Sec. 161, p. 77, L. 1877; re-en. Sec. 847, C. Civ. Proc. 1895; re-en. re-en. Sec. 161, 1st Div. Rev. Stat. 1879; Sec. 6629, Rev. C. 1907; re-en. Sec. 9227, re-en. Sec. 163, 1st Div. Comp. Stat. 1887; R. C. M. 1921.

9228. Sureties not released by second taking. Such second taking of such property referred to in the preceding section does not release or discharge the sureties on any undertaking given for the return of such property, but an action may be maintained on such undertaking and recovery thereon had, unless the property shall have been actually returned in accordance with the judgment rendered.

History: En. Sec. 162, p. 77, L. 1877; re-en. Sec. 848, C. Civ. Proc. 1895; re-en. re-en. Sec. 162, 1st Div. Rev. Stat. 1879; Sec. 6630, Rev. C. 1907; re-en. Sec. 9228, re-en. Sec. 164, 1st Div. Comp. Stat. 1887; R. C. M. 1921.

9229. Defendant may require return of property. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not required within five days after the taking and serving notice to the defendant, it shall be delivered to the plaintiff except as provided in section 9234.

History: En. Sec. 104, p. 152, L. 1867; re-en. Sec. 121, p. 50, Cod. Stat. 1871; re-en. Sec. 163, p. 78, L. 1877; re-en. Sec. 163, 1st Div. Rev. Stat. 1879; re-en. Sec. 165, 1st Div. Comp. Stat. 1887; re-en. Sec. 849, C. Civ. Proc. 1895; re-en. Sec. 6631, Rev. C. 1907; re-en. Sec. 9229, R. C. M. 1921. See also Secs. 77-80, pp. 67, 68, Bannack Stat. Cal. C. Civ. Proc. Sec. 514.

judgment in the replevin suit. Hedderick v. Pontet, 6 M 345, 12 P 765.

The giving of a redelivery bond does not amount to a waiver or discharge of the undertaking in a claim and delivery action; nor does the fact that the property held under writ of attachment was subsequently sold under execution release the surety from liability for costs awarded in the claim and delivery action. Clark v. National Surety Co., 81 M 113, 117, 261 P 618.

Operation and Effect

A bond, even though not executed in compliance with the provisions of this statute, may be good as a common law bond, and an action may be maintained thereon upon failure of the defendant in replevin to comply with the terms of the

References

Cited or applied as section 849, Code of Civil Procedure, in State ex rel. Weinstein Co. v. District Court, 28 M 445, 448, 72 P 867.

9230. Justification of defendant's sureties. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, shall justify before the judge or clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time or place appointed, he shall deliver the property to the plaintiff.

9229
143 P. (2d) 902

History: En. Sec. 105, p. 152, L. 1867; re-en. Sec. 122, p. 50, Cod. Stat. 1871; re-en. Sec. 164, p. 78, L. 1877; re-en. Sec. 164, 1st Div. Rev. Stat. 1879; re-en. Sec. 166, 1st Div. Comp. Stat. 1887; re-en. Sec. 850, C. Civ. Proc. 1895; re-en. Sec. 6632, Rev. C. 1907; re-en. Sec. 9230, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 515.

Operation and Effect

This section omits any requirement that written notice, or any notice, be given to the defendant that the sureties upon his redelivery bond are not deemed sufficient. *State ex rel. Johnson v. Collins*, 41 M 526, 530, 110 P 526.

Id. Where the sureties on a return bond of the defendant have failed to justify, it is the duty of the sheriff, specially enjoined upon him by this section, to deliver possession of the property to the plaintiff.

Id. Where the defendant in a claim and delivery action, after seizure of the property by the sheriff, desires a redelivery thereof to himself, he must not only tender to the officer the redelivery bond provided for by this section, but also have the sureties on said bond justify, in the same manner as upon bail on arrest, as a condition precedent to his right to the return of the property, even though exception to their sufficiency is not taken by plaintiff, or notice thereof given to defendant.

Id. Where, in claim and delivery, defendant, at the time the sheriff served the papers and sought to take possession of the property, tendered to the officer cash bond to retain the property, he thereby waived his right to thereafter tender a redelivery bond.

9231. Qualification of sureties. The qualification of sureties and their justification shall be such as are prescribed by sections 9193 to 9219 in respect to bail upon an order of arrest.

History: En. Sec. 106, p. 152, L. 1867; re-en. Sec. 123, p. 50, Cod. Stat. 1871; re-en. Sec. 165, p. 78, L. 1877; re-en. Sec. 165, 1st Div. Rev. Stat. 1879; re-en. Sec.

167, 1st Div. Comp. Stat. 1887; re-en. Sec. 851, C. Civ. Proc. 1895; re-en. Sec. 6633, Rev. C. 1907; re-en. Sec. 9231, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 516.

9232. Proceedings when property is concealed in building or inclosure. If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of the county.

History: En. Sec. 107, p. 152, L. 1867; re-en. Sec. 124, p. 50, Cod. Stat. 1871; re-en. Sec. 166, p. 79, L. 1877; re-en. Sec. 166, 1st Div. Rev. Stat. 1879; re-en. Sec. 168,

1st Div. Comp. Stat. 1887; re-en. Sec. 852, C. Civ. Proc. 1895; re-en. Sec. 6634, Rev. C. 1907; re-en. Sec. 9232, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 517.

9233. Duty of sheriff. When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

History: En. Sec. 108, p. 153, L. 1867; re-en. Sec. 125, p. 51, Cod. Stat. 1871; re-en. Sec. 167, p. 79, L. 1877; re-en. Sec. 167, 1st Div. Rev. Stat. 1879; re-en. Sec. 169,

1st Div. Comp. Stat. 1887; re-en. Sec. 853, C. Civ. Proc. 1895; re-en. Sec. 6635, Rev. C. 1907; re-en. Sec. 9233, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 518.

9234. Claim of property by third person. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right of the possession thereof, stating the grounds of such right or title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim by an undertaking by two sufficient sureties, accompanied by their affidavits that they are each worth

double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless so made.

History: En. Sec. 109, p. 153, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 854, re-en. Sec. 126, p. 51, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6636, Rev. Sec. 168, p. 79, L. 1877; re-en. Sec. 168, C. 1907; re-en. Sec. 9234, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 170, Cal. C. Civ. Proc. Sec. 519.

9235. Papers to be filed. The sheriff shall file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

History: En. Sec. 110, p. 153, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 855, re-en. Sec. 127, p. 51, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6637, Rev. Sec. 169, p. 79, L. 1877; re-en. Sec. 169, C. 1907; re-en. Sec. 9235, R. C. M. 1921. 1st Div. Rev. Stat. 1879; re-en. Sec. 171, Cal. C. Civ. Proc. Sec. 520.

9236. Description of property. Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity, as nearly as can be ascertained. Where it describes two or more chattels, it may, at the election of the plaintiff, state the aggregate value of all; or, separately, the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in this chapter, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been taken. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this chapter.

History: En. Sec. 856, C. Civ. Proc. 1895; re-en. Sec. 6638, Rev. C. 1907; re-en. Sec. 9236, R. C. M. 1921.

9237. Sheriff may take less. The sheriff must take a less number or quantity, if the whole of the property described in the affidavit cannot be found.

History: En. Sec. 857, C. Civ. Proc. 1895; re-en. Sec. 6639, Rev. C. 1907; re-en. Sec. 9237, R. C. M. 1921.

9238. Title in third person. The defendant may by answer defend, on the ground that a third person was entitled to the property, without connecting himself with the latter's title.

History: En. Sec. 858, C. Civ. Proc. 1895; re-en. Sec. 6640, Rev. C. 1907; re-en. Sec. 9238, R. C. M. 1921.

References

Agricultural Credit Co. v. O'Rourke, 65 M 517, 520, 211 P 200.

9239. Damages on default. Where the plaintiff is entitled to judgment by default, for want of an appearance or pleading, the court to which he applies for judgment may ascertain and determine the damages to which he is entitled, and the value of the property, if necessary; or may direct a reference for that purpose.

History: En. Sec. 859, C. Civ. Proc. 1895; re-en. Sec. 6641, Rev. C. 1907; re-en. Sec. 9239, R. C. M. 1921.

CHAPTER 43

INJUNCTION

- Section 9240. Injunction order defined—by whom granted.
 9241. Injunction—when allowed.
 9242. Injunction—when not allowed.
 9243. Injunction order—when granted.
 9244. Injunction order—at what time granted, and on what papers—who may serve.
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 9252. Costs may be awarded.
 9253. Injunction order as to corporation.
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 9255. Injunction may issue without bond.

9240. Injunction order defined—by whom granted. An injunction is an order requiring a person to refrain from a particular act. The order may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge be enforced as the order of the court.

History: En. Sec. 82, p. 58, Bannack Stat.; amd. Sec. 111, p. 154, L. 1867; re-en. Sec. 128, p. 52, Cod. Stat. 1871; re-en. Sec. 170, p. 79, L. 1877; re-en. Sec. 170, 1st Div. Rev. Stat. 1879; re-en. Sec. 172, 1st Div. Comp. Stat. 1887; amd. Sec. 870, C. Civ. Proc. 1895; re-en. Sec. 6642, Rev. C. 1907; re-en. Sec. 9240, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 525.

Mandatory Injunction

Though this section, defining an injunction, makes no provision for an order commanding affirmative action, a mandatory injunction may be issued in a proper case, such as involves nuisances, or continuing trespasses of an irreparable nature, or even where the act causing the injury has been completed before suit brought, for the purpose of putting complainant in statu quo. *Grosfield v. Johnson*, 98 M 412, 421, 39 P 2d 660.

Id. Under the above rule, held, that where defendant, sought to be enjoined from removing an old fence and erecting a new one on a dividing line claimed by him to be the proper one, contended that having completed the new fence before injunction proceeding was brought (the

court finding, however, that the fence was not then entirely completed), the writ did not lie, the court had jurisdiction to order removal of part of the fence and replacement of it on the true line found by the court.

Id. While it is only in rare instances that a court of equity will decree the mandatory form of injunction for any other purpose than to restore and maintain a condition which has been wrongfully changed it will relax the rule in order to attain the ends of justice.

Temporary Restraining Order is an Injunction

Held, that a temporary restraining order is an injunction the purpose of which is to keep matters in statu quo until upon a trial of the merits the rights of the parties may be determined. *Labbitt v. Bunston*, 80 M 293, 299, 260 P 727.

References

Cited or applied as section 870, Code of Civil Procedure, in *Butte Consolidated Min. Co. v. Frank*, 24 M 506, 509, 62 P 922; *Winnett Pacific Oil Co. v. Wilson*, 71 M 250, 229 P 850.

9241. Injunction—when allowed. Except where otherwise provided by the provisions of the Civil Code governing specific and preventive relief (sections 8707 to 8737), a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

1. Where pecuniary compensation would not afford adequate relief;
2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or,

4. Where the obligation arises from a trust.

History: En. Sec. 4462, Civ. C. 1895; re-en. Sec. 6120, Rev. C. 1907; re-en. Sec. 9241, R. C. M. 1921. Cal. Civ. C. Sec. 3422. Field Civ. C. Sec. 1911.

9242. Injunction—when not allowed. An injunction cannot be granted:

1. To stay a judicial proceeding pending at the commencement of an action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

2. To stay proceedings in a court of the United States;

3. To stay proceedings in another state upon a judgment of a court of that state;

4. To prevent the execution of a public statute, by officers of the law, for the public benefit;

5. To prevent the breach of a contract, the performance of which would not be specifically enforced;

6. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession;

7. To prevent a legislative act by a municipal corporation;

8. In labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character, or between parties neither or none of whom were laborers or interested in labor questions.

History: En. Sec. 4463, Civ. C. 1895; re-en. Sec. 6121, Rev. C. 1907; amd. Sec. 1, Ch. 28, L. 1913; re-en. Sec. 9242, R. C. M. 1921. Cal. Civ. C. Sec. 3423. Based on Field Civ. C. Sec. 1912.

Operation and Effect

Subdivision 8 of this section adds nothing to the pre-existing law, since there never has been, in theory at least, one rule for the wage-earner and another for the rest of the community; yet it must be taken as an expression by the legislature of the belief that injunctions have been granted in labor disputes when, under exactly similar conditions, they would not have been granted in controversies of a different character, and of an intention to forestall the possibility of such a happening in this state. *Empire Theatre Co. v. Cloke*, 53 M 183, 194, 163 P 107.

Under subdivision 1 of this section, injunction does not lie to restrain condemnation proceedings, in the absence of a showing that the restraint is necessary to prevent a multiplicity of proceedings. *Spratt v. Helena Power Transmission Co.*, 37 M 60, 92, 94 P 631.

Since there pertains to every citizen and taxpayer the right to sue to enjoin the issue of bonds by the state under legislation which he alleges to be invalid, it is

idle for the state to oppose such a suit on the ground that to grant the injunction will prevent the execution by officers of the law of a statute made for the public good. *Hill v. Rae*, 52 M 378, 380, 158 P 826.

A court of equity will not enjoin the prosecution of an action at law where another court has already acquired jurisdiction of the subject-matter thereof, unless such restraint is necessary to prevent a multiplicity of such proceedings; or unless there is some equitable circumstance in the case of which a party cannot avail himself at law. *Lutey Bros. v. Jackson*, 55 M 556, 558, 179 P 459.

The fact that a county attorney, alleged to be threatening to institute a criminal proceeding, is insolvent and therefore cannot respond in damages for the injury done by the prosecution does not authorize injunctive relief; nor does the writ lie to restrain proceedings for the seizure or forfeiture of property used in violation of law nor to enjoin one from applying for an injunction and under this section courts are prohibited from issuing injunctions to prevent the execution of a public statute by officers of the law for the public benefit. *State v. District Court et al.*, 85 M 439, 445, 279 P 234.

References

Cited or applied as section 6121, Revised Codes, in *Hill v. Rae*, 52 M 378, 380, 158 P 826; *Empire Theatre Co. v. Cloke*

et al., 53 M 183, 194, 163 P 107, L. R. A. 1917E, 383; *Atkinson v. Roosevelt County* et al., 66 M 411, 418, 214 P 74; *Labbitt v. Bunston*, 80 M 293, 298, 260 P 727.

9243. Injunction order—when granted. An injunction order may be granted in the following cases:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff;
3. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
4. When it appears by affidavit that the defendant, during the pendency of the action, threatens, or is about to remove or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

History: En. Sec. 83, p. 58, *Bannack Stat.*; re-en. Sec. 112, p. 154, L. 1867; re-en. Sec. 129, p. 52, *Cod. Stat.* 1871; re-en. Sec. 171, p. 79, L. 1877; re-en. Sec. 171, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 173, 1st Div. *Comp. Stat.* 1887; amd. Sec. 871, *C. Civ. Proc.* 1895; re-en. Sec. 6643, *Rev. C.* 1907; re-en. Sec. 9243, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 526.

Purpose of Restraining Order

The purpose and office of a restraining order is merely to prevent such injury as may occur before the hearing for an injunction can be had and inquiry be made as to the truth of the preliminary showing made by the plaintiff. This is its only office. When the hearing has been had, its office is accomplished, and it is without further efficiency. *Rea Bros. Sheep Co. v. Rudi*, 46 M 149, 159, 127 P 85.

Refusal of Injunction Pendente Lite as to Property Not Involved in Suit

An injunction may be granted only with relation to something connected with the subject matter of the action in which it is sought; hence where the holder of a mortgage covering two adjoining tracts of land separately owned by husband and wife proceeded to foreclose as to the land owned by the latter only, he having purchased the husband's land at bankruptcy sale, the court properly denied defendant an injunction pendente lite to restrain plaintiff from interfering with the wife's

possession of land formerly owned by the husband; such land not having been involved in the suit, the matter of its possession was foreign to it and injunction did not lie. *National Bank of Montana v. Bingham*, 83 M 21, 34, 269 P 162.

Review on Appeal

The allowance of a temporary injunction is vested largely in the sound discretion of the district court, with the exercise of which the supreme court will not interfere except in instances of manifest abuse. *Parsons et al. v. Mussigbrod et al.*, 59 M 336, 339, 196 P 528; *Atkinson v. Roosevelt County et al.*, 66 M 411, 418, 214 P 74.

What Are Insufficient Facts to Allow an Injunction

The complaint of a city taxpayer which omitted to show that he was a police officer or that he would suffer a special injury by a resolution of the council authorizing the appointment of a commission to make a physical examination of the members of the police force for the purpose of ascertaining whether any one of them had, by reason of old age or disease, become permanently incapacitated to discharge the duties of his office, was, under this section, insufficient as a basis for an injunction to restrain the examination or the incurring of the expense incident to it. *Larkin v. City of Butte*, 52 M 410, 412, 158 P 316.

When Restraining Order Should Be Set Aside

If, upon the hearing for a preliminary injunction, a prima facie case as to the truth of the charges of wrongful conduct by the defendant is not shown, the restraining order should be set aside and the injunction refused. *Rea Bros. Sheep Co. v. Rudi*, 46 M 149, 159, 127 P 85.

When a Temporary Injunction Will Be Allowed

Where the house of plaintiff stood on the line of an alley which lay between her lots and those of defendant, the alley never having been dedicated to public use, and being owned in equal portions by the litigants, and defendant commenced the erection of a fence on plaintiff's portion of the alley, which would have closed up certain windows in said house, but was enjoined by the district court, the writ was properly granted as constituting a case likely to produce an irreparable injury to plaintiff. *Sankey v. St. Mary's Female Academy*, 8 M 265, 269, 21 P 23. See also *Musselshell Cattle Co. v. Woolfolk*, 34 M 126, 133, 85 P 874.

If the plaintiff for a preliminary injunction makes out a prima facie case, or if, upon the showing made, it is left doubtful whether or not he will suffer irreparable injury before his rights can be fully investigated and determined, the court ought to incline to issue the injunc-

tion and preserve the status quo. *Rea Bros. Sheep Co. v. Rudi*, 46 M 149, 160, 127 P 85.

When it appears from the decisions in prior litigation that a mining company, in a pending suit, will probably recover a large judgment against another company for the value of ore extracted from veins owned by plaintiff, a court is authorized to grant an injunction restraining the defendant from extracting and selling the ore from its mine, where it is shown by affidavit that the result would be that it would not have sufficient property remaining to respond to the judgment. *Montana Min. Co. v. St. Louis M. & M. Co.*, 168 Fed. 514, 518, 93 C. C. A. 538.

Where in a water right suit, plaintiffs had filed their complaint, positively verified, and introduced uncontradicted oral proof in support of their application for a temporary restraining order, defendants appearing by general demurrer and neither filing verified answer nor submitting evidence, the court held not to have abused its discretion in granting a temporary injunction. *Parsons et al. v. Mussigbrod et al.*, 59 M 337, 339, 196 P 528.

References

Cited or applied as section 6643, Revised Codes, in *City of Bozeman v. Bohart*, 42 M 290, 300, 112 P 388; *Labbitt v. Bunston*, 80 M 293, 298, 260 P 727.

9244. Injunction order—at what time granted, and on what papers—who may serve. The injunction order may be granted at the time of issuing the summons upon the complaint, or at any time afterward, before judgment, upon affidavits. In the one case, the complaint, with or without affidavits to support it, and, in the other, the affidavits shall show satisfactorily that sufficient grounds exist therefor. An injunction order shall not be granted on the complaint alone, unless:

1. It be duly verified;
2. The material allegations of the complaint, setting forth the grounds therefor, be made positively and not upon information and belief.

When granted on the complaint, a copy thereof, including the verification, shall be served with the injunction order; when granted upon the complaint, with affidavits to support it, or upon affidavits alone, a copy of the affidavits likewise shall be served with the injunction order. Any person qualified to serve a summons may serve the order and affidavits.

History: En. Sec. 84, p. 58, *Bannack Stat.*; re-en. Sec. 113, p. 154, L. 1867; re-en. Sec. 130, p. 52, *Cod. Stat.* 1871; re-en. Sec. 172, p. 79, L. 1877; re-en. Sec. 172, 1st Div. Rev. Stat. 1879; re-en. Sec. 174, 1st Div. Comp. Stat. 1887; amd. Sec. 872, C. Civ. Proc. 1895; re-en. Sec. 6644, Rev. C.

1907; re-en. Sec. 9244, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 527.

Ex Parte Affidavits May Be Used

Ex parte affidavits may be used by the plaintiff as evidence in support of an application for an injunction. *Wetzstein*

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v. Boston & M. C. & S. M. Co., 26 M 193, 201, 66 P 943.

Insolvency of Defendant as Bearing on Relief

The fact that the complaint seeking specific performance of a contract, under the terms of which defendant agreed, among other things, to take over certain lots owned by plaintiffs in discharge of a judgment held by her, and asking a preliminary injunction restraining conduct on defendant's part which, but for the restraint, would result in a condition rendering a final decree in favor of plaintiffs, ineffective, failed to allege that defendant was insolvent, did not render the court's action in granting the injunction erroneous; the pleading having been verified upon knowledge, the requirements of this section were met. Lowery v. Cole, 47 M 64, 67, 130 P 410.

Order May be Granted on Complaint or Complaint and Affidavits

An injunction order may be made upon the complaint alone, or upon the complaint with affidavits; in either case it must satisfactorily appear that sufficient grounds exist for granting it. Rea Bros. Sheep Co. v. Rudi, 46 M 149, 159, 127 P 85.

An injunction may be granted on the complaint alone where its material allegations setting forth the grounds for the relief asked are made positively, and not upon information and belief. Peterson et al. v. Fugle et al., 96 M 537, 541, 31 P 2d 1030.

Order Issued Before Filing Complaint is Invalid

Where a temporary restraining order was issued upon a reading of the complaint by the district judge, which complaint was not filed until two days thereafter, the order was void and was not rendered valid by a modification thereof, after such filing, on a hearing of defend-

ant's motion to dissolve the injunctive order; since then such an order could only be made upon affidavits filed. Labbitt v. Bunston, 80 M 293, 306, 260 P 727.

Verification on Information and Belief Will Not Support an Injunction Order

A restraining order cannot be granted on a complaint by a corporation verified only on information and belief; the affidavit of verification must be made positively. Butte & B. Consol. v. Montana O. P. Co., 24 M 125, 128, 60 P 1039.

On the hearing of an order to show cause why an injunction pendente lite should not issue, the proposed answer of defendant to the suit, and the proposed answer of defendant to another suit concerning the same property, the complaint of which had been made a part of the present complaint, were properly rejected where the verifications of the same were on information and belief, as in such case positive verifications are required. Wetstein v. Boston & M. C. C. & S. M. Co., 26 M 193, 202, 66 P 943.

Where after motion to dissolve a temporary injunction, but before hearing thereon, the court properly permitted plaintiff to substitute his affidavit made positively for one made on information and belief, the amendment related back to the commencement of the action, and it was error to dissolve the injunction after hearing on the ground that the complaint originally did not have a positive verification attached to it. Claussen v. Chapin, 69 M 205, 209, 211, 221 P 1073.

When It May be Granted Without Notice

In exigent cases, a preliminary injunction may be granted, without notice, either upon the verified complaint alone or upon affidavits, if, in the opinion of the court, irreparable injury will result from the delay required by giving notice. Lowery v. Cole, 47 M 64, 67, 130 P 410.

9245. When notice required. The order may be granted, upon or without notice, in the discretion of the court or judge, unless the defendant has answered, in which case it can be granted only upon notice, or an order to show cause. Where an application for an injunction is made upon notice, or an order to show cause, either before or after answer, the court or judge may enjoin the defendant, until the hearing and decision of the application, by an order which is called a restraining order. In no case shall an injunction order or restraining order be issued without notice, unless it appears to the court or judge that irreparable injury would result by the delay of giving notice.

History: Ap. p. Sec. 85, p. 59, Bannack Stat.; re-en. Sec. 114, p. 154, L. 1867; re-en. Sec. 131, p. 52, Cod. Stat. 1871; re-en. Sec. 173, p. 79, L. 1877; re-en. Sec. 173, 1st Div. Rev. Stat. 1879; re-en. Sec. 175, 1st Div.

Comp. Stat. 1887; en. Sec. 873, C. Civ. Proc. 1895; re-en. Sec. 6645, Rev. C. 1907; re-en. Sec. 9245, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 528.

Operation and Effect

This section clearly makes a distinction between an injunction and a restraining order. A restraining order is distinguishable from an injunction, in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation, and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause why an injunction should not issue. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 25 M 135, 136, 63 P 1043.

Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 25 M 135, 138, 63 P 1043.

References

Cited or applied as section 6645, Revised Codes, in *Lowery et al. v. Cole*, 47 M 64, 67, 130 P 410; *Labbitt v. Bunston*, 80 M 293, 298 et seq., 260 P 727.

9246. Security upon injunction. On granting an injunction or restraining order, the court or judge may require, except when the state, a county, or any subdivision thereof, or municipal corporation, or a married woman in a suit for divorce against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved.

History: Ap. p. Sec. 86, p. 59, *Bannack Stat.*; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, *Cod. Stat.* 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 176, 1st Div. *Comp. Stat.* 1887; en. Sec. 874, *C. Civ. Proc.* 1895; re-en. Sec. 6646, *Rev. C.* 1907; re-en. Sec. 9246, *E. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 529.

"Damages"

The word "damages" as used in this section, providing that an injunction bond must be to the effect that the plaintiff will pay to the party enjoined such damages as the latter may sustain by reason of the injunction, embraces the reasonable expenses and costs of procuring the dissolution of the injunction when wrongfully issued, including attorneys' fees. *Foster v. Royal Indemnity Co.*, 83 M 170, 174, 271 P 609.

Liability Determinable by Bond and This Statute

A surety on an injunction bond contracts with reference to the provisions

of this section and his contractual liability is determinable by its terms and those of the bond. *Foster v. Royal Indemnity Co.*, 83 M 170, 174, 271 P 609.

Operation in General

A finding of the district court in its order of dissolution of a temporary injunction that "the court should not have granted the injunction in the first instance" was tantamount to saying that plaintiff "was not entitled thereto" (this section) and therefore sufficient to show a breach of the condition of the bond and to support judgment in favor of plaintiff in his action on the injunction bond to recover damages sustained by him incident to procuring dissolution of the injunction. *Foster v. Royal Indemnity Co.*, 83 M 170, 174, 271 P 609.

What May be Recovered

If counsel fees come within the provisions of this section, then by the same rule of construction they fall within the purview of section 9259, and may be recovered as an element of damages on

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the contract of a surety. *Plymouth Gold Min. Co. v. United States Fidelity Co.*, 35 M 23, 29, 88 P 565.

Attorney's fees paid or contracted to be paid in securing the dissolution of an injunction, recoverable as damages in an action on the injunction bond, are to be limited to compensation for services rendered before a hearing of the cause on the merits, except where a trial of the merits is the only available means of testing plaintiff's right to the injunction, or where timely motion to dissolve has been made but decision withheld until trial upon the merits. *McDermott v. American Bonding Co.*, 56 M 1, 6, 179 P 828.

Id. Where a motion to dissolve an injunction pendente lite was not made because not authorized by law, the decision made

by the court when the trial of the case on the merits was concluded and the injunction dissolved was the final decision, upon the making of which the sureties on the injunction bond had bound themselves to pay damages flowing from the wrongful issuance of the writ.

Id. Whenever the direct and proximate effect of an injunction wrongfully issued is to deprive the party enjoined of the use of money which belongs to him, interest thereon at the legal rate for the time the money was impounded may be recovered by way of damages in an action on the injunction bond.

Id. Court costs and witness fees necessarily incurred in procuring the dissolution of an injunction wrongfully issued are properly recoverable in an action on the bond.

9247. Order to show cause. If the court or judge deem it proper that the defendant, or any of the several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted, and the defendant may in the meantime be restrained. Cause may be shown upon affidavits or oral testimony.

History: En. Sec. 87, p. 59, *Bannack Stat.*; re-en. Sec. 116, p. 55, L. 1867; re-en. Sec. 133, p. 52, *Cod. Stat.* 1871; re-en. Sec. 175, p. 81, L. 1877; re-en. Sec. 175, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 177, 1st Div. *Comp. Stat.* 1887; amd. Sec. 875, *C. Civ. Proc.* 1895; re-en. Sec. 6647, *Rev. C.* 1907; re-en. Sec. 9247, *R. C. M.* 1921. *Cal. C. Civ. Proc.* Sec. 530.

Operation and Effect

Although the granting or refusing an interlocutory injunction is a matter within the discretion of the lower court, the appellate court will reverse an order where there has been an abuse of discretion. Upon the hearing of an application for an injunction, or for dissolving an order granting an injunction, the plaintiff may

use in support of his application affidavits and oral testimony. *Butte & B. Co. v. Montana O. P. Co.*, 21 M 539, 542, 55 P 112.

Ex parte affidavits may be used by defendant in resisting an application for injunction. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 26 M 193, 201, 66 P 943.

References

Cited or applied as section 6647, *Revised Codes*, in *Rea Bros. Sheep Co. v. Rudi*, 46 M 149, 159, 127 P 85; *Parsons et al. v. Mussigbrod et al.*, 59 M 336, 339, 196 P 528; *Atkinson v. Roosevelt County et al.*, 66 M 411, 418, 214 P 74.

9248. New undertaking may be required. Upon the hearing of an application to vacate or modify an injunction order, or on a hearing to show cause, the court or judge may require a new undertaking, in the same or a different sum, to be given by the plaintiff, with like sureties, and to the like effect, as upon granting of the original order. The persons executing the new undertaking become liable thereon, as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon until the new undertaking is given and approved, and no longer. Upon such hearing the court or judge may, where the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money, vacate the injunc-

tion order upon the defendant's executing an undertaking in such form and amount, and with such sureties, as the court or judge shall direct, conditioned to indemnify the plaintiff against loss sustained by reason of vacating such injunction order.

History: En. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R. C. M. 1921.

Operation and Effect

An injunction pendente lite to restrain majority stockholders of a corporation

from ratifying an illegal transfer of the corporate property, and one that is ultra vires, made by the officers and directors, will not be refused because the corporation offers a bond. *Forrester v. B. & M. C. C. & S. M. Co.*, 21 M 544, 552, 55 P 229.

9249. Verified answer has effect of affidavit. Upon the hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

History: En. Sec. 877, C. Civ. Proc. 1895; re-en. Sec. 6649, Rev. C. 1907; re-en. Sec. 9249, R. C. M. 1921.

Operation and Effect

Where an application for an injunction is resisted, oral evidence may be resorted to by both parties, but the answer, if verified, has the effect only of an affidavit. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 26 M 193, 201, 66 P 943.

9250. Application to dissolve or modify. If an injunction order be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice, or upon order to show cause returnable at a specified time or forthwith, after service thereof, to the judge who granted the injunction order, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and affidavit on which the injunction order was granted, or upon affidavit on part of defendant, with or without the answer. If the application be made upon affidavits on part of defendant, but not otherwise, the plaintiff may oppose the same by affidavits or oral testimony, in addition to those on which the injunction order was granted. The defendant may also use oral testimony.

History: En. Sec. 89, p. 59, Bannack Stat.; re-en. Sec. 118, p. 155, L. 1867; re-en. Sec. 135, p. 53, Cod. Stat. 1871; re-en. Sec. 177, p. 81, L. 1877; re-en. Sec. 177, 1st Div. Rev. Stat. 1879; re-en. Sec. 179, 1st Div. Comp. Stat. 1887; amd. Sec. 878, C. Civ. Proc. 1895; re-en. Sec. 6650, Rev. C. 1907; re-en. Sec. 9250, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 532.

In General

Where defendant's motion to dissolve a temporary injunction is based on the complaint alone, plaintiff has no right to file an affidavit in support of the complaint. *Campbell v. Flannery*, 29 M 246, 247, 74 P 450.

Mandamus Will Not Lie to Modify or Dissolve

Mandamus will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on

References

Cited or applied as section 877, Code of Civil Procedure, in *Butte & B. Co. v. Montana O. P. Co.*, 21 M 539, 542, 55 P 112; as section 6649, Revised Codes, in *Rea Bros. Sheep Co. v. Rudi*, 46 M 149, 159, 127 P 85.

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order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction, where the motion to modify is based upon the same facts and rests upon the same grounds as those which had been presented in opposition to the granting of the injunction, and where the privilege of applying for such dissolution or modification was not reserved in the order granting the injunction. Such hearing is in the discretion of the court. *State ex rel. Hickey v. District Court*, 23 M 564, 566, 59 P 917.

The manifest implication of this section and the following section is that, unless authority therefor exist elsewhere in the law, an application for the dissolution or modification of an injunction granted upon notice will not lie and than an injunction order so granted must stand, so far as the power of the district court

is concerned, until the cause in which it was granted is tried. *Butte Consolidated Min. Co. v. Frank*, 24 M 506, 509, 62 P 922.

When Modification Not Permissible

Where an injunction pendente lite was issued after notice and a hearing, a motion to dissolve prior to trial upon the merits was unauthorized; it is only where the injunction issues without notice that the party enjoined may move for dissolution before a trial of the merits. *McDermott v. American Bonding Co.*, 56 M 1, 8, 179 P 828.

A temporary restraining order granted upon notice and after a hearing may not,

in the absence of a showing of inadvertence, mistake or change in existing circumstances or of a provision in the order preserving to the party enjoined the privilege of moving for a modification, be modified thereafter pending trial of the cause on its merits. *Winnett Pacific Oil Co. v. Wilson*, 71 M 250, 252, 229 P 850.

References

Cited or applied as section 878, Code of Civil Procedure, in *Butte & B. Co. v. Montana O. P. Co.*, 21 M 539, 542, 55 P 112; *Labbitt v. Bunston*, 80 M 293, 302, 260 P 727.

9251. Dissolution or modification. If, upon such application, it satisfactorily appear that there is not sufficient ground for the injunction order, it shall be dissolved; or, if it satisfactorily appear that the extent of the injunction order is too great, it shall be modified.

History: En. Sec. 90, p. 60, *Bannack Stat.*; re-en. Sec. 119, p. 155, L. 1867; re-en. Sec. 136, p. 53, *Cod. Stat.* 1871; re-en. Sec. 178, p. 81, L. 1877; re-en. Sec. 178, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 180, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 879, *C. Civ. Proc.* 1895; re-en. Sec. 6651, *Rev. C.* 1907;

re-en. Sec. 9251, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 533.

References

Cited or applied as section 879, Code of Civil Procedure, in *Butte Consolidated Min. Co. v. Frank*, 24 M 506, 509, 62 P 922.

9252. Costs may be awarded. Where an injunction order is granted without notice, and the same is afterward dissolved upon application of the party enjoined thereby, the court or judge to whom the application to dissolve is made may award as costs of the application against the plaintiff, and in favor of the party applying, such sum as to the court or judge may appear just, not less than ten dollars, nor more than one hundred dollars.

History: En. Sec. 880, *C. Civ. Proc.* 1895; re-en. Sec. 6652, *Rev. C.* 1907; re-en. Sec. 9252, *R. C. M.* 1921.

Operation and Effect

The power to allow costs is purely statutory, and unless some statutory authority exists for their allowance, an allowance thereof is erroneous. *Colusa Parrot S. & S. Co. v. Barnard*, 28 M 11, 16, 72 P 45.

Held, that the provision of this section that where an injunction order is granted without notice and afterward dissolved on application of the party enjoined, as improperly issued, the court may award the enjoined party as costs such sum as to the court may appear just, not exceeding \$100, is permissive only, and the court may, therefore, award such costs or leave the

party enjoined to an action at law on the bond, if that instrument is so conditioned as to permit of such an action. *Foster v. Royal Indemnity Co.*, 83 M 170, 173, 271 P 609.

Id. Under the preceding rule, held, that plaintiff in an action on an injunction bond after dissolution of the injunction, issued without notice, as improperly issued, to recover \$162 as damages suffered by way of expenses incident to procuring its dissolution, including witness and attorneys' fees, was not required to allege in his complaint that the court had awarded him costs in its order of dissolution and that he had served and filed a memorandum of costs and disbursements.

9253. Injunction order as to corporation. An injunction order to suspend the general and ordinary business of a corporation must not be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the state is a party to the action.

History: En. Sec. 88, p. 59, Bannack Stat.; amd. Sec. 117, p. 155, L. 1867; re-en. Sec. 134, p. 53, Cod. Stat. 1871; re-en. Sec. 176, p. 81, L. 1877; re-en. Sec. 176, 1st Div. Rev. Stat. 1879; re-en. Sec. 178, 1st Div. Comp. Stat. 1887; amd. Sec. 881, C. Civ. Proc. 1895; re-en. Sec. 6653, Rev. C. 1907;

re-en. Sec. 9253, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 531.

References

Cited or applied as section 881, Code of Civil Procedure, in Butte Consolidated Min. Co. v. Frank, 24 M 506, 509, 62 P 922.

9254. Injunction against formation of trust. Whenever any action, either civil or criminal, shall have been instituted in court in this state against any person or persons, corporation or corporations, foreign or domestic, for the purpose of enforcing the provisions of section 20 of article XV of the constitution of the state of Montana, or any law or laws enacted pursuant to or for carrying out the same, the court in which such action is pending, if it be a court of record, or if not, then any court of record in this state, shall be and it is hereby authorized to issue an injunction to restrain any such person or persons, corporation or corporations, foreign or domestic, from doing business in this state in violation of said section of the constitution, or in violation of any law or laws enacted pursuant to or for the purpose of enforcing said section of the constitution, pending the final determination of said action so instituted.

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History: En. Sec. 1, Ch. 93, L. 1905; re-en. Sec. 6654, Rev. C. 1907; re-en. Sec. 9254, R. C. M. 1921.

9255. Injunction may issue without bond. Said injunction shall issue as in cases of equity, without bond, upon the application of the county attorney of the county in which such action is pending, or upon the application of the attorney-general, in the name of the state of Montana, upon a prima facie showing that an action, civil or criminal, has been so instituted and is so pending, charging such person or persons, corporation or corporations, foreign or domestic, with a violation of said section of the constitution, or of any law or laws enacted thereunder.

History: En. Sec. 2, Ch. 93, L. 1905; re-en. Sec. 6655, Rev. C. 1907; re-en. Sec. 9255, R. C. M. 1921.

CHAPTER 44

ATTACHMENT

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9256. When attachment may issue. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, as follows:

In an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless, and in an action based upon a statutory stockholders' liability.

History: Earlier acts were Sec. 91, p. 60, Bannack Stat.; amd. Sec. 120, p. 156, L. 1867; amd. Sec. 11, p. 64, L. 1869; amd. Sec. 137, p. 54, Cod. Stat. 1871; amd. Sec. 2, p. 40, Ex. L. 1873; re-en. Sec. 179, p. 82, L. 1877; re-en. Sec. 179, 1st Div. Rev. Stat. 1879; re-en. Sec. 181, 1st Div. Comp. Stat. 1887.

En. Sec. 890, C. Civ. Proc. 1895; re-en. Sec. 6656, Rev. C. 1907; re-en. Sec. 9256, E. C. M. 1921; amd. Sec. 1, Ch. 82, L. 1931. Cal. C. Civ. Proc. Sec. 537.

Attachment Before Summons is Void

A writ of attachment which is issued before a valid summons is absolutely void, and not merely voidable. *Sherman v. Huot*, 20 M 555, 557, 52 P 558; *Burke v. Interstate Sav. & Loan Assn.*, 25 M 315, 329, 64 P 879; *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 92, 149 P 494.

Where the original summons was void because entitled in the wrong county, a

so-called "alias summons" was not such in fact, but was the first valid summons issued in the action, and could not give legal effect to a writ of attachment issued and served before it was issued. *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 92, 149 P 494.

Attachment Does Not Lie After Judgment

Where an attachment exists at the time of judgment in favor of the attaching creditor, it becomes merged in the judgment. *Harboldt v. Hensen*, 75 M 512, 244 P 488.

Id. Attachment may not issue upon a cause of action which has ripened into judgment.

Burden on Defendant to Prove Existence of Security

To justify a justice of the peace in discharging an attachment on the ground

that the debt was secured, defendant had the burden of showing that it was secured by a mortgage or lien upon real or personal property or a pledge of personal property, security of any other kind or class being excluded. *State ex rel. Malin-Yates Co. v. Justice of Peace Court*, 51 M 133, 138, 149 P 709.

Effect of an Invalid Attachment

Where an attachment is issued in an action not falling within the provision of this section, and service of summons is made by publication only, the property of defendant is not brought within the jurisdiction and control of the court, and a judgment by default, being one in personam, is void. *Hinderager v. MacGinniss*, 61 M 312, 318, 202 P 200.

Liberal Construction

The attachment law is a remedial statute, and must be liberally construed. *Cope v. Upper Missouri M. & P. Co.*, 1 M 53, 57.

Although the attachment statute, being remedial in character, must be liberally construed, substantial compliance with its requirements is necessary. *Gilna v. Barker et al.*, 78 M 343, 347, 254 P 169.

Nature of Attachment

Attachment is classified by the codes as a provisional remedy. It is a summary proceeding ancillary to the action in which it is issued. As employed in this chapter, the writ was unknown to the common law. It is of statutory origin, and depends for its validity entirely upon a compliance with the statutory requirements. *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 91, 149 P 494.

Attachment is a provisional remedy, ancillary to the civil action in which it is issued. *American Surety Co. v. Kartowitz*, 54 M 92, 93, 166 P 685.

An attachment is a provisional remedy ancillary to the civil action in which it is issued; it but impounds and conserves the property as security for the satisfaction of a judgment that may be recovered, and the lien attaches only upon the title which the attachment debtor has in the property at the time of the levy. *Short et al. v. Karnop et al.*, 84 M 276, 280, 275 P 278.

Requisites for an Attachment

The necessary requisites for an attachment are the pendency of an action on a contract, express or implied, for the direct payment of money, and an outstanding valid summons issued in such action. *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 91, 149 P 494; *American Surety Co. v. Kartowitz*, 54 M 92, 93, 166 P 685.

Sufficient Allegation Where Debt Sued on is Part Express and Part Implied

Where part of the debt sued for is on an express and part on an implied contract,

an affidavit simply stating the affiant's conclusion, namely, that the defendants are indebted to the plaintiffs in a specified sum, upon an express and implied contract for the payment of money, which is now due and payable, is a sufficient compliance with the requirement of the statute that the debt sued for is upon contract. *Newell v. Whitwell*, 16 M 243, 258, 40 P 866.

What is an Action Upon a Contract for the Direct Payment of Money

An action against sureties on a bond, conditioned to be void if the principal performed his contract, is not an action on a contract for the "direct payment" of money. *Ancient Order of Hibernians v. Sparrow*, 29 M 132, 134, 74 P 197.

The plaintiff is entitled to an attachment, upon making and filing the affidavit required by the following section, where, under the terms of a mortgage given upon personal property to secure the payment of a note, he is authorized to take possession of the mortgaged property whenever he considers possession essential to the security of the note, and at his option to declare the note due; and where he has exercised such option in such a case, the unpaid balance of the note is an indebtedness due upon an express contract for the payment of money. *Union Bank & Trust Co. v. Himmelbauer*, 56 M 82, 90, 181 P 332.

Attachment does not lie in an action by the buyer of hay at an agreed price per ton, to recover damages from the seller because of the inferior quality of the hay delivered, the action not being one upon a contract for the direct payment of money. *Beartooth Stock Co. v. Grosseup*, 57 M 595, 189 P 773.

An action to recover damages, unliquidated in character, upon hail insurance policies, under which total and partial losses were alleged, was not one upon contracts for the direct payment of money, and an attachment was properly dissolved. *Carter v. Bankers Insurance Co.*, 58 M 319, 326, 192 P 827; distinguishing *Ancient Order of Hibernians v. Sparrow*, 29 M 132, 74 P 197.

An action by the buyer of an automobile to recover its purchase price with interest thereon from the date of sale because of failure of title in the seller was not one upon a contract for the direct payment of money, and therefore an attachment issued therein was properly dissolved. *Heffron v. Thomas et al.*, 61 M 10, 14, 201 P 572.

Held, before amendment that the liability of a director for the debts of his corporation imposed by Sec. 6003, for failure of the corporation to file its annual report exhibiting its financial condition, etc., does not arise out of a contract, express or implied, for the direct payment of

money, and that therefore a writ of attachment was improperly issued in an action by a creditor of a corporation against one of its directors to recover a debt owing to plaintiff by the corporation. *Butler v. Peters*, 62 M 381, 383, 387, 205 P 247.

A contract guaranteeing "the collection and payment of the within note" was not one for the direct payment of money within the meaning of the attachment statute and therefore an attachment issued in an action to enforce the guaranty was properly dissolved. *Square Butte State Bank v. Ballard*, 64 M 554, 210 P 889.

A bond in which the sureties unconditionally agreed to indemnify a county treasurer for default of a bank to pay over to him on demand any funds he might have on deposit therein was a contract of surety and not of guaranty, by which they bound themselves to pay a fixed and definite sum not exceeding that named in the bond, to-wit, the amount on deposit—a contract for the direct payment of money, warranting the issuance of an attachment against the property of the sureties in an action on the bond. *State ex rel. Barnett v. Reynolds et al.*, 68 M 572, 576, 220 P 525.

An action by a surety for contribution from his cosurety is one on an implied contract for money paid by the former for the use and benefit of the latter, which the latter unconditionally and absolutely is required to pay, under section 8206, in a definite sum, to-wit, his proportion of the amount which plaintiff was required to pay on the undertaking; hence the action is one for the direct payment of money in which attachment may issue. *Wall v. Brookman*, 72 M 228, 231, 232 P 774.

The double liability imposed by section 6036, R. C. M. 1921, as amended by chapter 9, Laws of 1923, upon a stockholder in a state banking corporation is in its nature contractual, and in an action to collect an assessment made against him upon that liability, attachment lies as upon an implied contract for the direct payment of money. *Home State Bank v. Swartz*, 72 M 425, 429, 234 P 281.

An action by a county treasurer to recover on a bond securing bank deposits of county funds is one on a contract for the direct payment of money, warranting the issuance of a writ of attachment against the property of the sureties. *Jenkins v. First Nat. Bank et al.*, 73 M 110, 116 et seq., 236 P 1085.

A bond given in pursuance to section 4767, to insure the safety and prompt payment of county funds deposited by the county treasurer (disregarding an unintelligible clause therein, held a contract for the direct payment of money,

warranting the issuance of a writ of attachment against the property of the sureties in an action to recover thereon. *State v. Pondera Valley State Bank et al.*, 77 M 1, 5, 248 P 207.

In order to constitute a contract, express or implied, one for the direct payment of money, within the meaning of the attachment statute, the obligation sued upon must be for a definite sum, unconditional, absolute, payable at a specific time and free from intervening agencies or conditions; it must not be a collateral agreement nor dependent upon any other agreement. *Gilna v. Barker et al.*, 78 M 343, 347, 254 P 169.

Id. Held, under the preceding rule, that a complaint alleging that defendants leased to plaintiff certain mining property for the purpose of mining, plaintiff to receive from defendants sixty-five per cent. of the net proceeds, was one for the "direct payment of money" and that the court erred in discharging it on the ground that it was not.

Id. Where the contract made the basis of attachment proceedings does not specify the precise amount to be paid by defendant but points to an instrument which furnishes the measure of ascertaining defendant's liability, it is sufficient to meet the requirement of this section, that it must be one for the "direct payment of money" to warrant the issuance of a writ of attachment.

Contracts made by the wife for necessities under authority of section 5800, where the husband fails or refuses to furnish them, are his contracts and the obligations arising thereunder are his obligations; the agency referred to above is statutory but the husband's obligations are contractual; therefore attachment may issue in an action to recover for necessities furnished the wife as upon contracts "express or implied, for the direct payment of money" within the meaning of this section. *McQuay et al. v. McQuay*, 86 M 535, 537 et seq., 284 P 532.

Id. Under the last rule, held, in an action by the assignee of claims against defendant to recover the reasonable value of medical and surgical attention and hospital care provided for his wife during her last illness, that the claims were based upon contracts, for the direct payment of money, authorizing attachment of funds belonging to defendant. (Mr. Justice Angstman, dissenting.)

What is a Sufficient Mortgage, Pledge or Lien to Abrogate an Attachment

Where personalty is sold under an agreement that title shall remain in the seller until the purchase price is paid, possession being delivered to the pros-

pective purchaser upon giving his note for the amount thereof, the seller did not have a mortgage, pledge or lien to secure its claim against the purchaser, within the meaning of this section, so as to destroy its right to a writ of attachment in an action on the note. *State ex rel. Malin-Yates Co. v. Justice of Peace Court*, 51 M 133, 139, 149 P 709.

An instrument whereby accounts were transferred from a debtor to a creditor with authority to collect them and apply the proceeds on the indebtedness to the extent of sixty-five per cent., thirty-five per cent. being remitted to the debtor, constituted a "pledge" securing payment of the indebtedness, and therefore attachment did not lie on an affidavit stating that it had never been secured by any pledge, etc. *Savage Tire Sales Co. v. Stuart et al.*, 61 M 524, 530, 203 P 364.

When Attachment May be Issued in Tort Action Under Special Acts

Held, that in an action brought under sections 6902-6904, to obtain the cancellation of an oil and gas lease and to recover the penalty provided therein for the lessee's failure to release within the time specified and resultant damages, a writ of attachment may issue as authorized by section 6903. *Daley et al. v. Torrey et al.*, 71 M 513, 514, 230 P 782.

Id. Attachment is a summary proceeding ancillary to the action in which it is issued and is of purely statutory origin, and the legislature by enacting the general attachment statute under which the writ can issue only in an action upon a contract, express or implied, for the direct payment of money, was not thereby deprived of its power to grant the remedy in an action *ex delicto*.

Id. Where one act deals with a subject generally and another with a part of the same subject specially, the two must be read together and harmonized, if possible, but to the extent of any necessary repugnancy between them, the special statute prevails over the general one.

When Attachment May Issue

The writ of attachment may issue at the time of issuing summons, or thereafter, but not before. *American Surety Co. v. Kartowitz*, 54 M 92, 93, 166 P 685.

When Defective Cause of Action is Not Grounds for Discharge of Attachment

Where discharge of an attachment is sought on the ground that the complaint does not state a cause of action, the

inquiry as to the sufficiency of the pleading is confined to the questions whether the action is upon a contract, express or implied, for the direct payment of money; whether it states facts sufficient to constitute a cause of action against the defendant, and if not, whether it can be amended so as to state a cause of action, a mere defective statement of a cause of action not being a sufficient ground for the discharge of an attachment. *Savage Tire Sales Co. v. Stuart et al.*, 61 M 524, 530, 203 P 364.

A mere defective statement of a cause of action readily susceptible of amendment is not a sufficient ground for the discharge of an attachment. *Wall v. Brookman*, 72 M 228, 231, 232 P 774.

Where after a writ of attachment was issued the complaint was amended to show a reduction of the amount of the indebtedness due from defendant sureties because of payments made by other sureties on their bonds, the writ issued was not rendered invalid thereby; having conformed to the demand made in the original complaint, it was not rendered void by what transpired thereafter. *State v. Pondera Valley State Bank et al.*, 77 M 1, 5, 248 P 207.

The validity of an attachment is not affected by the fact that the complaint upon which the writ was issued asked for more than was justly due, nor may the attachment be discharged on that ground. *Gilna v. Barker et al.*, 78 M 343, 347, 254 P 169.

Whether Attachment is Permissible Must be Determined From the Complaint Alone

The question whether an action is one in which a writ of attachment may issue under this section, must be determined upon the complaint alone. *Heffron v. Thomas et al.*, 61 M 10, 14, 201 P 572.

References

Cited or applied as section 890, Code of Civil Procedure, in *Brophy v. Downey*, 26 M 252, 254, 67 P 312; *Mueller v. Renkes*, 31 M 100, 105, 77 P 512; as section 6656, Revised Codes, in *Kyle v. Chester*, 42 M 522, 528, 113 P 749; *National Bank v. First Nat. Bank*, 71 M 242, 248, 228 P 80; *Englehart v. Sage*, 73 M 139, 144, 235 P 767; *Muri v. Young*, 75 M 213, 215 et seq., 245 P 956; *Wall v. Duggan et al.*, 76 M 239, 245, 245 P 953; *Skarie v. Marron*, 78 M 295, 300, 253 P 895; *Piccolo et al. v. Tanaka et al.*, 78 M 445, 451, 253 P 890; *Davis et al. v. Claxton et al.*, 82 M 574, 591, 268 P 787; *Mieyr v. Federal Surety Co. et al.*, 97 M 503, 511, 34 P 2d 982.

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9257. Affidavit—what to contain. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of the plaintiff, showing:

1. That such defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal counterclaims) upon a contract, express or implied, for the direct payment of money, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and,

2. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.

History: Earlier acts were Sec. 91, p. 60, Bannack Stat.; amd. Sec. 120, p. 156, L. 1867; amd. Sec. 11, p. 64, L. 1869; amd. Sec. 137, p. 54, Cod. Stat. 1871; amd. Sec. 2, p. 40, Ex. L. 1873; re-en. Sec. 179, p. 82, L. 1877; re-en. Sec. 179, 1st Div. Rev. Stat. 1879; re-en. Sec. 181, 1st Div. Comp. Stat. 1887.

This section en. Sec. 891, C. Civ. Proc. 1895; re-en. Sec. 6657, Rev. C. 1907; re-en. Sec. 9257, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 538.

Affidavit Alleging Interest

An affidavit on attachment which alleges specific indebtedness of the defendant in a principal sum is not vitiated by reference to interest, but is sufficient to sustain the attachment to the extent of the principal sum at least. *State v. Pondera Valley State Bank et al.*, 77 M 1, 6, 7, 248 P 207.

Defective Affidavit With Reference to Security Clause

An affidavit on attachment, stating that payment of the debt due "is not secured," is insufficient to satisfy the requirements of this section, the statement being referable to the date upon which the writing was prepared, and pregnant with the admission that it had been secured by mortgage or lien prior thereto. *Continental Oil Co. v. Jameson*, 53 M 466, 469, 164 P 727.

In an action by a state bank to recover a deficiency due on an assessment against a stockholder after a sale of the stock by it as provided in section 4 of chapter 90, Laws of 1923 (Sec. 6109d, p. 243), in which a writ of attachment was issued, the affidavit on attachment held defective for failure to allege, after setting forth that "if originally so secured, such security has, without any act of the plaintiff, become valueless." *Home State Bank v. Swartz*, 72 M 425, 430, 234 P 281.

A plaintiff who desires to avail himself of the remedy of the writ of attachment must comply with the provisions of this

section, one of which is that the affidavit must recite that the debt sued upon "has not been secured"; hence a statement that the debt "is not secured," leaving it to be inferred that it once may have been secured but is not then, renders the affidavit insufficient and the writ subject to discharge. *Jenkins v. First Nat. Bank et al.*, 73 M 110, 116 et seq., 236 P 1085.

An affidavit for attachment stating that the debt sued upon has not been secured, or, if originally secured, the security had become valueless, was defective, but amendable, and therefore not void, but merely voidable. *Patch v. Stewart et al.*, 78 M 192, 196, 253 P 254.

Must be Substantially Complied With

Substantial compliance with the requirements of the statute is necessary to authorize the issuance of a valid writ of attachment. *Continental Oil Co. v. Jameson*, 53 M 466, 469, 164 P 727.

Necessity for

An indispensable prerequisite to the issuance of a valid writ of attachment is the presentation to the clerk of the court, by the plaintiff, of an affidavit containing the averments enumerated in this section. *Continental Oil Co. v. Jameson*, 53 M 466, 469, 164 P 727.

Requisite That Facts Showing That Security Has Become Valueless be Given

An attachment may issue where the debt sought to be recovered was originally secured, but such security has become valueless without fault of the plaintiff, or the person to whom the security was given, but the facts must be disclosed in the affidavit for attachment; there is but one action for the recovery of debt secured by mortgage upon real or personal property, namely, foreclosure. *Continental Oil Co. v. Jameson*, 53 M 466, 469, 164 P 727.

Requisite That It be Signed by Person Authorized to Administer Oaths

A paper intended as an affidavit required as a prerequisite to the issuance of

a writ of attachment, but not signed by an officer authorized to administer an oath, was insufficient on the face of it. *Continental Oil Co. v. Jameson*, 53 M 466, 468, 164 P 727.

References

Cited or applied as section 891, Code of Civil Procedure, in *Brophy v. Downey*, 26 M 252, 254, 67 P 312; *Ancient Order of Hibernians v. Sparrow*, 29 M 132, 134, 74

P 197; *Mueller v. Renkes*, 31 M 100, 105, 77 P 512; as section 6657, Revised Codes, in *Union Bank & Trust Co. v. Himmelbauer*, 56 M 82, 90, 181 P 332; *Savage Tire Sales Co. v. Stuart et al.*, 61 M 524, 530, 203 P 364; *Butler v. Peters*, 62 M 381, 383, 387, 205 P 247; *Daley et al. v. Torrey et al.*, 71 M 513, 514, 230 P 782; *Barth v. Ely*, 85 M 310, 326, 278 P 1002; *Sloan v. Young*, 86 M 414, 418, 284 P 131.

9258. Attachments prior to maturity of debt. Actions may be commenced and writs of attachment issued upon any debt for the payment of money or specific property before the same shall have become due, when it shall appear by the affidavit, in addition to what is required in the preceding section:

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1. That the defendant is leaving, or is about to leave, this state, taking with him property, moneys, or other effects, which might be subjected to the payment of the debt, for the purpose of defrauding his creditors; or,

2. That the defendant is disposing of his property, or is about to dispose of his property, subject to execution, for the purpose of defrauding his creditors;

Provided, however, that on the trial of any cause brought under the provisions of this section, judgment may be rendered on any such debt not due upon satisfactory proof to the court of the facts alleged in the affidavit for attachment, as provided in this section. Any such judgment shall be with a rebatement of the interest from the time said judgment is rendered until the time at which said debt shall have become due; provided, also, that the defendant may, by plea, put in issue the matter alleged in the affidavit herein required, and if the plaintiff fails to substantiate some one of the causes required to be alleged in said affidavit, the suit for debt or debts not due shall abate.

History: Earlier acts were Secs. 313-316, p. 109, *Bannack Stat.*; amd. Sec. 13, p. 65, L. 1869; re-en. Sec. 139, p. 55, *Cod. Stat.* 1871; amd. Sec. 1, p. 47, L. 1874; re-en. Sec. 181, p. 83, L. 1877; re-en. Sec. 181, 1st Div. Rev. Stat. 1879; re-en. Sec. 183, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1, p. 141, L. 1899; re-en. Sec. 6658, Rev. C. 1907; amd. Sec. 1, Ch. 14, L. 1911; re-en. Sec. 9258, R. C. M. 1921.

Operation and Effect

This section relates only to actions for the recovery of debts not due when the defendant is leaving, or is about to leave, the state, taking his property with him, or is disposing, or about to dispose, of it for the purpose of defrauding his creditors. *Union Bank & Trust Co. v. Himmelbauer*, 56 M 82, 89, 181 P 332.

9259. Undertaking. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars or under, or, in case the amount so claimed by plaintiff shall exceed one thousand dollars, then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of ten thousand dollars. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay

all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two days nor more than five days, must justify before a judge of the district court, or before the clerk thereof, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.

History: Ap. p. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C. 1907; re-en. Sec. 9259, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 539.

Action on Bond

In an action on a bond given to procure an attachment, the obligor is estopped to deny the validity of the attachment proceeding, and on the sheriff's return of an attachment levy, the obligor will not be heard to question the legality of the levy. *Williard et al. v. Federal Surety Co.*, 91 M 465, 468, 8 P 2d 633.

Id. A judgment on the merits dissolving an attachment is conclusive, in a subsequent action on the bond given to procure it to recover the damages flowing from its levy, that the writ was wrongfully issued.

All Costs and Damages—What Comprehended

Attorney's fees, paid or agreed to be paid for services rendered in having an attachment dissolved, fall within the purview of this section. *Plymouth Gold Min. Co. v. United States Fidelity Co.*, 35 M 23, 29, 88 P 565.

Plaintiff in an action on an attachment bond may recover as damages the amount paid, or contracted to be paid, by him in bringing about a dissolution of the attachment. *Williard et al. v. Federal Surety Co.*, 91 M 465, 468, 8 P 2d 633.

County Officers Not Required to Furnish Undertaking

Under section 9829, a county treasurer is not required to furnish an undertaking on attachment in an action brought in his official capacity for the benefit of the county, to recover on an indemnity bond against loss of county funds in a bank. *Jenkins v. First Nat. Bank et al.*, 73 M 110, 115, 236 P 1085.

Sufficiency of Signatures to Undertaking

An undertaking in attachment need not be signed by the plaintiff. The statute is complied with if two sufficient sureties sign the undertaking on behalf of the plaintiff. If such undertaking is defective, a new one may be filed. *Pierse v. Miles*, 5 M 549, 552, 6 P 347; *McIntosh v. Hurst*, 6 M 287, 288, 12 P 647; *Hoskins v. White*, 13 M 70, 72, 32 P 163; *Woodman v. Calkins*, 13 M 363, 366, 34 P 187.

Sufficiency of Undertaking in General

An undertaking in attachment, in which the sureties contract to answer for the wrongful suing out of the attachment, is not a sufficient compliance with a statute requiring such undertaking to be conditioned for the payment of all damages that the defendant may sustain, if it is finally decided that the plaintiff was not entitled to the attachment. *Pierse v. Miles*, 5 M 549, 551, 6 P 347.

References

Cited or applied as section 6659, Revised Codes, in *Gehlert v. Quinn*, 38 M 1, 4, 98 P 369; *Dunlavey v. Doggett*, 38 M 204, 209, 99 P 436; *Helena Adjustment Co. v. Predivich*, 98 M 162, 37 P 2d 651.

9260. Writ—to whom directed and what to contain—undertaking by defendant to prevent levy. The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated

in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached, in which case, to take such undertaking; such undertaking is to be to the plaintiff or plaintiffs in the action, and shall be approved in writing on the back thereof by the plaintiff or plaintiffs, or his or their attorney or attorneys, or, upon their refusal, by the judge of the district court of the same county as the residence of the sheriff; the sheriff shall thereupon file said undertaking with the clerk of the district court out of which said writ of attachment emanates, and such sheriff shall thereupon cease to be liable under said writ, and any and all actions on such undertaking shall be against the obligors named in such undertaking. Several writs may be issued at the same time to the sheriffs of different counties. In no case shall the sheriff attach more property than appears necessary to satisfy the plaintiff's demand.

History: Ap. p. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, Cod. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83, L. 1877; re-en. Sec. 182, 1st Div. Rev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. Sec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 540.

Amount of Plaintiff's Demand to be Stated

The clerk is required to insert in the writ the amount of the plaintiff's demand or demands, in conformity with that cause of action or those causes of action, set out in the complaint, on which, as shown by the affidavit, plaintiff is entitled to attach. When the writ so states, the ministerial duty of the clerk is performed. *Wilson v. Barbour*, 21 M 176, 181, 53 P 315.

Where the complaint on which a writ of attachment is issued demands different amounts from several defendants, the writ must conform to the complaint in that

respect and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each one. *State v. Pondera Valley State Bank et al.*, 77 M 1, 7, 248 P 207.

Exempt Property May Not be Attached

Authority is given to attach or levy upon property not exempt. When exempt personal property is mortgaged, it is still exempt as to all the world except the mortgagee. *Cheney v. Caldwell*, 20 M 77, 79, 49 P 397.

References

Cited or applied as section 6660, Revised Codes, in *Daly v. Kelley*, 57 M 306, 187 P 1022; *State ex rel. Hopkins v. Stephens*, 63 M 318, 322, 206 P 1094; *Himmelbauer v. Union Bank & Trust Co.*, 68 M 34, 38, 220 P 84; *Jenkins v. First Nat. Bank et al.*, 73 M 110, 118, 236 P 1085; *Englehart v. Sage*, 73 M 139, 144, 235 P 767; *Sloan v. Young*, 86 M 414, 418, 284 P 131.

9261. Property subject to attachment. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

History: En. Sec. 95, p. 61, Bannack Stat.; amd. Sec. 124, p. 157, L. 1867; re-en. Sec. 141, p. 55, Cod. Stat. 1871; re-en. Sec. 183, p. 84, L. 1877; re-en. Sec. 183, 1st Div. Rev. Stat. 1879; re-en. Sec. 185, 1st Div. Comp. Stat. 1887; re-en. Sec. 894, C. Civ. Proc. 1895; re-en. Sec. 6661, Rev. C. 1907; re-en. Sec. 9261, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 541.

Operation and Effect

"All debts due such defendant" does not include judgments and promissory notes not due. *Perkins v. Guy*, 2 M 15, 18.

Where an owner sold his land to be paid for in installments, to run through a number of years, and placed a deed in escrow to be delivered to the purchaser when all of the payments should have been

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made, but such land was attached before the last payment was made, the title still remained in the vendor, and the land was, under this section and the following section, and sections 9288 and 9424, subject to attachment at the time of the levy. *Knapp v. Andrus*, 56 M 37, 40, 180 P 908.

Under this section and the following one, a debt is property which may be

attached, and a levy upon it operates to impound it and in effect to place it in the custody of the law and beyond the control of its owner; hence where a debt due plaintiff was wrongfully attached in an action against another, the seizure amounted to a conversion. *Englehart v. Sage*, 73 M 139, 144, 235 P 767.

9262. Levy of attachment. The sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in section 9260 be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the county clerk a copy of the writ, together with the description of the property attached, and a notice that it is attached.

2. Real property, or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the county clerk a copy of the writ, together with a description of the property, and a notice that such real property, and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached. The county clerk must index such attachment when filed, in the names both of the defendant and of the person by whom the property is held, or in whose name it stands on the record.

3. Personal property, capable of manual delivery, must be attached by taking it into custody, except in cases in which personal property capable of manual delivery is in the possession of a third person, and such personal property, so in the possession of a third person, may be attached in the same manner as debts or credits and other personal property, not capable of manual delivery, as hereinafter provided.

4. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ.

5. Debts or credits and personal property, not capable of manual delivery, and personal property in the possession of a third person, must be attached by leaving with the person owing such debt, or having in his possession or under his control such credits and personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

6. Judgments, standing in favor of and in the name of the defendant upon the records of the clerk of the district court, must be attached by leaving with the said clerk of the district court a copy of the writ, and a notice stating that the said judgment is attached in pursuance of such writ. The clerk of the district court must index and keep a record of all attachments of judgments thereunder, and such attachment is binding on the judgment creditor.

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7. The interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered and the personal representative shall report such attachment to the court when any petition for distribution is filed, and in the decree made upon such petition distribution shall be ordered to such heir, legatee or devisee, but delivery of such property shall be ordered to the officer making the levy subject to the claim of such heir, legatee or devisee, or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing such interest has become final.

History: En. Sec. 95, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R. C. M. 1921; amd. Sec. 1, Ch. 71, L. 1931. Cal. C. Civ. Proc. Sec. 542.

Attachment Against Person Receiving Goods From a Debtor in Violation of the Bulk Sales Law

Under this section and section 9424, where plaintiff, after recovery of judgment against a mercantile corporation which had theretofore transferred its entire stock of merchandise in bulk to defendant without complying with the provisions of the bulk sales law, had served a copy of a writ of execution on defendant, together with a notice that any property in his possession or under his control belonging to the judgment debtor, was attached pursuant to the writ, a specific lien was created and fastened upon the property in favor of plaintiff sufficient to enable it to prosecute a creditor's bill against the purchaser. *Wheeler & Motter Merc. Co. v. Moon*, 49 M 307, 316, 141 P 665.

Query: Whether a creditor seeking to reach assets of his debtor which have been fraudulently conveyed must allege and prove that he has secured a lien by causing attachment or execution to be levied. *Koopman v. Mansolf*, 51 M 48, 57, 149 P 491.

Credits

The "credits" referred to in subdivision 5 of this section, providing the manner in which debts, credits and personal property not capable of manual delivery must be attached, are something belonging to

the defendant but in possession and under the control of the garnishee, such as promissory notes or other evidences of indebtedness which may be delivered to the sheriff. *Davis et al. v. Claxton et al.*, 82 M 574, 590, 591, 268 P 787.

In General

Under the preceding section and this section, a debt is "property" which may be attached, and a levy upon it operates to impound it and in effect to place it in the custody of the law and beyond the control of its owner; hence where a debt due plaintiff was wrongfully attached in an action against another, the seizure amounted to a conversion. *Englehart v. Sage*, 73 M 139, 144, 235 P 767.

Personal Property

The requirements of the statute (this section) that personal property capable of manual delivery must be attached by taking it into custody, and that property of that description incapable of such delivery must be attached by leaving a copy of the writ with the owner or the person in control of it as his agent, together with a notice that it is attached in pursuance of the writ, must be substantially followed, the statute recognizing no equivalent or evasion, otherwise the attaching creditor acquires no lien upon the property in satisfaction of any judgment he may thereafter obtain. *Keith v. Ramage et al.*, 66 M 578, 588, 214 P 326.

Id. Where personal property capable of manual delivery is abandoned by the keeper placed in charge of it and the sheriff does not retake or attempt to retake possession, the abandonment is equivalent to a surrender of the property and the attachment is dissolved.

Personal Property Not Capable of Manual Delivery

A cause of action being personal property not capable of manual delivery, levy

of execution upon it must, under section 9424, be made in like manner as upon a writ of attachment, which is, under subdivision 5 of this section, by leaving a copy of the writ, and a notice that the cause of action is levied upon, with the owner; hence where the copy and notice were delivered to the clerk of the district court and not to the owner, the levy was ineffective. *State ex rel. Coffey v. District Court*, 74 M 355, 360, 240 P 667.

Property Held by Third Party

Where property of a defendant is held by one whose possession the plaintiff has no right to disturb, garnishment, under this section, is the only method by which it may be attached. *Noel v. Cowan et al.*, 80 M 258, 261, 260 P 116.

Where an attachment is made upon personal property in the possession of a third person (a garnishment) the property is in custodia legis irrespective of the answer made by the garnishee in the return, and thereby the garnisher acquires such a lien or interest in the property as will enable him to hold the garnishee liable for the property or its value. *Fousek v. DeForest et al.*, 90 M 448, 459, 4 P 2d 472.

Real Property

The right to search for oil or gas under a lease granting the lessee the right to appropriate them as personal property when found, upon yielding to the lessor an agreed royalty, is a right to take a profit from the land of another—the common-law profit a prendre; it is an interest in real property and attachable as such in the manner prescribed by this section, for attaching real property. *Williard et al. v. Federal Surety Co.*, 91 M 465, 471, 8 P 2d 633.

References

Cited or applied as section 186, First Division Compiled Statutes 1887, before amendment, in *Wilson v. Harris*, 21 M 374, 387, 54 P 46; as section 895, Code of Civil Procedure, before amendment, in *Raymond v. Blanegrass*, 36 M 449, 465, 93 P 648; as section 6662, Revised Codes, as amended, in *Knapp v. Andrus*, 56 M 37, 40, 180 P 908; *Newman v. Association of Credit Men*, 63 M 545, 553, 208 P 914; *Northern Montana State Bk. v. Collins*, 67 M 575, 584, 216 P 330; *Himmelbauer v. Union Bank & Trust Co.*, 68 M 34, 38, 220 P 84; *Marlowe v. Missoula Gas Co. et al.*, 68 M 372, 377, 219 P 1111; *Isom v. Larson*, 78 M 395, 400, 255 P 1049; *Chowning v. Madison Land & Irrigation Co.*, 84 M 494, 498, 276 P 946.

9263. Certificate of defendant's interest to be furnished. Upon the application of a sheriff, holding a writ of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying his right to a number of shares of the defendant, in the stock of the association or corporation, with all dividends declared, or encumbrances thereon; or the amount, nature, and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

History: En. Sec. 896, C. Civ. Proc. 1895; re-en. Sec. 6663, Rev. C. 1907; re-en. Sec. 9263, R. C. M. 1921.

9264. Persons refusing certificates to be examined. If a person to whom application is made, as prescribed in the last section, refuses to give such certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, that there is reason to suspect that a certificate given by him is untrue, or that it failed fully to set forth the facts required to be shown thereby, the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county to which the writ is issued, and submit to an examination under oath concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

History: En. Sec. 897, C. Civ. Proc. 1895; re-en. Sec. 6664, Rev. C. 1907; re-en. Sec. 9264, R. C. M. 1921.

9265. Sheriff to take into his possession books, etc. The sheriff must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep. The sheriff, to whom the writ of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount for which it was issued has been secured.

History: En. Sec. 898, C. Civ. Proc. 1895; re-en. Sec. 6665, Rev. C. 1907; re-en. Sec. 9265, R. C. M. 1921.

9266. Levy of attachment by sheriff according to instructions of plaintiff or attorney. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of said writ.

History: En. Sec. 97, p. 62, Bannack Stat.; re-en. Sec. 126, p. 157, L. 1867; re-en. Sec. 144, p. 56, Cod. Stat. 1871; re-en. Sec. 186, p. 85, L. 1877; re-en. Sec. 186, 1st Div. Rev. Stat. 1879; re-en. Sec. 188, 1st Div. Comp. Stat. 1887; re-en. Sec. 899, C. Civ. Proc. 1895; re-en. Sec. 6666, Rev. C. 1907; re-en. Sec. 9266, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 543.

Operation and Effect

It is the duty of a sheriff who has levied an attachment upon a stock of goods, and has in his possession thereunder the books

of account of the defendant, to garnish those who appear therein as debtors, without first receiving a written notice from the plaintiff or his attorney. *Montana Milling Co. v. Jeffries*, 14 M 143, 151, 35 P 908.

References

Cited or applied as section 186, First Division Compiled Statutes 1879, in *Brownell v. McCormick*, 7 M 12, 18, 14 P 651; as section 188, First Division Compiled Statutes 1887, in *Wilson v. Harris*, 21 M 374, 392, 54 P 46.

9267. Garnishment—when garnishee liable to plaintiff. All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

History: En. Sec. 98, p. 62, Bannack Stat.; re-en. Sec. 127, p. 157, L. 1867; re-en. Sec. 145, p. 56, Cod. Stat. 1871; re-en. Sec. 187, p. 85, L. 1877; re-en. Sec. 187, 1st Div. Rev. Stat. 1879; re-en. Sec. 189, 1st Div. Comp. Stat. 1887; re-en. Sec. 900, C. Civ. Proc. 1895; re-en. Sec. 6667, Rev. C. 1907; re-en. Sec. 9267, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 544.

Operation and Effect

In order to charge a garnishee, there must be, at the time of the service, a debt due or to become due, and not a contingent liability or a conditional contract. *Cowell v. May*, 26 M 163, 168, 66 P 843.

If the liability of the garnishee is certain, and the only uncertainty which exists is as to the amount of such liability,

then the debt, whatever it may be, is subject to garnishment. *Dolenty v. Rocky Mountain Bell Tel. Co.*, 41 M 105, 120, 108 P 921.

Where a merchant has transferred his stock in violation of the bulk sales law, and the buyer, at the time of the levy of an execution upon him, accompanied by a notice of garnishment, has the identical property in his possession, he is liable, under this section, to the plaintiff creditor who sues him as garnishee. *Wheeler & Motter Merc. Co. v. Moon*, 49 M 307, 317, 141 P 665.

References

Englehart v. Sage, 73 M 139, 145, 235 P 767; *Fousek v. DeForest et al.*, 90 M 448, 4 P 2d 472.

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100 Mont. 7
46 P (2d) 47

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100 Mont. 500,
502, 503
50 P (2d) 250, 251
101 Mont. 76, 77
52 P (2d) 163

9268. Citation to garnishee. Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, in the hands or under the control of such person or of the defendant, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

History: En. Sec. 99, p. 62, Bannack Stat.; re-en. Sec. 128, p. 158, L. 1867; re-en. Sec. 146, p. 56, Cod. Stat. 1871; re-en. Sec. 188, p. 86, L. 1877; re-en. Sec. 188, 1st Div. Rev. Stat. 1879; re-en. Sec. 190, 1st Div. Comp. Stat. 1887; re-en. Sec. 901, C. Civ. Proc. 1895; re-en. Sec. 6668,

Rev. C. 1907; re-en. Sec. 9268, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 545.

References

Cited or applied as section 190, First Division Compiled Statutes 1887, in *Whalen v. Harrison*, 11 M 63, 27 P 384; *Wilson v. Harris*, 21 M 374, 395, 54 P 46.

9269. Inventory—how made. The sheriff must make a full inventory of the property attached, and return the same with the writ. When the sheriff has levied several writs of attachment on the same property, only one inventory must be made. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the person owing the debt or having the credit to give him the memorandum, stating the amount and description of each; and if such memorandum be refused, the sheriff may apply upon one day's notice to the court or judge for an order to compel such memorandum to be given. If the order be granted, it shall also direct the payment of costs of the motion by the person refusing.

History: Ap. p. Sec. 100, p. 63, Bannack Stat.; amd. Sec. 129, p. 158, L. 1867; re-en. Sec. 147, p. 57, Cod. Stat. 1871; re-en. Sec. 189, p. 86, L. 1877; re-en. Sec. 189, 1st Div. Rev. Stat. 1879; re-en. Sec.

191, 1st Div. Comp. Stat. 1887; re-en. Sec. 902, C. Civ. Proc. 1895; re-en. Sec. 6669, Rev. C. 1907; re-en. Sec. 9269, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 546.

9270. Perishable property—how sold—collection of debts and credits without suit. If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

History: En. Sec. 101, p. 63, Bannack Stat.; re-en. Sec. 130, p. 158, L. 1867; re-en. Sec. 148, p. 57, Cod. Stat. 1871; re-en. Sec. 190, p. 86, L. 1877; re-en. Sec. 190, 1st Div. Rev. Stat. 1879; re-en. Sec. 192, 1st Div. Comp. Stat. 1887; re-en. Sec. 903, C. Civ. Proc. 1895; re-en. Sec. 6670,

Rev. C. 1907; re-en. Sec. 9270, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 547.

Operation and Effect

Under this section and section 9279, on the dismissal of an attachment, the sheriff is bound to account to the successful de-

fendant for moneys collected under the attachment from such defendant's debtor. *Michener v. Fransham*, 33 M 108, 113, 81 P 953.

A sale of perishable property under attachment is made, before judgment, by the sheriff on his own responsibility, under the authority conferred by this section; no showing is necessary, and no order of

court need be made. *State ex rel. Myersick v. District Court*, 53 M 450, 453, 164 P 546.

References

Cited or applied as section 903, Code of Civil Procedure, in *Cowell v. May*, 26 M 163, 168, 66 P 843.

9271. Property attached may be sold as under execution, when. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action.

History: En. Sec. 437, p. 132, *Bannack Stat.*; re-en. Sec. 594, p. 157, *Cod. Stat.* 1871; re-en. Sec. 524, p. 177, *L.* 1877; re-en. Sec. 524, 1st Div. Rev. Stat. 1879; re-en. Sec. 541, 1st Div. Comp. Stat. 1887; amd. Sec. 904, C. Civ. Proc. 1895; re-en. Sec. 6671, Rev. C. 1907; re-en. Sec. 9271, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 548.

Operation and Effect

It is only when attached property is sought to be sold, before judgment, under this section, that a showing as to subserving "the interests of the parties" is nec-

essary; in such a case the authority to sell is dependent upon an order of court. *State ex rel. Myersick v. District Court*, 53 M 450, 453, 164 P 546.

Id. Attached property that is depreciating in value may be sold before judgment, under an order of court, upon a proper showing made.

Id. A court's authority to order a sale of attached property before judgment is not affected by the fact that the defendants have no title; the court has power to order a sale of whatever interest they have.

9272. Application for order to sell. Application for the order shall be upon such notice to the adverse party or his attorney as the court or judge, considering the nature and condition of the property, may direct. If it shall appear to the court or judge that the delay necessary to give notice would cause a material depreciation in the value of property, the order may be made without notice.

History: En. Sec. 905, C. Civ. Proc. 1895; re-en. Sec. 6672, Rev. C. 1907; re-en. Sec. 9272, R. C. M. 1921.

9273. Property claimed by third persons. If personal property attached be claimed by a third person, he shall give notice thereof to the sheriff, and deliver to him an affidavit, stating his claim, ownership, and a description of the property, and unless the plaintiff, within ten days after receiving notice thereof, give the sheriff a good and sufficient bond to indemnify him against loss or damage by reason of such retaining said property, the sheriff shall deliver the same to such person.

History: Ap. p. Sec. 149, p. 57, *Cod. Stat.* 1871; re-en. Sec. 191, p. 87, *L.* 1877; re-en. Sec. 191, 1st Div. Rev. Stat. 1879; re-en. Sec. 193, 1st Div. Comp. Stat. 1887; en. Sec. 906, C. Civ. Proc. 1895; re-en. Sec. 6673, Rev. C. 1907; re-en. Sec. 9273, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 549.

Operation and Effect

Where the answer in an action against a sheriff for damages for the illegal seizure of saloon fixtures and stock in trade denied plaintiff's claim of ownership, it was not necessary for the latter to make a third-party claim, under this section, and

9273
133 P.(2d) 769,
770

to allege that he made such a claim, as a condition precedent to maintaining his action. *O'Brien v. Quinn*, 35 M 441, 446, 90 P 166. See also *Englehart v. Sage*, 73 M 139, 142, 235 P 767.

Practice where sheriff is sued in conversion for property attached and retained by him. *Gehlert v. Quinn*, 38 M 1, 4, 98 P 369.

The liability of a surety is fixed by the terms and conditions of the contract made by him, and may not be extended to matters not covered by the contract; therefore, sureties on an indemnity bond given to the sheriff on refusal of a demand for the release of attached property to a third

party claimant pursuant to the provisions of this section, were only liable for damages resulting from the attachment, seizing, levying, taking or retention of the property under attachment, and could not be held responsible for the wrongful conversion by the sheriff of some of the property attached. *McGinley v. Maryland Casualty Co.*, 85 M 1, 7, 277 P 414.

References

Cited or applied as section 6673, Revised Codes, in *Moreland v. Monarch Mining Co.*, 55 M 419, 425, 178 P 175; *Wray v. Great Falls Paper Co.*, 72 M 461, 468, 234 P 486; *Edenfield v. C. V. Seal Co., Inc.*, et al., 83 M 49, 64, 270 P 642.

9274. Death does not dissolve attachment. The death of the defendant does not release the attached property, and a lien of the attachment may be enforced as in the case of other liens.

History: En. Sec. 907, C. Civ. Proc. 1895; re-en. Sec. 6674, Rev. C. 1907; re-en. Sec. 9274, R. C. M. 1921.

Operation and Effect

Quaere: Does this section, by providing that the death of a defendant whose property has been attached does not release the attached property and that the attachment may be enforced as in the case of other liens, authorize the enforcement

of the attachment lien by execution? *Davis et al. v. Claxton et al.*, 82 M 574, 585, 268 P 787.

In the absence of a statute so providing, the death of the defendant in an action in which his real property was attached, occurring after levy and before judgment, does not dissolve the attachment or render it nonenforceable. In re *Stevenson*, 87 M 486, 492 et seq., 289 P 566.

9275. Alias writ of attachment—when and how issued. Whenever a writ of attachment has been lost, or whenever it shall appear from the sheriff's return thereof that no property of the party or parties defendant has been levied upon, or that the levy made is insufficient to satisfy the full amount of the plaintiff's demand, or if, for any reason, the levy of the original writ is void or ineffective, the clerk of the court, upon written demand of the plaintiff or his attorney, shall issue an alias writ in the same form as the original, but no such alias writ shall be issued in an action after the commencement of the trial thereof. No new or additional affidavit or undertaking on attachment shall be required for the issuance of an alias writ. Alias writs of attachment may be issued to the sheriffs of different counties.

History: En. Sec. 1, Ch. 121, L. 1921; re-en. Sec. 9275, R. C. M. 1921.

References

National Bank v. First Nat. Bank, 71 M 242, 249, 228 P 80.

9276. If plaintiff obtains judgment, how satisfied. If judgment be recovered by plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant, as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property, or property ordered by the court or judge to be sold by him, or of any debts or credits collected by him, or so much thereof as shall be necessary to satisfy the judgment.

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

History: En. Sec. 103, p. 64, Bannack Stat.; re-en. Sec. 132, p. 159, L. 1867; re-en. Sec. 150, p. 58, Cod. Stat. 1871; re-en. Sec. 192, p. 87, L. 1877; re-en. Sec. 192, 1st Div. Rev. Stat. 1879; re-en. Sec. 194, 1st Div. Comp. Stat. 1887; re-en. Sec. 908, C. Civ. Proc. 1895; re-en. Sec. 6675, Rev. C. 1907; re-en. Sec. 9276, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 550.

Operation and Effect

If judgment is rendered for the party who procured a writ of attachment, the property is automatically subjected to sale in satisfaction of the judgment. *Moreland v. Monarch Mining Co.*, 55 M 419, 425, 178 P 175.

References

Englehart v. Sage, 73 M 139, 143, 235 P 767; *Harboldt v. Hensen*, 75 M 512, 514, 244 P 488; *Wall v. Duggan et al.*, 76 M 239, 245, 245 P 953.

9277. Where there remains a balance due, how collected. If, after selling all property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debt or credit collected by him, deducting his fee, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of property attached unapplied on the judgment.

9277
136 P.(2d) 533

History: En. Sec. 104, p. 64, Bannack Stat.; re-en. Sec. 133, p. 159, L. 1867; re-en. Sec. 151, p. 58, Cod. Stat. 1871; re-en. Sec. 193, p. 87, L. 1877; re-en. Sec. 193, 1st Div. Rev. Stat. 1879; re-en. Sec. 195, 1st

Div. Comp. Stat. 1887; re-en. Sec. 909, C. Civ. Proc. 1895; re-en. Sec. 6676, Rev. C. 1907; re-en. Sec. 9277, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 551.

9278. When suits may be commenced on the undertaking. If the execution is returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 9260 or section 9281, or he may proceed, as in other cases, upon the return of an execution.

History: En. Sec. 105, p. 64, Bannack Stat.; re-en. Sec. 134, p. 159, L. 1867; re-en. Sec. 152, p. 58, Cod. Stat. 1871; re-en. Sec. 194, p. 88, L. 1877; re-en. Sec. 194, 1st Div. Rev. Stat. 1879; re-en. Sec. 196, 1st

Div. Comp. Stat. 1887; re-en. Sec. 910, C. Civ. Proc. 1895; re-en. Sec. 6677, Rev. C. 1907; re-en. Sec. 9278, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 552.

9279. If the defendant recover judgment, what the sheriff is to deliver. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all of the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

History: En. Sec. 106, p. 64, Bannack Stat.; re-en. Sec. 135, p. 159, L. 1867; re-en. Sec. 153, p. 58, Cod. Stat. 1871; re-en. Sec. 195, p. 88, L. 1877; re-en. Sec. 195, 1st Div. Rev. Stat. 1879; re-en. Sec. 197, 1st Div. Comp. Stat. 1887; re-en. Sec. 911, C. Civ. Proc. 1895; re-en. Sec. 6678, Rev. C. 1907; re-en. Sec. 9279, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 553.

References

Cited or applied as section 153, p. 58, Codified Statutes 1879, in *Haase v. Corbin*, 2 M 409; as section 911, Code of Civil Procedure, in *Michener v. Fransham*, 33 M 108, 112, 81 P 953; *Fergus Motor Co. v. Schott et al.*, 95 M 249, 265, 26 P 2d 365.

9280. Proceedings to release attachment—before whom taken. Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sale thereof, must be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

History: En. Sec. 108, p. 65, Bannack Stat.; re-en. Sec. 136, p. 159, L. 1867; amd. Sec. 154, p. 58, Cod. Stat. 1871; re-en. Sec. 196, p. 88, L. 1877; re-en. Sec. 196, 1st Div. Rev. Stat. 1879; re-en. Sec. 198, 1st

Div. Comp. Stat. 1887; amd. Sec. 912, C. Civ. Proc. 1895; re-en. Sec. 6679, Rev. C. 1907; re-en. Sec. 9280, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 554.

9281. Attachment—in what cases it may be released and upon what property. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders, or householders, in the state, to the effect that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making the order may fix the sum for which the undertaking shall be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released without their justification, if the same be required.

History: Ap. p. Sec. 109, p. 65, Bannack Stat.; en. Sec. 137, p. 159, L. 1867; amd. Sec. 2, p. 67, L. 1869; re-en. Sec. 155, p. 58, Cod. Stat. 1871; amd. Sec. 1, p. 48, L. 1874; amd. Sec. 197, p. 88, L. 1877; re-en. Sec. 197, 1st Div. Rev. Stat. 1879; re-en. Sec. 199, 1st Div. Comp. Stat. 1887; amd. Sec. 913, C. Civ. Proc. 1895; re-en. Sec. 6680, Rev. C. 1907; re-en. Sec. 9281, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 555.

Operation and Effect

The officer to whom the undertaking is given is the proper person to make the demand for the redelivery of the property. *Driggs v. Harrington*, 2 M 30, 33.

Id. In an action brought against the sureties upon a statutory undertaking for the redelivery of attached property, no demand is required for the redelivery of the property, when the property has been removed from the state by the defendant in the attachment suit, and said defendant

is insolvent and has left the state, and has no place of residence or business therein, and the sureties have been notified that the judgment, which was obtained in the attachment suit, remains unpaid.

If an undertaking of the nature of the above places a greater burden on the surety than contemplated by this section, and may therefore not be good as a statutory undertaking, it will nevertheless be sustained as a common-law bond. *Sloan v. Young*, 86 M 414, 420, 284 P 131.

Id. An undertaking for the release of attached personalty providing unqualifiedly that if plaintiff in the action in which the writ was issued shall recover judgment, the obligor will pay the amount thereof, fixes an unconditional obligation upon the surety to pay the judgment irrespective of any defects or irregularities in the issuance or levying of the attachment.

9282. When a motion to discharge attachment may be made, and upon what ground. The defendant may also at any time, either before or after

the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

History: Ap. p. Sec. 138, p. 160, L. 1867; re-en. Sec. 156, p. 59, Cod. Stat. 1871; amd. Sec. 1, p. 48, L. 1874; amd. Sec. 198, p. 89, L. 1877; re-en. Sec. 198, 1st Div. Rev. Stat. 1879; re-en. Sec. 200, 1st Div. Comp. Stat. 1887; en. Sec. 914, C. Civ. Proc. 1895; re-en. Sec. 6681, Rev. C. 1907; re-en. Sec. 9282, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 556.

Operation and Effect

An attachment may be dissolved for irregularities or imperfections in its issuance, not only apparent upon the face of the papers, but upon other grounds, wherein it is made to appear that the issuance of the writ was improper, but it is not within the scope of the inquiry under a motion to dissolve to try the merits of the main action. *Newell v. Whitwell*, 16 M 243, 259, 40 P 866.

The notice of motion and motion provided for by this section should state the grounds upon which the motion is based. *Omaha Upholstering Co. v. Chauvin-Fant Furniture Co.*, 18 M 468, 45 P 1087.

Where a writ of attachment has been issued upon an affidavit which is sufficient as to five of seven causes of action, but insufficient as to the remaining two, a motion to discharge the whole writ is properly denied. *Wilson v. Barbour*, 21 M 176, 182, 53 P 315.

9283. When motion made on affidavit, it may be opposed by affidavit. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

History: En. Sec. 139, p. 160, L. 1867; re-en. Sec. 157, p. 59, Cod. Stat. 1871; re-en. Sec. 199, p. 89, L. 1877; re-en. Sec. 199, 1st Div. Rev. Stat. 1879; re-en. Sec. 201, 1st Div. Comp. Stat. 1887; re-en. Sec. 915, C. Civ. Proc. 1895; re-en. Sec. 6682, Rev. C. 1907; re-en. Sec. 9283, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 557.

Operation and Effect

Where an affidavit for attachment does not purport to have been made under oath, or before an officer authorized to administer an oath, and a motion is made to discharge the attachment on the ground that no affidavit was presented at the time the

Defendant's general appearance in an action does not defeat the right to move thereafter to discharge the attachment on the ground that it had been issued prior to the issuance of a valid summons. *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 93, 149 P 494.

This section, permitting discharge of an attachment on the ground that the writ was improperly or irregularly issued, does not authorize its discharge on the ground that the proceeds of sale of homestead lands were exempt from seizure. *Davis et al. v. Bryant*, 62 M 352, 354, 205 P 209.

Since the discharge of a writ of attachment involves a judicial determination that the writ should not have been issued, and direction by plaintiff as to how and on what property levy shall be made does not amount to a discharge as to property not levied upon, it is immaterial on motion to discharge that he did not intend that levy should be made upon property not subject to attachment or in excess of defendant's liability as authorized by the writ. *Jenkins v. First Nat. Bank et al.*, 73 M 110, 119, 236 P 1085.

References

Cited or applied as section 6681, Revised Codes, in *Kyle v. Chester*, 42 M 522, 528, 113 P 749; *National Bank v. First Nat. Bank*, 71 M 242, 248, 249, 228 P 80.

writ was issued, it is not proper practice to present, in opposition to the motion, affidavits to the effect that the declarations contained in the writing were made under oath and that by inadvertence the officer omitted his signature, though such affidavits would be proper in support of an application, made under the following section to amend. *Continental Oil Co. v. Jameson*, 53 M 466, 469, 164 P 727.

References

Cited or applied as section 915, Code of Civil Procedure, in *Wilson v. Barbour*, 21 M 176, 179, 53 P 315; *Davis et al. v. Bryant*, 62 M 352, 354, 205 P 209.

9284. When writ must be discharged. If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. But the court or judge may allow the plaintiff to amend his affidavit or undertaking.

9284
105 P.(2d)1105

History: En. Sec. 140, p. 160, L. 1867; re-en. Sec. 158, p. 59, Cod. Stat. 1871; re-en. Sec. 200, p. 89, L. 1877; re-en. Sec. 200, 1st Div. Rev. Stat. 1879; re-en. Sec. 202, 1st Div. Comp. Stat. 1887; amd. Sec. 916, C. Civ. Proc. 1895; re-en. Sec. 6683, Rev. C. 1907; re-en. Sec. 9284, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 558.

Amendment of Affidavit or Undertaking

The procuring of an attachment, and the steps necessary therefor, is a proceeding within the spirit of the code, and, if such proceeding is defective, the same may be amended in furtherance of justice, like any other proceeding, under section 9187. *Pierse v. Miles*, 5 M 549, 552, 6 P 347; *Langstaff v. Miles*, 5 M 554, 555, 6 P 356; *Magee v. Fogerty*, 6 M 237, 239, 11 P 668; *Josephi v. Mady Clothing Co.*, 13 M 195, 200, 33 P 1; *Muth v. Erwin*, 14 M 227, 228, 36 P 43; *Newell v. Whitwell*, 16 M 243, 258, 40 P 866; *Herbst Importing Co. v. Hogan*, 16 M 384, 388, 41 P 135; *Wilson v. Barbour*, 21 M 176, 183, 53 P 315.

In view of the statutory liberality in permitting amendments to be made, the sustaining of a general demurrer to the complaint in a case where an attachment has issued, and granting the plaintiff time to amend, does not dissolve the attachment if the complaint can be amended so as to state a proper cause of action. *American Surety Co. v. Kartowitz*, 54 M 92, 96, 166 P 685.

An affidavit on attachment stating that the debt "is not secured" instead of "has not been secured," as required by statute, though defective, was not void, but subject to amendment under this section. *American Surety Co. of N. Y. v. Kartowitz*, 59 M 1, 7, 195 P 99.

The district court may and should, on motion to discharge a writ of attachment because of a defective affidavit, in furtherance of justice permit amendment of the affidavit and deny the motion, where the defect is readily amendable. *Jenkins v. First Nat. Bank et al.*, 73 M 110, 117, 236 P 1085.

Where the affidavit for a writ of attachment originally recited that the debt sued on had not been secured, the court properly permitted the affiant to amend to the effect that while the debt had originally been secured, the security had become valueless without any fault of his,

and refusal to dissolve the attachment was proper. *Hetrick v. Renwald*, 73 M 426, 428, 236 P 1089.

Release and Discharge Distinguished

The "release" of an attachment authorized under the attachment statute refers exclusively to the levy of the writ, involves a ministerial duty on the part of the officer directed to make the release, and may be ordered by the party who caused the levy to be made; whereas its "discharge" refers to the writ itself, involves a judicial function and one the party securing the writ cannot perform himself nor procure to have it performed by an officer for him. *National Bank v. First Nat. Bank*, 71 M 242, 248, 249, 228 P 80.

Scope of Act

This section considers two classes of cases, one in which an attachment has been issued in an action which does not fall within the class of actions mentioned in section 9256, and the other, one in which the writ has been issued in a proper action, but in which the proceedings to secure it have been irregular. *State ex rel. Malin-Yates Co. v. Justice of Peace Court*, 51 M 133, 140, 149 P 709.

When Writ Must be Discharged

An attachment is properly discharged where the complaint does not state a cause of action, though the affidavit for attachment does do so; the court must look to the complaint to ascertain whether a cause of action in contract, express or implied, is stated. *Kyle v. Chester*, 42 M 522, 523, 113 P 749.

A justice of the peace must discharge an attachment if it appears that the writ was improperly or irregularly issued. *State ex rel. Malin-Yates Co. v. Justice of Peace Court*, 51 M 133, 140, 149 P 709.

If the attachment was improperly issued, it should have been discharged (this section), and it was issued improperly if this action does not belong to the class of actions in which an attachment is authorized. *State ex rel. Malin-Yates Co. v. Justice of the Peace Court*, 51 M 133, 149 P 709; *Butler v. Peters*, 62 M 381, 383, 205 P 247.

References

Cited or applied as section 6683, Revised Codes, in *Continental Oil Co. v. Jameson*, 53 M 466, 468, 164 P 727; *Davis et al. v. Bryant*, 62 M 352, 354, 205 P 209.

9285. Motion to vacate or modify writ or increase security. The defendant, or a person who has acquired a lien upon or interest in his property, after it was attached, may, at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judg-

ment recovered in the action, apply to vacate or modify the writ of attachment, or to increase the security given by the plaintiff, or for one or more of those forms of release together, or in the alternative.

History: En. Sec. 917, C. Civ. Proc. 1895; re-en. Sec. 6684, Rev. C. 1907; re-en. Sec. 9285, R. C. M. 1921.

References
American Surety Co. of N. Y. v. Kartowitz, 59 M 1, 5, 195 P 99.

9286. How motion made. An application, specified in the last section, may be founded only upon the papers upon which the writ was granted; in which case it must be made to the court or judge, with or without notice, as the court or judge deems proper, or it may be founded upon proof, by affidavits, on the part of the defendant, or a person who has acquired a lien upon or interest in his property after it was attached, in which case it must be made to the court or judge upon notice; and it may be opposed by new proof, by affidavit, or other evidence on the part of the plaintiff, tending to sustain any grounds of attachment.

History: En. Sec. 918, C. Civ. Proc. 1895; re-en. Sec. 6685, Rev. C. 1907; re-en. Sec. 9286, R. C. M. 1921.

9287. When writ to be returned. The sheriff must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county clerk in which the notice of the attachment has been filed, and be indexed in like manner.

9287
112 P. (2d) 198

History: En. Sec. 114, p. 66, Bannack Stat.; re-en. Sec. 141, p. 160, L. 1867; re-en. Sec. 159, p. 59, Cod. Stat. 1871; re-en. Sec. 201, p. 89, L. 1877; re-en. Sec. 201, 1st Div. Rev. Stat. 1879; re-en. Sec. 203, 1st

Div. Comp. Stat. 1887; amd. Sec. 919, C. Civ. Proc. 1895; re-en. Sec. 6686, Rev. C. 1907; re-en. Sec. 9287, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 559.

9288. Different attachments—when liens accrue. All liens by attachment shall accrue at the time the property of the defendant shall be attached by the officer charged with the execution of the writ, in the order in which the writs are levied; and said lien shall not be affected by any subsequent attachment, or by any judgment obtained subsequent thereto. The writ of attachment first placed in the hands of the sheriff must be executed first, and when there are several writs against the same defendant, they must be executed in the order in which they were received by the sheriff. No written specification of property to be levied upon must be required by the sheriff, except as to property referred to in section 9266, and subdivision 2, of section 9262. The sheriff must indorse upon each writ of attachment received by him the time when the same was received, specifying the day, hour and minute.

History: Ap. p. Sec. 160, p. 59, Cod. Stat. 1871; re-en. Sec. 202, p. 89, L. 1877; re-en. Sec. 202, 1st Div. Rev. Stat. 1879; re-en. Sec. 204, 1st Div. Comp. Stat. 1887; amd. Sec. 920, C. Civ. Proc. 1895; re-en. Sec. 6687, Rev. C. 1907; re-en. Sec. 9288, R. C. M. 1921.

Operation and Effect

Property seized under a writ of attachment is impressed with a lien from the date on which the writ was levied, and this lien continues in force until judgment. *Moreland v. Monarch Mining Co.*, 55 M 419, 425, 178 P 175.

References

Cited or applied as section 6687, Revised Codes, in *Knapp v. Andrus*, 56 M 37, 40, 180 P 908; *Harboldt v. Hensen*, 75 M 512,

514, 244 P 488; *Wall v. Duggan*, 76 M 239, 245, 245 P 953; *Piccolo et al. v. Tanada et al.*, 78 M 445, 451, 253 P 890.

9289. Partners may apply to discharge attachment. If a writ of attachment is levied upon the interest of one or more partners, in goods or property of a partnership, the other partners, who are not defendants in the action, or any of them, may, at any time before final judgment, apply to the judge who granted the writ, or to the court upon an affidavit showing the facts, for an order to discharge the attachment as to that interest.

History: En. Sec. 921, C. Civ. Proc. 1895; re-en. Sec. 6688, Rev. C. 1907; re-en. Sec. 9289, R. C. M. 1921.

9290. Undertaking to be given. Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff, on demand, the amount of any judgment which may be recovered against the partner who is defendant in the action; or which may be recovered against him, in any other action, wherein the other partners are not defendants, and wherein a writ of attachment, or an execution, may come into the sheriff's hands, at any time before the writ of attachment, which was so levied, is vacated and annulled; not exceeding the sum specified in the undertaking, which must not be less than the value of the interest of the defendant, in the goods or property seized, by virtue of the attachment, as fixed by the court or judge. If the value, in the opinion of the court or judge, is uncertain, the sum must be such as the court or judge determines. For the purpose of fixing the sum or to determine the sufficiency of its sureties, the court or judge may receive affidavits or oral testimony, or may direct a reference.

History: En. Sec. 922, C. Civ. Proc. 1895; re-en. Sec. 6689, Rev. C. 1907; re-en. Sec. 9290, R. C. M. 1921.

9291. Attachment of personal property under lien of conditional sales notes. Personal property covered by the lien of conditional sales notes, contracts, or instruments filed or recorded in the manner provided by section 7594 of these codes may be taken on attachment or execution issued at the suit of a creditor of the owner of such property subject to such lien, but before the property is so taken, the officer must pay or tender to the payee under such lien the amount of the lien debt and interest, or must deposit said amount with the county treasurer of the county in which the lien is filed, payable to the order of the payee named in said lien; and, when the property then taken is sold under process, the officer must apply the proceeds of the sale in the same manner, and the same procedure shall thereafter be had as in the case of mortgaged personal property sold, or about to be sold, on attachment or execution; and the payee named in said lien shall have the same rights and duties as a mortgagee, and the owner of said property, subject to any of said liens, shall have the same rights, duties, and obligations as the mortgagor of personal property.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R. C. M. 1921.

Operation and Effect

Where an automobile dealer took an assignment of a conditional sales contract

covering a car to perfect an attachment thereon for an independent indebtedness under this section, the fact that the dealer accepted final payment on the car from the purchaser did not create an estoppel in

his action to recover on an undertaking in claim and delivery involving the same car. *Fergus Motor Co. v. Schott et al.*, 95 M 249, 264, 26 P 2d 365.

9292. Property mortgaged and pledged—how taken. Personal property mortgaged or pledged may be taken on attachment, as provided in section 8283 of the Civil Code.

History: En. Sec. 923, C. Civ. Proc. 1895; re-en. Sec. 6690, Rev. C. 1907; re-en. Sec. 9292, R. C. M. 1921.

9293. Attachment book. There must be kept in the office of the county clerk of each county a book called "attachment book," in which must be entered by such clerk, in alphabetical order, the names of all persons against whom any writ or notice of attachment has been filed in his office. There must also be entered in said book the time such writ or notice was filed. Such entry must be made under an appropriate head for that purpose.

History: En. Sec. 203, p. 89, L. 1877; amd. Sec. 924, C. Civ. Proc. 1895; re-en. re-en. Sec. 203, 1st Div. Rev. Stat. 1879; Sec. 6691, Rev. C. 1907; re-en. Sec. 9293, re-en. Sec. 205, 1st Div. Comp. Stat. 1887; R. C. M. 1921.

9294. Garnishment of public officers. Money, credits, or other property belonging to or due and owing to another, in the possession of or under the control of a public officer or board, including all officers or boards of a county, municipal corporation, and school district, or state board or state government, may be attached or garnished while in such possession or under such control, by making service, as provided in section 9262, upon the clerk of the county or chairman of the board of county commissioners, the city clerk or mayor of a municipal corporation, or upon the clerk of the board of school trustees or chairman of such board, as the case may be.

History: En. Sec. 1, p. 159, L. 1901; re-en. Sec. 6692, Rev. C. 1907; re-en. Sec. 9294, R. C. M. 1921.

References

Cited or applied as section 6692, Revised Codes, in *Duluth Brewing & Malting Co. v. Allen*, 51 M 89, 91, 149 P 494.

9295. Attachment of stocks of foreign corporations. The stocks and shares of certain foreign corporations and joint stock companies doing business in this state are subject to attachment in the manner provided by section 6661 of the Civil Code.

History: New section 9295, recommended by code commissioner 1921.

9296. Range stock—taking possession under process. Whenever it is necessary for an officer or person charged with the service of process out of any of the courts of this state to take possession of any cattle or horses running at large, and commonly known as range stock, between the first day of November and the next succeeding fifteenth day of May, it is a sufficient service of such process for the officer or person charged with the service of the same to file a copy thereof, with a notice appended thereto containing the number, as near as may be, and a description of said stock by marks and brands, that such property or a portion thereof, as the case may be, is attached or levied upon, in pursuance of such process, with the

county clerk of the county wherein such property is running at large, within fifteen days after the receipt of such process for service, and shall make due return of his said proceedings upon said process.

History: En. Sec. 1, p. 111, L. 1885; re-en. Sec. 223, 1st Div. Comp. Stat. 1887; re-en. Sec. 940, C. Civ. Proc. 1895; re-en. Sec. 6693, Rev. C. 1907; re-en. Sec. 9296, R. C. M. 1921.

Operation and Effect

In an action for damages for the conversion of certain horses, alleged to have been attached as range stock, the com-

plaint must show that the horses referred to were range stock within the meaning of the statute. *Harmon v. Comstock Horse & Cattle Co.*, 9 M 243, 249, 23 P 470.

References

Cited or applied as section 940, Code of Civil Procedure, in *Rosenbaum Bros. & Co. v. Ryan Bros. Co.*, 33 M 424, 426, 84 P 1120.

9297. Possession under a mortgage—how acquired. In all cases where it is necessary, under the laws of this state, for a party to any mortgage, assignment, bill of sale, or other contract, between the first day of November and the next succeeding fifteenth day of May, to take possession of any such cattle or horses in order to preserve his rights under any such mortgage, assignment, bill of sale, or other contract, it is sufficient for such party to file a copy of the instrument under which he claims, with a notice of such claim appended thereto, with the county clerk of the county wherein such property is running at large, within five days after it becomes necessary for him to so take custody and possession of the same.

History: En. Sec. 2, p. 111, L. 1885; re-en. Sec. 224, 1st Div. Comp. Stat. 1887; re-en. Sec. 941, C. Civ. Proc. 1895; re-en. Sec. 6694, Rev. C. 1907; re-en. Sec. 9297, R. C. M. 1921.

Circumstances in Which Sale of Horses on Open Range Fraudulent in Law

Where the purchaser of a band of horses, then on the open range, did not take actual

possession of them, nor file a copy of the bill of sale, with a notice of his claim in the office of the county clerk in which the animals were running at large (this section), nor rebrand them, he did not obtain constructive possession of them as against the claim of the vendor's creditors; as to them the transaction was fraudulent in law. *Anderson v. Hoffman*, 99 M 146, 148, 43 P 2d 644.

9298. Time possession holds good—limited. When the copy of the process or instrument, with the proper notice appended thereto, is filed as hereinbefore provided, it has the same effect as if actual possession of said cattle and horses had been taken by the officer or person charged with the execution of such process, or the party required under said instrument to take the same, and shall continue to have such effect until actual possession of such property has been taken or had by the officer, person, or party aforesaid; provided, that such actual possession be had or taken prior to the first day of August next succeeding.

History: En. Sec. 3, p. 112, L. 1885; re-en. Sec. 225, 1st Div. Comp. Stat. 1887; re-en. Sec. 942, C. Civ. Proc. 1895; re-en. Sec. 6695, Rev. C. 1907; re-en. Sec. 9298, R. C. M. 1921.

9299. Duty of county clerk to record papers. It is the duty of the county clerk to file all papers deposited with him for that purpose, and required to be filed under the provisions of the three preceding sections, and preserve the same as other records of his office are preserved, and furnish to persons making inquiry about such files all necessary information concerning the same.

History: En. Sec. 4, p. 112, L. 1885; re-en. Sec. 226, 1st Div. Comp. Stat. 1887; re-en. Sec. 943, C. Civ. Proc. 1895; re-en. Sec. 6696, Rev. C. 1907; re-en. Sec. 9299, R. C. M. 1921.

9300. Sale of property under supplementary writ. When an officer into whose hands a writ of execution is placed has served the same in accordance with section 9296 of this code, and made his return in accordance with the facts, at any time thereafter, within the time limited as hereinbefore provided to hold the property taken or levied upon under such writ, another writ of execution may be issued, which must be supplementary to the first writ, and in pursuance of which the officer or person charged with the service thereof may sell the property held by the said first writ, as hereinbefore provided.

History: En. Sec. 5, p. 113, L. 1885; Sec. 6697, Rev. C. 1907; re-en. Sec. 9330, re-en. Sec. 227, 1st Div. Comp. Stat. 1887; R. C. M. 1921.
re-en. Sec. 944, C. Civ. Proc. 1895; re-en.

CHAPTER 45

RECEIVERS

- Section 9301. Appointment of receiver.
9302. Notice of application for appointment.
9303. Appointment of receivers upon dissolution of corporations.
9304. Who shall not be appointed—undertaking to protect defendant from results of wrongful appointment.
9305. Oath and undertaking.
9306. Powers of receivers.
9307. Funds—how invested.

9301. Appointment of receiver. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

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1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

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2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

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6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

History: Ap. p. Sec. 116, p. 67, Bannack
Stat.; re-en. Sec. 143, p. 160, L. 1867; re-en.
Sec. 179, p. 62, Cod. Stat. 1871; en. Sec.
221, p. 93, L. 1877; re-en. Sec. 221, 1st Div.
Rev. Stat. 1879; re-en. Sec. 229, 1st Div.
Comp. Stat. 1887; re-en. Sec. 950, C. Civ.
Proc. 1895; re-en. Sec. 6698, Rev. C. 1907;
re-en. Sec. 9301, R. C. M. 1921. Cal. C.
Civ. Proc. Sec. 564.

Subd. 1New Cases for a Receiver Not Intended by This Subdivision

The provision of subdivision 1 of this section, that "on the application of the plaintiff or of any party whose right or interest in the property is probable, and where the property is in danger of being lost or materially injured," cannot be construed as creating new cases for a receiver, but merely provides on whose application, and under what circumstances, the appointment may be made in the cases already enumerated. *State ex rel. New York Sheep Co. v. District Court*, 14 M 577, 599, 37 P 969.

No Right to Receiver Exists to Care for Property Attached and in Hands of Sheriff

The district court has no jurisdiction, under either subdivision 1 or subdivision 6 of this section, in actions for debt in which the debtor's property has been attached, to appoint a receiver of the property so attached, on the application of a junior attaching creditor, though it appears that the property may be lost or materially injured if left in the hands of the sheriff. *State ex rel. New York Sheep Co. v. District Court*, 14 M 577, 595, 37 P 969.

Not Permissible in Attachment Suits

Neither subdivision 1 nor 6 of this section authorizes the appointment of a receiver in an attachment suit. *Berryman v. Billings Mut. Heating Co.*, 44 M 517, 522, 121 P 280.

When a Receiver Is Not Proper in Partnership Dispute

A proper case for the appointment of a receiver is not shown where it appeared from the complaint that all the joint operations in respect to the partnership property had been consummated except the collection of the balance of the price for which it had been sold, and there remained simply a dispute between plaintiff and defendant as to the proper apportionment of the fund arising from the sale of the property, there being no averment that the defendant was insolvent, or that the partnership fund was in danger of being lost, squandered, or removed from the jurisdiction. *McIntosh v. Perkins*, 13 M 143, 151, 32 P 653.

When Not Allowable in General

An action for debt in which defendant's property has been attached is not an action by a creditor to subject any property or fund to his claim, nor is it an action between persons jointly interested in any property or fund, and is not within subdivision 1 of this section. *State ex rel. New York Sheep Co. v. District Court*, 14 M 577, 597, 37 P 969.

Subd. 2Refusal to Appoint in Mortgage Foreclosure Discretionary

Held, in an action for the foreclosure of a mortgage on residence property and other relief, in which it appeared, *inter alia*, that for failure to file a renewal affidavit, the mortgage lien had expired prior to the commencement of the action, that plaintiff was in possession of the property, etc., that the record does not show a manifest abuse of the trial court's discretion in refusing to appoint a receiver. *Pereira v. Wulf et al.*, 83 M 343, 345, 272 P 532.

Right in General

Held, in an action for the conversion of grain raised on mortgaged land, that if a mortgagee desires to avail himself of his right to rents and profits pledged by the mortgage which does not give him the right of immediate possession, he must claim them by invoking the aid of a court of equity for the appointment of a receiver to take possession of the rents and profits, under this section; if he forecloses without asking for such appointment he waives his right to the rents and profits accruing before foreclosure, since foreclosure may not be had by piecemeal, and the mortgagor is entitled to them. *Long v. W. P. Devereux Co. et al.*, 87 M 198, 206, 286 P 402.

Where rents and profits are pledged for the payment of a debt secured by mortgage on lands from which they flow, they with the lands are primarily liable for each payment, and an application for the appointment of a receiver to take possession of such rents and profits pending determination of foreclosure proceedings should ordinarily be granted, regardless of the solvency or insolvency of the mortgagor, unless the court be satisfied that the mortgaged land, exclusive of rents and profits, is ample security for the payment of the debt. *Hastings et al. v. Wise et al.*, 89 M 325, 334 et seq., 297 P 482.

Id. A mortgage on farm lands contained an acceleration clause and provided that on breach of the contract the rents and profits should at once accrue to the benefit of the mortgagee; it did not authorize the latter to take possession. At the time suit to foreclose was brought no part of the principal (\$31,000) had been paid, and interest amounting to \$10,000 remained unpaid. Showing was made that the property was worth no more than \$25,000. Unpaid taxes amounted to about \$2,000. Held, under the above rules, that the court did not err in appointing a receiver *pendente lite*.

Id. The rule that a receiver will not be appointed in a mortgage foreclosure action unless it is probable that the mortgagee will succeed in his action, held met by the showing made by plaintiff justifying the conclusion of his ultimate success.

Subd. 5Appointment Only in Action Pending

Under this section, and this subdivision, a receiver for a dissolved or insolvent corporation may be appointed only in an action pending. *Mieyr v. Federal Surety Co. et al.*, 97 M 503, 517, 34 P 2d 982.

Subd. 6Improper Appointment in General

Held, that the action in unlawful detainer itself afforded plaintiff landlord speedy and adequate relief against the unlawful holding over by his tenant, and that therefore the appointment of a receiver therein was unwarranted. *Doggett v. Johnson*, 72 M 443, 446, 234 P 252.

While a receiver pendente lite may be appointed, upon a proper showing, in an action involving conflicting rights to the subject matter of the action, to husband the property for the benefit of the party who may be ultimately found entitled thereto, the statute providing for the appointment of receivers (this section) contains no authority for the appointment of such an officer in a bare action for debt. *Scholefield v. Merrill Mortuaries, Inc.*, 93 M 192, 207, 17 P 2d 1081.

In the absence of a statute so providing, a receiver of a corporation may not be appointed on petition of a general creditor. *Mieyr v. Federal Surety Co. of Davenport*, 94 M 508, 523 et seq., 23 P 2d 959. See also *Clark v. Williard*, 292 U. S. 112, 78 L. Ed. 1160, and *Mieyr v. Federal Surety Co. et al.*, 97 M 503, 34 P 2d 982.

Id. A receiver will not be appointed unless the applicant has no other plain, speedy or adequate remedy; hence where a general creditor had a cause of action against a foreign corporation for which a receiver had been appointed in the state of its domicile, on an express contract for the direct payment of money, and could have attached its property in the state, he was not entitled to the appointment of an ancillary receiver in Montana.

Lessee and Lessor Not Entitled to a Receiver

A lessee is no more entitled to have a receiver appointed than is his landlord. *Hickey v. Parrot S. & C. Co.*, 25 M 164, 187, 64 P 330.

Under subdivision 6 of this section, the lessee in possession of a certain mine, the operation of which was enjoined pending the settlement of a dispute as to title between the lessor and others, was not entitled to the appointment of a receiver, with power to remove ore, on the ground that his lease would expire before final adjudication, and hence be rendered valueless by the injunction. *Hickey v. Parrot S. & C. Co.*, 25 M 164, 183, 64 P 330.

May Receiver Be Appointed in Action to Quiet Title?

Quaere: May a receiver be appointed in an action to quiet title, under subdivision 6 of this section, providing that a receiver may be appointed in all cases where receivers have been appointed by the usages of courts of equity? *Doggett v. Johnson*, 77 M 461, 465, 251 P 145.

Not Permissible in Attachment Suit

Neither subdivision 1 nor 6 of this section authorizes the appointment of a receiver in an attachment suit. *Berryman v. Billings Mut. Heating Co.*, 44 M 517, 121 P 280.

Operation in General

Under subdivision 6 of this section, a receiver will not be appointed in an action for an injunction against trespasses, with power to take away the substance of the estate, on the ground that the defendant will enjoin or has enjoined the plaintiff in possession from extracting ore from the property. *Hickey v. Parrot S. & C. Co.*, 25 M 164, 184, 64 P 330.

This section does not authorize the appointment of a receiver when a money judgment has been recovered in a simple action at law, as the creditor can himself take the necessary steps to enforce the judgment. *Forsell v. Pittsburg & Montana Copper Co.*, 42 M 412, 422, 113 P 479.

Receiver Cannot Be Appointed in Aid of Execution

A receiver cannot be appointed in aid of execution, where no proceedings in aid of execution have been had, and no property has been found. *Forsell v. Pittsburg & Montana Copper Co.*, 42 M 412, 423, 113 P 479.

In GeneralAction May Not Be Brought for the Appointment of a Receiver

An action may not be brought for the appointment of a receiver; to justify such appointment, there must be an action pending, as provided in this section. *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 263, 146 P 539.

There is no such thing in this state as an action for the appointment of a receiver. *Hartnett v. St. Louis M. & M. Co.*, 51 M 395, 401, 153 P 437.

The power to appoint a receiver should be exercised sparingly and with extreme caution, and only to prevent manifest wrong immediately impending, or irreparable injury; to invoke the power there must be an action pending in which the right asserted can be litigated and a judgment rendered. *Scholefield v. Merrill Mortuaries, Inc.*, 93 M 192, 207, 17 P 2d 1081.

Application for Receiver Addressed to
Sound Discretion of the Court

An application for the appointment of a receiver is addressed to the sound legal discretion of the trial court. *Hickey v. Parrot S. & C. Co.*, 25 M 164, 186, 64 P 330; *Brown v. Erb-Harper-Rigney Co.*, 48 M 17, 27, 133 P 691; *Hartnett v. St. Louis M. & M. Co.*, 51 M 395, 405, 153 P 437; *Montana Ranches Co. v. Dolan*, 53 M 397, 402, 164 P 306.

Receivership is an extraordinary remedy of an ancillary character, its purpose being to husband the property in litigation for the benefit of the person who may ultimately be found entitled thereto; it is never a matter of right but the application is addressed to the sound legal discretion of the court, which discretion must be exercised sparingly and with unusual caution and only to prevent manifest wrong immediately impending or where it is made to appear clearly that plaintiff is in danger of suffering irreparable injury, and there is no other plain, speedy and adequate remedy available. *Pereira v. Wulf et al.*, 83 M 343, 345, 272 P 532.

Assignee is Not a Receiver

Neither an original assignee nor his successor, as such, is a receiver, and the successor of the assignee of an insolvent may be sued without leave of court. *Babcock v. Maxwell*, 21 M 507, 513, 54 P 943. See *Aetna Accident & Liability Co. v. Miller*, 54 M 377, 389, 170 P 760.

Nature of Action

Receivership is a provisional remedy of ancillary character, allowable only in an action pending for some other purpose. *Lyon v. United States F. & G. Co.*, 48 M 591, 600, 140 P 86; *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 263, 146 P 539; *Hartnett v. St. Louis M. & M. Co.*, 51 M 395, 401, 153 P 437.

Receivership is an extraordinary remedy of ancillary character, the chief reason for its allowance being to husband the property in litigation for the benefit of the person who may ultimately be found entitled thereto. *Lyon v. United States F. & G. Co.*, 48 M 591, 600, 140 P 86.

Property Must Be in Danger of Being
Lost, Removed or Materially Damaged

To justify the appointment of a receiver, it must appear that the property is in danger of being lost, removed, or materially injured. *Brown v. Erb-Harper-Rigney Co.*, 48 M 17, 26, 133 P 691.

Strong Showing Required to Have a
Receiver Appointed

The power to appoint a receiver is to be exercised sparingly, and not as of course.

A strong showing should be made, and even then the authority must be exercised with conservatism and caution. *Hickey v. Parrot S. & C. Co.*, 25 M 164, 183, 64 P 330; *Jacobs v. Jacobs Mercantile Co.*, 37 M 321, 334, 96 P 723; *Brown v. Erb-Harper-Rigney Co.*, 48 M 17, 27, 133 P 691; *Hartnett v. St. Louis M. & M. Co.*, 51 M 395, 405, 153 P 437.

Receivership is an extraordinary remedy, never to be allowed except upon a showing that it is necessary. *Berryman v. Billings Mut. Heating Co.*, 44 M 517, 523, 121 P 280; *Brown v. Erb-Harper-Rigney Co.*, 48 M 17, 27, 133 P 691; *Prudential Securities Co. v. Three Forks etc. R. Co.*, 49 M 567, 571, 144 P 158; *Montana Ranches Co. v. Dolan*, 53 M 397, 402, 164 P 306; *Masterson v. Hubbert*, 54 M 613, 618, 173 P 421.

This section is to be read in connection with the recognized principle that receivership is an extraordinary remedy, never to be allowed except upon a showing that it is necessary; no such showing is made by mere insolvency; nor, by a parity of reasoning, because the conduct of the corporation has been such that its corporate rights are subject to forfeiture. *Prudential Securities Co. v. Three Forks etc. R. Co.*, 49 M 567, 571, 144 P 158.

The action which, under this section, is required to be pending before ancillary relief by way of receivership may be granted, must be one for relief that could be litigated even though the application for the appointment of a receiver be denied, and presupposes a sufficient complaint. *Hartnett v. St. Louis M. & M. Co.*, 51 M 395, 401, 153 P 437.

The power to appoint a receiver is to be exercised sparingly and with unusual caution, and only to prevent manifest wrong imminently impending, or where there is no other plain, speedy, or adequate remedy. *Montana Ranches Co. v. Dolan*, 53 M 397, 402, 164 P 306; *Masterson v. Hubbert*, 54 M 613, 618, 173 P 421. See also *Pacific Coast Pipe Co. v. Conrad City Water Co.*, 245 Fed. 846, 848.

Receivership is an extraordinary provisional remedy of ancillary character, allowable only in an action pending for some other purpose; the power of appointment should be exercised with unusual caution and only to prevent manifest wrong imminently impending, or where the case shows clearly that the complaining party is in danger of suffering irreparable loss and there is no other plain, speedy or adequate remedy. *Doggett v. Johnson*, 72 M 443, 446, 234 P 252.

A party seeking the appointment of a receiver has the burden of showing to the trial court that his case falls within the above rules and the provisions of this section, defining the cases in which a court

may appoint a receiver, and on appeal from an order denying relief he must be able to show that the court manifestly abused its discretion. *Pereira v. Wulf et al.*, 83 M 343, 345, 272 P 532.

References

Griffiths v. Thrasher, 95 M 238, 248, 26 P 2d 983.

9302. Notice of application for appointment. Notice of an application for the appointment of a receiver, in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired; or unless it shall appear to the court that there is immediate danger that the property or fund will be removed beyond the jurisdiction of the court, or lost, materially injured, destroyed, or unlawfully disposed of. The word "property," used in this chapter, includes the rents, profits, or other income, and the increase of real or personal property.

History: En. Sec. 951, C. Civ. Proc. 1895; re-en. Sec. 6699, Rev. C. 1907; re-en. Sec. 9302, R. C. M. 1921.

Burden on Applicant to Show Facts to Justify Appointment Without Notice

Under this section, authorizing the ex parte appointment of a receiver only when there is immediate danger of the removal, loss, or destruction of the property or fund, the burden is on the applicant to show that such an exigency exists as to authorize the appointment ex parte, and when the case is brought before a court of review, such showing must affirmatively appear from the record. *Benepe-Owenhouse Co. v. Scheidegger*, 32 M 424, 431, 80 P 1024.

Effect of Failure to Give Notice

An order appointing a receiver, made before judgment is entered in the action, will be vacated when it is made without notice to the adverse party, whose time to appear in the action has not expired, unless it is made to appear to the court that there is immediate danger that the property or fund, for which a receiver is sought, will be removed from the jurisdiction of the court, or lost, materially injured, destroyed, or unlawfully disposed of. *State ex rel. Thornton-Thomas M. Co. v. Clancy*, 20 M 284, 287, 50 P 852.

When Facts Are Not Sufficient to Justify an Appointment Without Notice

A complaint which merely alleges mismanagement of the business of a corporation, a resolution of the stockholders to wind up the business of the company, because it was losing money, the refusal of the officers to comply with the resolution, and that they were wrongfully, fraudulently, and wilfully carrying on and continuing the same, in violation of the resolution, in order that they might convert the proceeds of the business to their own benefit, does not state facts sufficient to justify the granting of an order appointing a receiver, when

the application is made before judgment and without notice to the adverse party who is not in default. *State ex rel. Thornton-Thomas M. Co. v. Clancy*, 20 M 284, 287, 50 P 852. See also *State ex rel. Johnston v. District Court*, 21 M 155, 159, 53 P 272.

When Facts Are Sufficient to Justify an Appointment Without Notice

A showing that there was imminent danger that property in the possession of defendant would be removed beyond the jurisdiction of the court, and unlawfully disposed of, unless a receiver were appointed ex parte, is sufficient to give the court jurisdiction to appoint such receiver without notice of the application therefor. *State ex rel. Boston & M. C. C. & S. M. Co. v. District Court*, 22 M 241, 243, 56 P 281; *Id.*, 22 M 376, 381, 56 P 687.

To justify the appointment of a receiver without notice, it must be made to appear that the delay resulting from giving notice would defeat the very right which plaintiff seeks to protect, or imperil the property involved in the litigation. *Masterson v. Hubbert*, 54 M 613, 616, 173 P 421.

When Notice May be Waived

While notice of application for the appointment of a receiver to defendant is necessary where he has appeared in the action, notice may be waived, and recognition of the receivership and efforts to obtain benefits thereunder estop him from attacking the validity of the appointment. *Burgess v. Lasby et al.*, 94 M 534, 548, 24 P 2d 147.

Id. Where one of counsel for defendant mortgagor, though present in court when the mortgagee asked for the appointment of a receiver, did not object to taking up the matter at that time or protest because of lack of statutory notice, but he and co-counsel had anticipated the application and concluded not to do anything because the complaint was insufficient, and thereafter

for a number of years knew of the appointment of the officer, defendant will be held to have waived formal notice of the application.

References

Hastings et al. v. Wise et al., 89 M 325, 334, 297 P 482; Fisk Tire Co. v. Lanstrum et al., 96 M 279, 281, 30 P 2d 84.

9303. Appointment of receivers upon dissolution of corporations. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

History: En. Sec. 222, p. 94, L. 1877; re-en. Sec. 222, 1st Div. Rev. Stat. 1879; re-en. Sec. 230, 1st Div. Comp. Stat. 1887; re-en. Sec. 952, C. Civ. Proc. 1895; re-en. Sec. 6700, Rev. C. 1907; re-en. Sec. 9303, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 565.

Operation and Effect

Under this section the directors of a corporation, on dissolution of the same, become trustees, with power to settle its affairs and to sell property, but without title, which, subject to the trust, vests in the stockholders, who, as to its real estate, become tenants in common. *Barker v. Edwards*, 259 Fed. 484, 488.

In the absence of a statute so providing, a receiver of a corporation may not be appointed on petition of a general creditor. *Mieyr v. Federal Surety Co. of Davenport*, 94 M 508, 523, 23 P 2d 959.

Id. A receiver will not be appointed unless the applicant has no other plain, speedy or adequate remedy; hence where a general creditor had a cause of action against a foreign corporation for which a receiver had been appointed in the state of its domicile, on an express contract for the direct pay-

ment of money, and could have attached its property in the state, he was not entitled to the appointment of an ancillary receiver in Montana.

Id. Where the appointment of a receiver of a corporation by a court of the state of its creation is involuntary and carries with it the transfer of its property to him, but he has not taken its property in another state into his possession, the transfer will not be recognized in the latter jurisdiction to the prejudice of its citizens who have obtained rights to or liens thereon, there being no provision in the federal Constitution requiring such state to carry the transfer into effect.

Id. Property of a foreign surety company within this state, which company had been dissolved by a court of the state of its creation and for which a receiver had been appointed by such court but who had not taken possession of such property, held subject to levy of execution by a judgment creditor pursuant to judgment rendered by a Montana court.

See also *Clark v. Williard*, 292 U. S. 112, 78 L. Ed. 1160, and *Mieyr v. Federal Surety Co. et al.*, 97 M 503, 34 P 2d 982.

9304. Who shall not be appointed—undertaking to protect defendant from results of wrongful appointment. No party, or attorney, or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

History: En. Sec. 223, p. 94, L. 1877; re-en. Sec. 223, 1st Div. Rev. Stat. 1879; re-en. Sec. 231, 1st Div. Comp. Stat. 1887; re-en. Sec. 953, C. Civ. Proc. 1895; re-en. Sec. 6701, Rev. C. 1907; re-en. Sec. 9304, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 566.

Operation and Effect

Where the appointment of a receiver in an action rests solely upon an ex parte showing, which upon trial has been found wanting in proof to sustain it, the appointment ought not to be allowed to stand where the proceedings virtually destroy the business, and result in great and unjust damage, if the action is not well founded, unless the plaintiff assumes effectually a position of responsibility to answer for such damage, in case the action is found to be "without sufficient cause." *Arnold v. Sinclair*, 12 M 248, 278, 29 P 1124.

In an action on an undertaking given pursuant to the provisions of this section, an adjudication that the appointment of the receivership was procured wrongfully, maliciously, and without sufficient cause, may be implied from the final decree in the primary suit, adjudging the ownership of the property to be in the defendant, the plaintiff in the action on the undertaking. *Lyon v. United States F. & G. Co.*, 48 M 591, 601, 140 P 86.

Id. In an action on an undertaking, conditioned as prescribed in this section, the

value of property delivered to the receiver, but not returned by him, may be recovered, though it is not shown that the loss was due to his fault, or that it could not have occurred without his fault.

Id. This section was designed to provide indemnity against wrongful receiverships, and has special application to those cases in which the appointment was wrongful, because the applicant has no right thereto upon the merits; but this fact is not determinable anywhere short of trial; hence, an adjudication, on a motion to vacate the receivership, that the appointment was procured wrongfully, maliciously, and without sufficient cause, is not an essential prerequisite to an action on the undertaking, conditioned as provided in this section.

Id. In an action on an undertaking given pursuant to the provisions of this section, it is not necessary for the plaintiff to allege and prove a specific adjudication, in the primary suit, that the appointment of the receiver was procured wrongfully, maliciously, or without sufficient cause; or, that the receivership has been vacated in response to a motion for that purpose.

9305. Oath and undertaking. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. The court may at any time remove a receiver, or direct him to give new bonds with new sureties with the like effect. Such undertaking may be sued on as provided in section 504 of the Political Code.

History: En. Sec. 224, p. 94, L. 1877; re-en. Sec. 224, 1st Div. Rev. Stat. 1879; re-en. Sec. 232, 1st Div. Comp. Stat. 1887; re-en. Sec. 954, C. Civ. Proc. 1895; re-en. Sec. 6702, Rev. C. 1907; re-en. Sec. 9305, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 567.

9306. Powers of receivers. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

History: En. Sec. 225, p. 94, L. 1877; re-en. Sec. 225, 1st Div. Rev. Stat. 1879; re-en. Sec. 233, 1st Div. Comp. Stat. 1887; re-en. Sec. 955, C. Civ. Proc. 1895; re-en. Sec. 6703, Rev. C. 1907; re-en. Sec. 9306, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 568.

Operation and Effect

The appointment of a receiver for a corporation, when coupled with his due qualification, invests him with the right to sue in behalf of the corporation, and suspends the capacity of the corporation

to sue for the time being; if the receiver refuses to bring a necessary action, the proper practice requires an application to the court for an order directing him to institute the action. *Boston & M. C. C. & S. M. Co. v. Montana O. P. Co.*, 24 M 142, 144, 60 P 990.

The appointment of a receiver for a corporation does not operate to dissolve the corporation, or to transfer the ownership of the property involved in the receivership. The property still belongs to the corporation, but a stay was granted

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pending a hearing in the supreme court, the corporation had full power to bring suit until the receiver took possession, and after his discharge to prosecute to completion an action so commenced during the stay. *Boston & M. C. C. & S. M. Co. v. Montana O. P. Co.*, 27 M 431, 436, 71 P 471.

The appointment of a receiver for a corporation invests the receiver with the right to the possession and control of the corporation's assets, and to the same ex-

tent suspends the functions of the corporation. Suits with reference to the trust estate must thereafter be prosecuted by the receiver, and, to the same extent that this power is lodged in the receiver, it is withdrawn from the corporation. *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 262, 146 P 539.

Id. Where a receiver was appointed for a corporation, though it is in the hands of the receiver to be administered under the law.

9307. Funds—how invested. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made except upon the consent of all the parties to the action.

History: En. Sec. 226, p. 94, L. 1877; re-en. Sec. 226, 1st Div. Rev. Stat. 1879; re-en. Sec. 234, 1st Div. Comp. Stat. 1887; re-en. Sec. 956, C. Civ. Proc. 1895; re-en. Sec. 6704, Rev. C. 1907; re-en. Sec. 9307, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 569.

References

Cited or applied as section 956, Code of Civil Procedure, in *Babcock v. Maxwell*, 21 M 507, 513, 54 P 943; as section 6704, Revised Codes, in *Lyon v. United States F. & G. Co.*, 48 M 591, 600, 140 P 86.

CHAPTER 46

DEPOSIT IN COURT

Section 9308. Deposit in court.

9309. Money paid to clerk must be deposited with county treasurer.

9310. Manner of enforcing the order.

9308. Deposit in court. When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

History: En. Sec. 115, p. 66, Bannack Stat.; re-en. Sec. 142, p. 160, L. 1867; re-en. Sec. 178, p. 61, Cod. Stat. 1871; re-en. Sec. 227, p. 95, L. 1877; re-en. Sec. 227, 1st Div. Rev. Stat. 1879; re-en. Sec. 235, 1st

Div. Comp. Stat. 1887; amd. Sec. 970, C. Civ. Proc. 1895; re-en. Sec. 6705, Rev. C. 1907; re-en. Sec. 9308, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 572.

9309. Money paid to clerk must be deposited with county treasurer. If the money is deposited in court, it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe-keeping of the money deposited with the treasurer his official bond shall be security.

History: En. Sec. 228, p. 95, L. 1877; re-en. Sec. 228, 1st Div. Rev. Stat. 1879; re-en. Sec. 236, 1st Div. Comp. Stat. 1887; amd. Sec. 971, C. Civ. Proc. 1895; re-en. Sec. 6706, Rev. C. 1907; re-en. Sec. 9309, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 573.

References

State v. McGraw, 74 M 152, 162, 240 P 812.

9310. Manner of enforcing the order. Where the court has directed a deposit or delivery of money, or where a judgment directs a party to make a deposit or delivery, or to convey real property, if the direction is

disobeyed, the court, besides punishing the disobedience as a contempt, may, by order, require the sheriff to take, and deposit or deliver the money or other personal property, or to convey the real property, in conformity with the direction of the court.

History: En. Sec. 229, p. 95, L. 1877; re-en. Sec. 229, 1st Div. Rev. Stat. 1879; re-en. Sec. 237, 1st Div. Comp. Stat. 1887; amd. Sec. 972, C. Civ. Proc. 1895; re-en. Sec. 6707, Rev. C. 1907; re-en. Sec. 9310, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 574.

References

State v. District Court, 61 M 558, 567, 202 P 756.

CHAPTER 47

MISCELLANEOUS PROVISIONS

- Section 9311. Arrest, injunction, and attachment—when not to be granted together—when motions to be decided.
9312. Defendant interposing counterclaim entitled to same provisional remedies as plaintiff.

9311. Arrest, injunction, and attachment—when not to be granted together—when motions to be decided. Where an application for an order of arrest, an injunction order, and writ of attachment, or two of them, is made, in the same action, against the same defendant, and it satisfactorily appears that, under the particular circumstances of the case, two or all of them are not necessary for the plaintiff's security, the court or judge may, in its or his discretion, require the plaintiff to elect between them. Where an application is made to obtain, vacate, modify, or set aside an order of arrest, injunction order, or writ of attachment, the court or judge must finally decide the same, within twenty days after it is submitted for decision.

History: En. Sec. 980, C. Civ. Proc. 1895; re-en. Sec. 6708, Rev. C. 1907; re-en. Sec. 9311, R. C. M. 1921.

9312. Defendant interposing counterclaim entitled to same provisional remedies as plaintiff. Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment; and for the purpose of applying to such a case the provisions of sections 9193 to 9311 of this code, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim so set forth in the answer is deemed the complaint.

History: En. Sec. 981, C. Civ. Proc. 1895; re-en. Sec. 6709, Rev. C. 1907; re-en. Sec. 9312, R. C. M. 1921.

actions, and not to questions of pleading. Gilchrist v. Hore, 34 M 443, 447, 87 P 443.

References

Cited or applied as section 981, Code of Civil Procedure, in State ex rel. Heinze v. District Court, 28 M 227, 233, 72 P 613.

Operation and Effect

The provisions of this section are applicable to provisional remedies in civil

CHAPTER 48

JUDGMENT IN GENERAL

- Section 9313. Judgment defined.
9314. Execution against principal debtor before surety may be directed in judgment—judgment may be for or against one of the parties.

9315. Judgment may be against one party and action proceed as to other.
 9316. Relief to be awarded to plaintiff.
 9317. Action may be dismissed or nonsuit entered.
 9318. All other judgments are on the merits.
 9319. Judgment for or against married woman.
 9320. Effect of judgment dismissing complaint.
 9321. Judgment for costs, duty of court to render, when.

9313. Judgment defined. A judgment is the final determination of the rights of the parties in an action or proceeding.

History: En. Sec. 117, p. 67, Bannack Stat.; re-en. Sec. 144, p. 161, L. 1867; re-en. Sec. 180, p. 62, Cod. Stat. 1871; re-en. Sec. 230, p. 95, L. 1877; re-en. Sec. 230, 1st Div. Rev. Stat. 1879; re-en. Sec. 238, 1st Div. Comp. Stat. 1887; re-en. Sec. 1000, C. Civ. Proc. 1895; re-en. Sec. 6710, Rev. C. 1907; re-en. Sec. 9313, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 577.

Decree in Equity

If, after a decree in equity has been entered, no further questions could come before the court except such as are necessary for carrying the decree into effect, it is final, within the meaning of the code. Arnold v. Sinclair, 11 M 556, 564, 29 P 340; Bryant v. Davis, 22 M 534, 538, 57 P 143.

Decrees in equity are judgments within the meaning of this section, and are, so far as they award a recovery of money, in nowise different from judgments at law. Raymond v. Blancgrass, 36 M 449, 458, 93 P 648; State ex rel. Happel v. District Court, 38 M 166, 172, 99 P 291; Kline v. Murray et al., 79 M 530, 537, 257 P 465.

Definition for Purpose of Permitting Appeal

That only is a judgment, within the statutes granting the right of appeal, which is pronounced between the parties to an action submitted to the court for decision, the term "judgment" comprehending the idea of a settlement of a controversy between two opposing parties; therefore where a court refused to take jurisdiction of an application for writ of review, thus in effect declining to issue process to bring the other party into court, the order in that behalf was not a judgment from which an appeal lay. State v. District Court, 89 M 531, 538, 300 P 235.

Judgment Declaring a Trust

A judgment declaring a trust and removing the trustee is a final order, notwithstanding that it directs the trustee to file an inventory and an account of all property received by him as trustee. Bryant v. Davis, 22 M 534, 538, 57 P 143.

Judgment on the Pleadings

An order of court sustaining a defendant's motion for judgment on the plead-

ings is a judgment rendered in defendant's favor. Whitbeck v. Montana Central Ry. Co., 21 M 102, 106, 52 P 1098.

Order Allowing Fees Not Judgment

An order made in an estate matter allowing an attorney's fee for services rendered to a special administrator held not a "judgment" within the meaning of section 7729, allowing interest on judgments, such an order being no more than a settlement of one of the matters arising in a probate proceeding preparatory to a final judgment. (Mr. Justice Angstman dissenting.) In re Bielenberg's Estate, 98 M 546, 548, 40 P 2d 49.

Order Directing a Dismissal is Not a Judgment

An order entered in the minutes of the court sustaining a demurrer to the complaint, and directing a dismissal of the action is not a judgment. Pentz v. Corscadden, 49 M 581, 144 P 157.

Order Overruling a Motion to Strike Not a Judgment

Where an affidavit has been filed in support of a motion to modify a decree of divorce, an order overruling a motion to strike such affidavit is not an "appealable order" nor a "judgment," within the meaning of this section. Weed v. Weed, 55 M 599, 600, 179 P 827.

When Final

A final judgment is not necessarily the last one in an action; a judgment which is conclusive of any question in a case is final as to that question. Kline v. Murray et al., 79 M 530, 537, 257 P 465.

Id. When a court has once rendered the judgment as intended by it, it becomes "final" and must stand until modified, revised or set aside in manner provided by statute.

The right of appeal did not exist at common law; it is purely statutory, and unless a judgment appealed from as a final judgment authorized by section 9713, and defined by this section as "the final determination of the rights of the parties in an action or proceeding," is in reality final—not merely interlocutory—an appeal therefrom does not lie. Ringling v. Biering et al., 83 M 391, 395, 272 P 688.

The final determination by the district court of the rights of the parties to a controversy arising between employer and employee with relation to an award made under the Workmen's Compensation Act is a judgment. *Paulich v. Republic Coal Co.*, 97 M 224, 227, 33 P 2d 514.

References

Cited or applied as section 230, First Division Revised Statutes 1879, in *Fredericks v. Davis*, 6 M 460, 13 P 125; as section 1000, Code of Civil Procedure, in *State ex rel. Weinstein Co. v. District Court*, 28 M 445, 449, 72 P 867; *Forrester v. Bos-*

ton & M. C. & S. M. Co., 29 M 397, 408, 74 P 1088; 76 P 211; as section 6710, Revised Codes, in *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 570, 111 P 152; *Peterson v. City of Butte*, 44 M 129, 133, 120 P 231; *In re Roberts' Estate*, 48 M 40, 42, 135 P 909; *In re Smith's Estate*, 60 M 276, 296, 199 P 696; *McCormick et al. v. Shields*, 63 M 9, 13, 205 P 831; *State Bank of New Salem v. Schultze*, 63 M 410, 417, 209 P 599; *Noe v. Matlock et al.*, 64 M 35, 38, 208 P 591; *Heater v. Boston & Montana Corp. et al.*, 84 M 500, 277 P 11; *State v. Lay et al.*, 89 M 541, 544, 300 P 238.

9314. Execution against principal debtor before surety may be directed in judgment—judgment may be for or against one of the parties. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors, or, if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety.

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Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

History: Ap. p. Sec. 118, p. 67, *Bannack Stat.*; re-en. Sec. 145, p. 161, L. 1867; re-en. Sec. 181, p. 62, *Cod. Stat.* 1871; re-en. Sec. 231, p. 95, L. 1877; re-en. Sec. 231, 1st Div. Rev. Stat. 1879; re-en. Sec. 239, 1st Div. Comp. Stat. 1887; re-en. Sec. 1001, C. Civ. Proc. 1895; re-en. Sec. 6711, Rev. C. 1907; re-en. Sec. 9314, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 578.

Operation and Effect

This section refers to the rendition of judgments upon obligations the makers of which signed in fact as principal and surety, and not to judgments upon those on which the makers are all principals. It

also applies to cases in which the parties whose rights are to be determined are before the court, and not to cases in which judgment is sought, at the option of the plaintiff, against one of the obligors. *Brownlee v. Young*, 25 M 38, 40, 63 P 798.

References

Cited or applied as section 1001, Code of Civil Procedure, in *Gilchrist v. Hore*, 34 M 443, 447, 87 P 443; as section 6711, Revised Codes, in *Logan v. Billings & Northern R. Co.*, 40 M 467, 471, 107 P 415; *Chealey v. Purdy*, 54 M 489, 494, 171 P 926; *Lee et al. v. Hayden*, 63 M 589, 597, 208 P 596.

9315. Judgment may be against one party and action proceed as to other. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

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History: En. Sec. 119, p. 67, *Bannack Stat.*; re-en. Sec. 146, p. 161, L. 1867; re-en. Sec. 182, p. 62, *Cod. Stat.* 1871; re-en. Sec. 232, p. 96, L. 1877; re-en. Sec. 232, 1st Div. Rev. Stat. 1879; re-en. Sec. 240, 1st Div. Comp. Stat. 1887; re-en. Sec. 1002, C. Civ. Proc. 1895; re-en. Sec. 6712, Rev.

C. 1907; re-en. Sec. 9315, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 579.

Operation and Effect

Where several parties are sued as assignees for the benefit of creditors, and a partnership is alleged to exist between

them, and it appears from the findings that the assignment was not to the firm but to one of the partners individually, a judgment may be properly entered against the individual partner and the action dismissed as to the others. *Knatz v. Wise*, 16 M 555, 557, 41 P 710. See *Logan v. Billings & Northern Ry. Co.*, 40 M 467, 471, 107 P 415.

Where several defendants are jointly and severally liable, the district court may enter judgment against one or more of them, leaving the action proceed against the others. *State ex rel. Stiefel v. District Court*, 37 M 298, 302, 96 P 337; *Stauffacher v. Great Falls P. S. Co. et al.*, 99 M 324, 43 P 2d 647.

The plaintiff, in an action against a railway company and one of its employees, for injuries caused to him in being ejected from a freight train by one of the company's brakemen, has the option to proceed against either or both of the defendants by whose concurrent negligence the wrong was done. *Golden v. Northern Pacific Ry. Co.*, 39 M 435, 444, 104 P 549. See also *Rand v. Butte Electric Ry. Co.*, 40 M 398, 407, 107 P 87; *Knuckey v. Butte Electric Ry. Co.*, 41 M 314, 320, 109 P 979;

Verlinda v. Stone & Webster Eng. Corp., 44 M 223, 234, 119 P 573; *Grorud v. Lossi*, 48 M 274, 280, 136 P 1069; *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 484, 148 P 330.

The common-law rule that a joint judgment against two alleged tort-feasors may not be reversed as to one and permitted to stand as against the other, held to have been modified by this section, and under this, the supreme court will in a negligence action where the evidence does not justify a verdict against one defendant reverse the judgment with direction to dismiss the action as to him, and affirm it as to the other shown to have been negligent. (The rule is subject to certain exceptions not applicable in the instant case.) *Mellon v. Kelly et al.*, 99 M 10, 27, 41 P 2d 49.

References

Cited or applied as section 232, p. 96, *Laws of 1887*, in *Conklin v. Fox*, 3 M 208; as section 6712, *Revised Codes*, in *Jenkins v. Carroll*, 42 M 302, 308, 112 P 1064; *Chealey v. Purdy*, 54 M 489, 494, 171 P 926; *Lee et al. v. Hayden*, 63 M 589, 597, 208 P 596.

9316. Relief to be awarded to plaintiff. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

History: En. Sec. 120, p. 67, *Bannack Stat.*; re-en. Sec. 147, p. 161, L. 1867; re-en. Sec. 183, p. 62, *Cod. Stat. 1871*; re-en. Sec. 233, p. 96, L. 1877; re-en. Sec. 233, 1st Div. *Rev. Stat. 1879*; re-en. Sec. 241, 1st Div. *Comp. Stat. 1887*; re-en. Sec. 1003, C. *Civ. Proc. 1895*; re-en. Sec. 6713, *Rev. C. 1907*; re-en. Sec. 9316, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 580*.

Complaint Will be Sustained if Plaintiff is Entitled to Relief

The rule is well established in this jurisdiction, both by the statute and the numerous decisions of the supreme court, that, if upon the facts stated, from any point of view, the plaintiff is entitled to relief, the complaint will be sustained. *Morse v. Swan*, 2 M 306, 309; *Gillett v. Clark*, 6 M 190, 192, 9 P 823; *Leopold v. Silverman*, 7 M 266, 286, 16 P 580; *Davis v. Davis*, 9 M 267, 275, 23 P 715; *Kleinschmidt v. Steele*, 15 M 181, 188, 38 P 827; *State ex rel. Russel v. Tooker*, 18 M 540, 547, 46 P 530; *Merk v. Bowery Min. Co.*, 31 M 298, 308, 78 P 519; *Donovan v. McDevitt*, 36 M 61, 65, 92 P 49; *Raymond v. Blancgrass*, 36 M 449, 457, 93 P 648; *Anaconda Copper Min. Co. v.*

Thomas, 48 M 222, 225, 137 P 380; *Hicks v. Rupp*, 49 M 40, 43, 140 P 97; *Hamilton v. Hamilton*, 51 M 509, 521, 154 P 717; *Simonsen v. Barth et al.*, 64 M 95, 208 P 938.

Effect of Absence of Prayer in Complaint

Informality of the prayer in a complaint, or the total absence of one, not being one of the defects named in section 9313, a demurrer for that reason should not be sustained, notwithstanding the provisions of this section. *Donovan v. McDevitt*, 36 M 61, 66, 92 P 49.

Though a complaint has no formal prayer for judgment, it is sufficient if it contains an allegation showing the limits of the plaintiff's claim, as such an allegation serves the same practical purpose as a formal prayer for judgment. *Pearce v. Butte Electric Ry. Co.*, 41 M 304, 307, 109 P 275.

Extent of Relief Where There is an Answer Interposed

When there is appearance and answer by the defendant, any relief may be awarded which is consistent with the com-

plaint and embraced within the issues, but the award may not extend further in any case. *Merk v. Bowery Min. Co.*, 31 M 298, 308, 78 P 519; *Consolidated Gold & Sapphire Min. Co.*, 41 M 565, 570, 111 P 152.

Error for Court to Exceed

Where, in a foreclosure suit, the principal defendants enter into a stipulation that the judgment may be entered against them in accordance with the prayer of the complaint, it is error for the court to direct, in its decree, not only the sale of the property and the application of the proceeds to the satisfaction of the mortgages, but also the application of the surplus to the satisfaction of judgments set up in the plaintiff's replication to the answer of another defendant, holding liens on the property. *Manuel v. Turner*, 36 M 512, 518, 93 P 808.

In an action to quiet title commenced on October 25, 1929, the complaint spoke in the present tense, i. e., that plaintiff "is" the owner, that the defendants "claim" some right or interest in the property, etc., no reference being made as to claim of title in plaintiff as of June 1, 1926. One of defendants answered and plaintiff county replied setting up tax title as of June 1, 1926. Appealing defendants were served by publication and defaulted. The court decreed that plaintiff's title be quieted as of the latter date. Held, under the above rules, that the court erred, and decree modified by substitution of the date first mentioned above. *Stillwater Co. v. Kenyon et al.*, 89 M 354, 359, 297 P 453.

Inconsistent Theory Principle Not Abrogated by This Section

The rule that a party may not adopt one theory of the case in his complaint and recover upon another, or adopt one theory in the trial court and insist upon a different one on appeal, is not affected by the provision of this section, that the district court may grant plaintiff any relief consistent with his complaint and

fairly embraced within the issues. *Outlook F. E. Co. v. American S. Co.*, 70 M 8, 16, 223 P 905.

Relief as to Defaulting Defendants

Under this section, the relief granted to plaintiff as to defaulting defendants cannot exceed that which is demanded in the complaint. *Stillwater Co. v. Kenyon et al.*, 89 M 354, 359, 297 P 453.

What Relief May be Granted Under General Equity Plea

A prayer in the complaint for such other and further relief as may be meet and agreeable to equity and good conscience warrants the granting of any relief to which plaintiff is entitled on the allegations and proof. *Merk v. Bowery Min. Co.*, 31 M 298, 308, 78 P 519.

When Court May Exceed Prayer

In a mortgage foreclosure suit, the court may order the land to be sold en masse without a foundation being laid therefor in the pleadings, and therefore the contention of defendants, who defaulted, that since plaintiff did not in his prayer ask that it be so sold, and on default he was not entitled to relief not demanded in the complaint, the court was without authority to direct that mode of sale, held without merit. *Elston v. Hix et al.*, 67 M 294, 300, 215 P 657.

When Rule is Inapplicable

Where the complaint not only does not state a cause of action but is intelligible, the rule that if from the facts stated it is apparent that plaintiff is entitled to some relief, the pleading will be upheld, does not obtain. *Wing et al. v. Brasher*, 59 M 10, 19, 194 P 1106.

References

Cited or applied as section 6713, Revised Codes, in *Bush v. Baker*, 51 M 326, 334, 152 P 750; *State v. District Court et al.*, 76 M 143, 149, 245 P 529; *State ex rel. Costello v. District Court*, 86 M 387, 391, 284 P 128.

9317. Action may be dismissed or nonsuit entered. An action may be dismissed or a judgment of nonsuit entered in the following cases:

- 1. By the plaintiff himself, at any time before trial, upon payment of costs; provided, a counterclaim has not been made, or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;
- 2. By either party upon the written consent of the other;
- 3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;
- 4. By the court, when, upon the trial and before the submission of the case, the plaintiff abandons it;

9317
89 P.(2d) 1083

9317
146 P.(2d)
1015

9317
100 Mont. 430
49 P(2d) 444

9317 subsec. 1
61 P(2d) 829

9317 subsec. 4
102 Mont. 507
59 P(2d) 47
9317, subd. 1
62 P(2d) 681

9317
Subs. 6
159 P. 2d 888

9317
121 P.(2d) 987

9317
198 P.(2d) 477

9317
152 P. 2d 141

9317(5)
96 F.(2d) 401

5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury;

6. By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months;

7. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served and return made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years. The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register.

History: En. Sec. 121, p. 67, Bannack Stat.; re-en. Sec. 148, p. 161, L. 1867; re-en. Sec. 184, p. 63, Cod. Stat. 1871; re-en. Sec. 234, p. 96, L. 1877; re-en. Sec. 234, 1st Div. Rev. Stat. 1879; re-en. Sec. 242, 1st Div. Comp. Stat. 1887; amd. Sec. 1004, C. Civ. Proc. 1895; re-en. Sec. 6714, Rev. C. 1907; re-en. Sec. 9317, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 581.

Subd. 1

Affirmative Relief Such as to Deny Dismissal

Plaintiff in a partition suit could not dismiss his action after answer filed setting up defendant's interests in lands in question, since such answer sought affirmative relief. State ex rel. Cornue v. Lindsay, 24 M 352, 357, 61 P 883.

Operation in General

A plaintiff may, at any time before trial, file a praecipe with the clerk for the dismissal of the action, and direct the clerk to enter dismissal on the register of actions, and when such acts have been performed the case is dismissed, and has passed entirely beyond the jurisdiction of the court, except for the purpose of entering a judgment for costs in favor of the defendant under section 9321, if the defendant so demands. Miller v. Northern Pacific Ry. Co., 30 M 289, 296, 76 P 691.

Where defendant in an action for divorce did not interpose a counterclaim or ask for affirmative relief in her answer, plaintiff, under this section, could properly dismiss the action before trial, after he had been ordered to pay alimony, and commence a new action in another county without being open to the charge of sharp practice. Davenport v. Davenport, 69 M 405, 413, 222 P 422.

Payment of Costs Not Prerequisite

Under subdivision 1 of this section, the payment of defendant's costs is not a prerequisite to the exercise of plaintiff's right to dismiss the action. Miller v. Northern Pacific Ry. Co., 30 M 289, 293, 76 P 691; State ex rel. Cornue v. Lindsay, 24 M 352, 61 P 883, overruled.

What is a "Trial"

The argument and submission to the district court of a motion for judgment on the pleadings, on the ground that defendant's answer contained allegations of new matter which were admitted by plaintiff's failure to reply, is a "trial" within the meaning of subdivision 1 of this section. State ex rel. Mont. C. Ry. Co. v. District Court, 32 M 37, 41, 79 P 546. See also State ex rel. Carleton v. District Court, 33 M 138, 146, 152, 82 P 789.

When Plaintiff May Not Dismiss as of Course

A plaintiff may dismiss or discontinue an action where no judgment other than for costs can be recovered against him by the defendant, but when, under the pleadings and evidence relevant thereto, such other judgment may be recovered, the plaintiff will not be permitted, as of course, to dismiss or discontinue. State ex rel. Cornue v. Lindsay, 24 M 352, 358, 61 P 883.

Where a receiver had been appointed, plaintiff could not dismiss his action until payment of such receiver's compensation, since such expense is a taxable cost on the losing party. State ex rel. Cornue v. Lindsay, 24 M 352, 358, 61 P 883; overruled in Miller v. Northern Pacific Ry. Co., 30 M 289, 296, 76 P 691.

Who May Move Dismissal

The provision of this section authorizing dismissal of an action at any time before trial "by the plaintiff himself," held to mean by the plaintiff through his counsel, unless he appears in person and has no counsel. *Barbarich v. Chicago etc. Ry. Co. et al.*, 92 M 1, 17, 9 P 2d 797.

Subd. 4

Operation in General

Where the plaintiff fails to be present at the trial and offer evidence in support of allegations of the complaint, which were traversed by the answer, constitutes an abandonment of the cause and authorizes the court to render a judgment of dismissal or nonsuit. *Sell v. Sell*, 58 M 329, 332, 193 P 561.

Subd. 5

Liberal Construction of

Since, in legal effect, a motion for a directed verdict is a demurrer to the evidence, where no evidence was introduced in a claim and delivery action, an order directing the jury to find in favor of defendant, was technical error, this section, subdivision 5, providing that in such a case a nonsuit or dismissal of the complaint is the proper remedy; held, however, that the error was harmless, the action taken by the court having placed plaintiff in no worse position than he would have been if the statute had been strictly pursued. *Barrett v. Shipley*, 63 M 152, 157, 206 P 430.

Nature of Nonsuit

The action of the court in granting a nonsuit, upon the ground that the plaintiff has failed to prove a sufficient case for a jury, is as much a decision upon a matter of law as its action in sustaining a demurrer to a pleading. Such a decision does not come within the meaning of trial as defined by the code. *Kleinschmidt v. McAndrews*, 4 M 8, 34, 5 P 281.

A motion for nonsuit is in effect a demurrer to plaintiff's evidence; hence the fact established by it or which it tends to prove must be taken as undisputed. *Claypool v. Malta Standard Garage*, 96 M 285, 287, 30 P 2d 89.

When Nonsuit May be Entered

When the evidence on the part of the plaintiff does not tend to establish the cause of action stated in the complaint, the court may direct a verdict, or take the case from the jury and enter a judgment of nonsuit. Whether the court pursues one course or the other, the result is the same; for, though the court directs the return of a formal verdict, the result is

nothing more than a determination of the case by the court; the jury performing no other office than that of giving form to the court's conclusion. *McKay v. Montana Union Ry. Co.*, 13 M 15, 19, 31 P 999; *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 572, 111 P 152.

A motion for a nonsuit will be sustained where, upon the facts proved, the plaintiff is not entitled to any relief. *Hoskins v. Northern Pacific Ry. Co.*, 39 M 394, 403, 102 P 988.

Subdivision 5 of this section refers to a case in which the plaintiff has tendered some evidence in support of the complaint, but the evidence is legally insufficient to sustain a verdict, and this insufficiency may arise from the inherent weakness of the testimony itself. *McIntyre v. Northern Pacific Ry. Co.*, 56 M 43, 50, 180 P 971.

A judgment of nonsuit is proper where the plaintiff fails to prove a case for the jury, and when no substantial evidence has been introduced by the party upon whom rests the burden of proof, a question of law for the decision by the court is presented. *Lee v. Stockmen's Nat. Bank et al.*, 63 M 262, 285, 207 P 623.

Under this section, providing for a dismissal or nonsuit for failure of proof, whether there is substantial evidence in support of plaintiff's case is always a question of law for the court. *Flynn v. Poindexter & Orr L. Co.*, 63 M 337, 360, 207 P 341.

On motion for directed verdict made by defendant based upon this section, subdivision 5, granting the court power to so direct when the plaintiff has failed to prove a sufficient case for the jury, it may not pass upon the weight and sufficiency of the evidence where it is in sharp conflict upon a vital issue and there is nothing inherently improbable or unbelievable in plaintiff's testimony, the phrase "a sufficient case for the jury" meaning no more than that the evidence of plaintiff is legally insufficient to warrant the jury in finding for plaintiff. *Durocher v. Myers*, 84 M 225, 236, 274 P 1062.

A motion for nonsuit, the granting of which must necessarily be based upon a holding of the trial court that plaintiff has failed to prove a sufficient case to go to the jury, should never be granted when reasonable men may draw different conclusions from the evidence introduced by plaintiff or where it shows a substantial support for his complaint, but only where from the undisputed facts the conclusion necessarily follows, as a matter of law, that recovery cannot be had upon any view which may reasonably be taken from

the facts established. *Claypool v. Malta Standard Garage*, 96 M 285, 287, 30 P 2d 89.

Subd. 6

Effect of a Dismissal—Does Not Bar Future Action

In an action against a city for injuries claimed to have resulted from a defective sidewalk, where no judgment was entered within six months on a verdict in favor of the defendant, and plaintiff thereupon procured a judgment to be entered dismissing the action under this section, the said judgment was not one on the merits, and did not bar another action for the same cause. It was not necessary that the judgment should have dismissed the action without prejudice, and the court could not have enlarged the rights of the plaintiff by inserting therein a notation that the cause was dismissed in that form. *Pullen v. City of Butte*, 45 M 46, 57, 121 P 878; *Lynch v. City of Butte*, 99 M 287, 43 P 2d 652.

Effect of Failure to Notify of Decision

Where neither the party entitled to judgment nor his attorney, both of whom were non-residents, knew that a decision had been rendered until after the expiration of six months, and the clerk of court not only failed in his duty to notify counsel thereof, as required by a custom prevailing in his court, which was relied on by the latter, but neglected to obey the court's specific order in that regard, failure to have judgment entered within time was not cause for dismissal of the action under subdivision 6 of this section. *Rule v. Butori*, 49 M 342, 346, 141 P 672.

"Final Submission"

The words "final submission," found in subdivision 6 of this section, mean a submission which is the equivalent of the return of a verdict; or, in other words, they refer to that state of the case when a judgment may rightfully be demanded as of course. *State ex rel. Stiefel v. District Court*, 37 M 298, 300, 96 P 337; *State ex rel. Kohl v. District Court*, 46 M 348, 354, 128 P 582; *Marias River Syndicate v. Big West Oil Co.*, 98 M 254, 38 P 2d 599.

In the case of a default, final submission has not been reached until formal entry of the default; hence, where no such formal entry has been made, there has been no final submission, and the court cannot be compelled to dismiss the cause. *State ex rel. Kohl v. District Court*, 46 M 348, 355, 128 P 582.

Where in an action for unliquidated damages, plaintiff did not, after entry of de-

fault, apply to the court, make proof of his damages and secure a determination of the amount either by the court or by the verdict of a jury, there was no submission which was the equivalent of a verdict, and the court erred in dismissing the action on the ground that plaintiff had neglected for more than six months after entry of default to demand and have judgment entered. *Smotherman v. Christianson*, 59 M 202, 204, 205, 195 P 1106.

Mandatory Clause

Subdivision 6 of this section is mandatory, notwithstanding the use of the word "may" in the first sentence of the section. *State ex rel. Stiefel v. District Court*, 37 M 298, 304, 96 P 337.

While the language of subdivision 6 of this section, that an action may be dismissed by the court when after verdict or final submission the party entitled to judgment neglects to have it entered for more than six months, is mandatory, the provision can be invoked only in a case which comes clearly within its terms. *Kasun v. Todevich*, 71 M 315, 321, 229 P 714.

Must Be a Judgment in Fact

Where the clerk of the district court entered a final decree in a foreclosure suit, though the court had done no more than lodged with him its findings of fact and conclusions of law, there was no rendition of judgment, entry of which the successful party could demand, and hence his failure to demand it within six months after the clerk's unauthorized entry thereof did not constitute that neglect which warrants dismissal of the action. *Security Trust etc. v. Reser*, 58 M 501, 193 P 532.

Operation in General

Where more than six months had elapsed after an order sustaining a motion to dismiss an appeal from a justice's court, and respondent had neglected to demand and have entered a judgment in accordance with such ruling, as required by subdivision 6 of this section, it was error to deny a motion to dismiss the case and to render judgment dismissing the appeal. *Franzman v. Davies*, 32 M 251, 254, 80 P 251.

It is only after verdict, or final submission equivalent thereto, that a cause may be dismissed for failure to have judgment entered for more than six months. *State ex rel. Kohl v. District Court*, 46 M 348, 354, 128 P 582.

Subdivision 6 of this section, which is mandatory in character, requires dismissal of an action, not when the party simply fails, without fault on his part, to act

within time, but only when he is guilty of negligence in not acting. *Rule v. Butori*, 49 M 342, 344, 141 P 672.

In an action for the balance due under a contract and for the foreclosure of a mechanics' lien, where the plaintiff failed to obtain a valid judgment against the defaulting defendant by reason of the entry of a void judgment against said defendant, it was held that such failure did not constitute neglect within the meaning of this section as to the dismissal of action where the party entitled to judgment neglects to have the same entered within six months, nor does such void judgment constitute a bar to a further prosecution of the action. *Soliri v. Fassio*, 56 M 400, 407, 185 P 322.

Under subdivision 6 of this section, an action may be dismissed by the court when after final submission, i. e., a submission which is the equivalent of a verdict, and when judgment may be demanded as of course, the party entitled thereto has neglected for more than six months to demand and have judgment entered. *Smotherman v. Christianson*, 59 M 202, 204, 205, 195 P 1106.

Under this section, an action may be dismissed when after "final submission"—when judgment may be demanded as a matter of right—the party entitled thereto through his own neglect fails to have it entered for more than six months, thus evincing an intention to abandon the fruits of his victory. *Samuell v. Montana-Holland Colonization Co.*, 69 M 111, 114, 220 P 1093.

Id. In an action tried to the court sitting without a jury findings of fact and conclusions of law were made in favor of plaintiff but before judgment was entered the trial judge notified counsel that they had been withdrawn for further consideration, and a minute entry was made to that effect. The judge soon thereafter resigned and the parties stipulated that the cause should be submitted to his successor for decision upon the evidence previously taken and upon arguments to be presented. The cause was set but the setting canceled. The term of the second judge expired without a decision having been reached. It was again stipulated that the cause should be submitted to the newly elected judge, but before it was actually submitted counsel for plaintiff ascertained that the findings and conclusions never had been withdrawn from the files and he thereupon asked for judgment, counsel for defendant on the other hand moving for dismissal of the action for failure of plaintiff to have the judgment entered for more than six months after the findings and conclusions had been made and filed. The court granted

the latter motion and denied the former. Held, that the court erred since, under the circumstances, plaintiff was not guilty of neglect in failing to have judgment entered within the time limited by this section.

Purpose

Subdivision 6 of this section was enacted for the benefit of the defeated or defaulting party, and to prevent the suspension over his head of an action which should be ended; the policy of the law is to put an end to litigation at the earliest practical moment. *State ex rel. Stiefel v. District Court*, 37 M 298, 304, 96 P 337.

When Court May Deny Motion

Where all the parties to a water right suit were equally neglectful in failing to have judgment entered for about eight years after rendition thereof, the trial court properly denied a motion to dismiss, inasmuch as by dismissal the respective rights of the parties settled in said judgment would have been left unsettled and the controversy renewed, contrary to the design of subdivision 6 of this section. *Joyce v. McDonald*, 51 M 163, 166, 149 P 953.

Held, that dismissal of an action for neglect of the successful party to have judgment entered for more than six months after verdict or final submission must precede entry of judgment, and that therefore a judgment entered after the expiration of the six months' period, but before motion to dismiss is interposed, is not void, and hence not open to collateral attack. *Kasun v. Todevich*, 71 M 315, 321, 229 P 714.

When Six Months' Period Begins to Run

The six months' period at the expiration of which an action may be dismissed by the court, under this section, if the party entitled to judgment neglects to demand and have the same entered, does not commence to run from date of entry of default, in a personal injury action, but from the date of final submission, i. e., production of proof by plaintiff. *Batchoff v. Butte Pacific Copper Co.*, 60 M 179, 186, 198 P 132.

In General

Appealable Dismissals

An entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken. *Kinman v. Scheuer*, 30 M 73, 74, 75 P 690.

The mere entry in the minutes of the court of an order that an action "is dismissed without prejudice, as per praecipe filed" by plaintiff, is not a final judgment

from which an appeal lies, but is simply an order upon which a judgment of dismissal and for costs could have been entered. *State ex rel. Mont. C. Ry. Co. v. District Court*, 32 M 37, 44, 79 P 546.

Applies to Both Plaintiffs and Defendants

This section applies to both plaintiffs and defendants, and the action of the court is in the nature of a penalty. *Pullen v. City of Butte*, 45 M 46, 57, 121 P 878.

Nonsuit Improper in Equity

In an equity case (quieting title) there is, technically, no such thing as a nonsuit. *Le Vasseur v. Roullman et al.*, 93 M 552, 559, 20 P 2d 250.

Term "Case"

The term "case" does not include the entire action stated in the complaint. *Gans v. Woolfolk*, 2 M 458, 462.

When Court May Dismiss Independently of This Section

Independently of the provisions of this section, a court has power to dismiss an action whenever it appears that the plaintiff has, without sufficient excuse, failed to prosecute it to final judgment. *State Savings Bank v. Albertson*, 39 M 414, 421, 102 P 692.

9318. All other judgments are on the merits. In every case, other than those mentioned in the last section, judgment must be rendered on the merits.

History: En. Sec. 122, p. 68, *Bannack Stat.*; re-en. Sec. 149, p. 162, L. 1867; re-en. Sec. 185, p. 63, *Cod. Stat.* 1871; re-en. Sec. 235, p. 96, L. 1877; re-en. Sec. 235, 1st Div. Rev. Stat. 1879; re-en. Sec. 243, 1st Div. Comp. Stat. 1887; re-en. Sec. 1005, C. Civ. Proc. 1895; re-en. Sec. 6715, Rev. C. 1907; re-en. Sec. 9318, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 582.

Operation and Effect

A judgment must show of itself, or by the aid of the judgment-roll, that it concludes the merits of the controversy. *Glass v. Basin & Bay State Min. Co.*, 34 M 88, 95, 85 P 746.

9319. Judgment for or against married woman. Judgment for or against a married woman may be rendered and enforced as if she were single.

History: En. Sec. 1006, C. Civ. Proc. 1895; re-en. Sec. 6716, Rev. C. 1907; re-en. Sec. 9319, R. C. M. 1921.

9320. Effect of judgment dismissing complaint. A final judgment dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon its merits.

Where plaintiff without sufficient cause fails to prosecute his action with reasonable diligence, an application to dismiss for that reason is proper. *Smotherman v. Christianson*, 59 M 202, 204, 205, 195 P 1106.

When Court May Enter Nonsuit

The district court may, after erroneously overruling defendant's motion for nonsuit and hearing the testimony of defendant reverse its former ruling and sustain the motion before submission of the case to the jury. *School Dist. No. 42 v. Pribyl*, 82 M 295, 302, 267 P 289.

References

Cited or applied as section 242, First Division Compiled Statutes 1887, in *Carron v. Clark*, 14 M 301, 36 P 178; as section 1004, Code of Civil Procedure, in *State ex rel. Reins v. District Court*, 22 M 449, 457, 57 P 89, 145; *Glass v. Basin & Bay State Min. Co.*, 34 M 88, 94, 85 P 746; as section 6714, Code of Civil Procedure, in *Glass v. Basin & Bay State Min. Co.*, 35 M 567, 571, 90 P 753; *Bennetts v. Silver Bow Amusement Co.*, 65 M 340, 346, 211 P 336; *Patterson et al. v. Law et al.*, 78 M 221, 223, 254 P 412; *McGinley v. Maryland Casualty Co.*, 85 M 1, 9, 277 P 414; *Thompson v. Shanley*, 93 M 235, 243, 17 P 2d 1085; *Roper v. Caterpillar Tractor Co. et al.*, 98 M 76, 37 P 2d 812.

For a judgment on the pleadings to constitute a judgment on the "merits," it must determine the merits of the controversy, as distinguished from the merits of the pleading attacked. *Glass v. Basin & Bay State Min. Co.*, 35 M 567, 571, 90 P 753.

References

Cited or applied as section 243, First Division Compiled Statutes 1887, in *Kleinschmidt v. Binzel*, 14 M 31, 61, 35 P 460; *Bennetts v. Silver Bow Amusement Co.*, 65 M 340, 347, 211 P 336; *Le Vasseur v. Roullman et al.*, 93 M 552, 559, 20 P 2d 250.

9318, subd. 1
62 P (2d) 681
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96 F.(2d) 401

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89 P.(2d) 1033

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101 Mont. 437
54 P(2d) 868
102 Mont. 147
56 P(2d) 1347

9320
96 F.(2d) 401

9320
89 P.(2d) 1033

9320
187 P.(2d)
1017
198 P.(2d) 477

History: En. Sec. 1007, C. Civ. Proc. 1895; re-en. Sec. 6717, Rev. C. 1907; re-en. Sec. 9320, R. C. M. 1921.

Operation and Effect

This section emphasizes the fact that the final disposition of an action on a dismissal thereof is accomplished by a judgment. State ex rel. Mont. C. Ry. Co. v. District Court, 32 M 37, 44, 79 P 546.

This section means that judgments of dismissal, whether included in the enumeration in section 9317 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment-roll. Glass v. Basin & Bay State Min. Co., 34 M 88, 95, 85 P 746.

The decision of the supreme court on a former appeal that a judgment on the pleadings is the same as a judgment on demurrer, and that a judgment, relied on as res adjudicata, showed upon its face that it belonged to the class referred to in this section, when it declares that a final judgment dismissing a complaint is not a bar to a new action on the same cause of action "unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon its merits," constitutes the law of the case on a subsequent appeal. Glass v. Basin & Bay State Min. Co., 35 M 567, 571, 90 P 753.

Id. A judgment of dismissal is not a bar to another action upon the same cause of action, unless rendered on the merits, which fact must appear either by express declaration upon the face of the judgment, or elsewhere, from the judgment-roll.

Where plaintiff brought an action in the federal courts against a street-railway company to recover damages for personal

injuries, and the judgment in that court recited that, after the impaneling of a jury, evidence was submitted by both parties, and at its conclusion a verdict was directed in favor of defendant, and plaintiff subsequently instituted suit in the state court on the same cause of action against the same defendant, the judgment in the federal court was upon the merits, and a bar to the action in the state court. Dunseth v. Butte Electric Ry. Co., 41 M 14, 22, 108 P 567.

A judgment of dismissal (or nonsuit) in an action of the nature of the above carries with it one for costs, and does not prevent a new action for the same cause of action unless it expressly declares, or it appears from the judgment-roll, that it was rendered on the merits (this section). Fergus Motor Co. v. Schott et al., 95 M 249, 262, 26 P 2d 365.

Under this section, a judgment of dismissal on motion for nonsuit does not prevent a new action for the same cause of action unless it expressly declares or appears from the judgment-roll that it was rendered upon the merits. In the absence of the judgment-roll the presumption that it was rendered on the merits may not be indulged. Arnold et al. v. Genzberger et al., 96 M 358, 31 P 2d 306; State ex rel. Odenwald v. District Court, 98 M 1, 38 P 2d 269.

References

Cited or applied as section 6717, Revised Codes, in State ex rel. American S. & R. Co. v. District Court, 46 M 384, 390, 128 P 583; Bennetts v. Silver Bow Amusement Co., 65 M 340, 347, 211 P 336; McGinley v. Maryland Casualty Co., 85 M 1, 9, 277 P 414; State ex rel. Wilson v. District Court et al., 91 M 87, 89, 5 P 2d 558; United States Fidelity & Guaranty Co. v. Whittaker, 8 F 2d 455.

9321. Judgment for costs, duty of court to render, when. Upon the dismissal or disposition of an action in which the court has jurisdiction of the subject-matter of the action, it is the duty of the court to render such judgment for costs.

History: En. Sec. 18, p. 54, L. 1874; re-en. Sec. 819, Rev. Stat. 1879, p. 191; re-en. Sec. 244, 1st Div. Comp. Stat. 1887; amd. Sec. 1008, C. Civ. Proc. 1895; re-en. Sec. 6718, Rev. C. 1907; re-en. Sec. 9321, R. C. M. 1921.

Operation and Effect

Where a plaintiff elects to stand on his complaint after demurrer sustained, it is the duty of the court to render judgment against him for costs so as to place him in a position to appeal; and where the plaintiff is compelled to ask the court to enter such judgment, it is not such a consent to the judgment as to debar him

of the right to appeal. Stevenson v. Matteson, 13 M 108, 110, 32 P 291.

A judgment of dismissal (or nonsuit) in an action of the nature of the above carries with it one for costs, and does not prevent a new action for the same cause of action unless it expressly declares, or it appears from the judgment-roll, that it was rendered on the merits. Fergus Motor Co. v. Schott et al., 95 M 249, 262, 26 P 2d 365.

References

Cited or applied as section 1008, Code of Civil Procedure, in Miller v. Northern Pacific Ry. Co., 30 M 289, 291, 76 P 691.

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100 Mont. 431
49 P (2d) 445

CHAPTER 49

JUDGMENT BY DEFAULT

Section 9322. In what cases judgment by default may be entered.

9322. In what cases judgment by default may be entered. Judgment may be had, if the defendant fail to answer the complaint or to challenge the jurisdiction of the court, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer, demurrer, motion, or special appearance, coupled with a motion, has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, or no motion to quash or set aside the service of summons, or to challenge the jurisdiction of the court, has been made and filed, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section 9121.

2. In other actions, if no answer, demurrer, motion, or special appearance, coupled with a motion, has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, or within twenty days after a motion to quash or set aside the service of summons, or any motion challenging the jurisdiction of the court, has been denied, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved, by a reference, as above provided.

3. In an action where the service of summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer or motion to quash or set aside the service of summons, or motion to challenge the jurisdiction of the court, has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff, or his agent, to be examined on oath respecting any payments that may have been made to the plaintiff, or to anyone for his use, on account of such demand, and may render judgment for the amount for which he is entitled to recover.

History: En. Sec. 150, p. 162, L. 1867; re-en. Sec. 186, p. 63, Cod. Stat. 1871; re-en. Sec. 236, p. 96, L. 1877; re-en. Sec. 236, 1st Div. Rev. Stat. 1879; re-en. Sec. 245, 1st Div. Comp. Stat. 1887; re-en. Sec.

1020, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 59, L. 1905; re-en. Sec. 6719, Rev. C. 1907; re-en. Sec. 9322, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 585.

Action for Foreclosure of Lien Requires Judicial Action

An action for the foreclosure of a lien is not an action on contract for the recovery of money or damages only, and the rendition of a proper judgment on default in such an action requires judicial action, and not the performance by the clerk of a mere ministerial function, and this section does not apply to the entry of a judgment in such a case; the clerk is therefore without authority to enter the same thereunder. *Soliri v. Fasso*, 56 M 400, 406, 185 P 322.

Effect of Appearance by Motion

Under this section, appearance by motion in an action on contract for the recovery of money, whether general or special, prevents entry of default prior to disposition of the motion. *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 347, 19 P 2d 223.

Effect of Default After Appearance

Where defendants, judgment creditors, in an action to foreclose a trust deed in which a receiver had been appointed, filed an answer, a demurrer to which was sustained, they, being given twenty days in which to further answer, declined to plead further and did not appeal from the judgment, they were not entitled to notice of subsequent proceedings had some three months thereafter by way of applications for the authorization of the issuance of receiver's certificates in payment of receiver's and attorney's fees, since a party who permits himself to get into default after general appearance is as effectively out of court, as respects his right to notice of subsequent proceedings, as though he had failed to enter appearance in the first instance. *Marlowe v. Missoula Gas Co. et al.*, 68 M 372, 376, 219 P 1111.

Effect of Defaults Entered by Clerk

The clerk of the court, in entering a judgment under the authority of this section, acts ministerially and not judicially, and must determine from the allegations of the complaint alone whether the action is one upon contract for the recovery of money or damages only, and, if not, then he has no authority to enter a judgment therein, and the judgment is a nullity. *Soliri v. Fasso*, 56 M 400, 406, 185 P 322.

The ministerial act of the clerk of the district court in entering judgment upon default of defendant in an action upon a contract for the recovery of money, pursuant to subdivision 1 of this section, has the same effect as a judgment rendered upon a verdict of the jury, and the judgment-roll in the action is admissible in evidence in another action the same as

though a formal judgment had been signed by the judge. *Commercial Bank & Trust Co. v. Jordan*, 85 M 375, 384, 278 P 832.

Where the clerk of the district court is empowered by statute to enter judgments, as under Sec. 9403, and this section, the judgment is one pronounced by law as a necessary consequence of the facts established. *Lasby et al. v. Burgess*, 93 M 349, 353, 18 P 2d 1104.

Effect of Entry Prior to Time of Default

A judgment by default can only be entered where the defendant has wholly failed to make an appearance, either general or special; and where it is entered notwithstanding appearance made, it is premature and a nullity. *Taylor v. Southwick*, 78 M 329, 332, 333, 253 P 889.

Defendant was granted additional time within which to plead to an amended complaint; within that time he interposed a motion to strike such complaint; the motion was denied, and plaintiff at once and before expiration of the time allowed defendant within which to plead, caused the latter's default to be entered. Held, on appeal from an order setting aside the default, that the motion was not a demurrer and therefore not a pleading on defendant's part and that a default, prematurely entered, was properly vacated. *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 347, 19 P 2d 223.

Effect of Motion Challenging the Jurisdiction

The filing by the defendant of a motion challenging the jurisdiction of the court before he interposes his answer or demurrer extends the time for making appearance on the merits until the motion is determined. *Missoula Belt Line Ry. Co. v. Smith*, 58 M 432, 438, 193 P 529.

A motion requiring the attorney for the adverse party to produce his authority challenges the jurisdiction of the court. *Missoula Belt Line Ry. Co. v. Smith et al.*, 58 M 432, 442, 193 P 529.

The filing of a motion challenging the jurisdiction of the court to make an order permitting a supplemental complaint to be filed without notice, constituted a special appearance only and extended defendant's time for making appearance on the merits until the motion was determined, under this section. *State ex rel. Bingham v. District Court*, 80 M 97, 100, 257 P 1014.

Granting of Further Time

The "further time" which may be granted a defendant under this section, in addition to that specified in the summons within which to make appearance, held to mean such time as may be granted by order of court, by stipulation or impliedly

by the failure of the plaintiff to have default entered. *Edenfield v. Seal Co., Inc.*, 74 M 509, 511, 241 P 227.

Id. Where defendant does not make appearance within the statutory limit of twenty days and plaintiff permits further time to elapse without taking action, he thereby impliedly grants the former further time, and if appearance is made thereafter and before default is entered, it is timely, and subsequent entry of judgment by default is void.

Mere Appearance of Defendant Will Not Prevent a Default

The mere appearance of a defendant does not prevent his default from being entered; judgment by default may be had when there has been a failure to do the things indicated by this section. *Donlan v. Thompson Falls C. & M. Co.*, 42 M 257, 264, 112 P 445.

Id. Where defendants filed no pleadings except a motion to dissolve a preliminary injunction, until after the time to answer had expired, their default was properly entered without notice, though such motion be regarded as an appearance.

Must Be Filed Within Time

If the defendant, where his demurrer to an amended complaint has been overruled, fails to file his answer within the time set by the court, the plaintiff is entitled to have default entered, although the answer has been served upon his counsel before the expiration of that time. *State ex rel. Smotherman v. District Court*, 50 M 119, 121, 145 P 724.

Operation in General

The power of the clerk to enter a default in any case is restricted to those in which no appearance, either general or special, has been made. *Missoula Belt Line Ry. Co. v. Smith et al.*, 58 M 432, 440, 193 P 529.

What Constitutes the Record

Since, when a judgment has been rendered by default upon a complaint which is insufficient by reason of its failure to state facts sufficient to constitute a cause of action, the complaint, with a memorandum of the default indorsed upon it, the summons and proof of service, and a copy of the judgment, constitute the record under this section, the record itself discloses the infirmity of the judgment, and the latter is exposed to collateral attack at any time when it is made the basis of a right. *Crawford v. Pierse*, 56 M 371, 377, 185 P 315.

What Default Admits

In an action to recover unliquidated damages, the default of the defendant admits the cause of action and the material

and traversable allegations of the complaint, but not the amount of damages. *Smotherman v. Christianson*, 59 M 202, 204, 195 P 1106.

What is Not a Default

The failure to appear at a trial after issues joined does not constitute a default, and the denial of a motion to set aside the order of the court directing the entry of a default is not an appealable error. *Sell v. Sell*, 58 M 329, 193 P 561.

Who May Enter Defaults

In an action upon a contract or for the recovery of money or damages only, in which the default of the defendant has been entered regularly, the plaintiff is entitled to have the clerk enter judgment for the amount demanded; in other actions, after entry of default, plaintiff must apply to the court for relief. *Smotherman v. Christianson*, 59 M 202, 204, 195 P 1106.

When Provisions Are Directory and Not Mandatory

The provision of subdivision 2 of this section, concerning the entry of default of the defendant, is directory only, not mandatory. *State ex rel. Kohl v. District Court*, 46 M 348, 355, 128 P 582.

The provision of subdivision 2 of this section, that where no appearance has been made by defendant within the time therein specified, "the clerk must enter" his default is directory rather than mandatory. *Edenfield v. Seal Co., Inc.*, 74 M 509, 241 P 227.

The provision of this section, subdivision 3, to the effect that the default of a defendant who fails to demur or answer within the time specified must be entered by the clerk is directory merely, and failure of plaintiff in such a case, to cause defendant's default to be entered is an implied grant of further time in which to make appearance. *Mitchell v. Banking Corp. of Montana*, 81 M 459, 464, 264 P 127.

References

Cited or applied as section 245, First Division Compiled Statutes 1887, in *Barker v. Briscoe*, 8 M 214, 219, 19 P 589; *Safely v. Caldwell*, 17 M 184, 42 P 766; as section 1020, Code of Civil Procedure, before amendment, in *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 23 M 311, 318, 58 P 870; in *Quinlan v. Calvert*, 31 M 115, 119, 77 P 428; *Mantle v. Casey*, 31 M 408, 413, 78 P 591; *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 554, 87 P 963; as section 6719, Revised Codes, in *Lovell v. Willis*, 46 M 581, 582, 129 P 1052; *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 599, 144 P 159; *Mihelich v. Butte Electric Ry. Co. et al.*, 85 M 604, 614, 281 P 540.

CHAPTER 50

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS

- Section 9323. Issue defined, and the different kinds.
9324. Issue of law—how raised.
9325. Issue of law—how tried.
9326. Issue of fact—how raised.
9327. Issue of fact—how tried—when issues both of law and fact, the former to be first disposed of.
9328. Court may direct separate trials and change order of disposing of issues.
9329. Counterclaim to be deemed an action within the meaning of foregoing sections.
9330. Clerk must enter cause on the calendar, to remain until disposed of.
9331. Parties may bring issue to trial.
9332. Motion to postpone a trial for absence of testimony, requisites of.
9333. In cases of adjournment a party may have the testimony of any witness taken.

9323. Issue defined, and the different kinds. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

History: En. Sec. 123, p. 68, Bannack Stat.; re-en. Sec. 151, p. 163, L. 1867; re-en. Sec. 187, p. 64, Cod. Stat. 1871; re-en. Sec. 237, p. 98, L. 1877; re-en. Sec. 237, 1st Div. Rev. Stat. 1879; re-en. Sec. 246, 1st Div. Comp. Stat. 1887; amd. Sec. 1030, C. Civ. Proc. 1895; re-en. Sec. 6720, Rev. C. 1907; re-en. Sec. 9323, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 588.

Operation and Effect

The issue of fact mentioned in section 9395 is that defined by this section as arising upon the pleadings. *Beach v. Spokane Ranch & Water Co.*, 21 M 7, 9, 52 P 560.

References

Helena Adjustment Co. v. Predovich, 98 M 162, 37 P 2d 651.

9324. Issue of law—how raised. An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof.

History: En. Sec. 124, p. 68, Bannack Stat.; amd. Sec. 152, p. 163, L. 1867; amd. Sec. 188, p. 64, Cod. Stat. 1871; re-en. Sec. 238, p. 98, L. 1877; re-en. Sec. 238, 1st Div. Rev. Stat. 1879; re-en. Sec. 247, 1st Div. Comp. Stat. 1887; re-en. Sec. 1031, C. Civ. Proc. 1895; re-en. Sec. 6721, Rev. C. 1907;

re-en. Sec. 9324, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 589.

References

Helena Adjustment Co. v. Predovich, 98 M 162, 37 P 2d 651.

9325. Issue of law—how tried. An issue of law must be tried by the court, unless it is referred upon consent.

History: En. Sec. 126, p. 68, Bannack Stat.; amd. Sec. 154, p. 163, L. 1867; re-en. Sec. 190, p. 64, Cod. Stat. 1871; re-en. Sec. 240, p. 98, L. 1877; re-en. Sec. 240, 1st Div. Rev. Stat. 1879; re-en. Sec. 249, 1st Div. Comp. Stat. 1887; re-en. Sec. 1032, C. Civ. Proc. 1895; re-en. Sec. 6722, Rev. C. 1907; re-en. Sec. 9325, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 591.

as a gift causa mortis was undisputed, as to the fact that such a gift had been made, the case presented in effect one on an agreed statement of facts, the question for decision became one of law for the court, and it was therefore prejudicial error to submit it to the jury. *Davidson v. Stagg*, 94 M 272, 277, 22 P 152.

References

Helena Adjustment Co. v. Predovich, 98 M 162, 37 P 2d 651.

Operation and Effect
Where the evidence in an action to recover the possession of jewelry claimed

9326. Issue of fact—how raised. An issue of fact arises in either of the following cases:

9325
203 P.(2d) 982

9326
101 Mont. 168
53 P (2d) 97

9326
98 P.(2d) 338

9326
199 P.(2d) 851

1. Upon a denial, contained in the answer, of a material allegation of the complaint; or upon an allegation, contained in the answer, that the defendant has not sufficient knowledge or information to form a belief, with respect to a material allegation of the complaint;

2. Upon a similar denial or allegation, contained in the reply, with respect to a material allegation of the answer;

3. Upon a material allegation of new matter, contained in the answer, not requiring a reply, unless an issue of law is joined thereupon;

4. Upon a material allegation of new matter, contained in the reply, unless an issue of law is joined thereupon.

History: En. Sec. 125, p. 68, Bannack Stat.; re-en. Sec. 153, p. 163, L. 1867; re-en. Sec. 189, p. 64, Cod. Stat. 1871; re-en. Sec. 240, p. 98, L. 1877; re-en. Sec. 239, 1st Div. Rev. Stat. 1879; re-en. Sec. 248, 1st Div. Comp. Stat. 1887; amd. Sec. 1033, C. Civ. Proc. 1895; re-en. Sec. 6723, Rev. C. 1907; re-en. Sec. 9326, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 590.

Operation and Effect

The expression, "issue of fact," refers only to issues of fact raised by formal pleadings, and excludes issues arising on affidavits or oral evidence used on motions. *State ex rel. Heinze v. District Court*, 28 M 227, 235, 72 P 613.

An "issue of fact" is an issue arising upon formal pleadings only. In *re Antonioli's Estate*, 42 M 219, 223, 111 P 1033.

In an action to enforce payment of a promissory note, a denial of knowledge or information sufficient to form a belief as to the truth of an allegation that the note

has not been paid raises an issue; the allegation of non-payment is a material and essential allegation in an action of this character. *First National Bank v. Silver*, 45 M 231, 235, 122 P 584.

A new trial is the re-examination of an issue of fact created by formal pleadings in the manner prescribed by this section, and once tried, and does not lie under any other circumstances. *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 599, 144 P 159.

Where formal pleadings authorized or required by the statute in a probate proceeding, no matter how denominated, present issues of fact, a new trial lies even though the proceeding was disposed of solely upon a question of law. In *re Stinger Estate*, 61 M 173, 201 P 693.

References

Murray et al. v. Creese et al., 80 M 453, 462, 260 P 1051; *Helena Adjustment Co. v. Predovich*, 98 M 162, 37 P 2d 651.

9327. Issue of fact—how tried—when issues both of law and fact, the former to be first disposed of. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.

History: Ap. p. Sec. 241, p. 98, L. 1877; re-en. Sec. 241, 1st Div. Rev. Stat. 1879; re-en. Sec. 250, 1st Div. Comp. Stat. 1887; en. Sec. 1034, C. Civ. Proc. 1895; re-en. Sec. 6724, Rev. C. 1907; re-en. Sec. 9327, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 592.

Operation and Effect

The long-established principles relating to the equity functions of the district courts of this state, respecting the findings of a jury on an issue presented to it in an equitable action, are not changed by the provision of a statute to the effect

that "in all cases issues of fact must be tried to a jury," so as to render the verdict of a jury in such cases binding upon the court until formally vacated. *Arnold v. Sinclair*, 12 M 248, 277, 29 P 1124.

In an equity case brought to determine the priority of water right appropriations, the court is not bound to make its decree in conformity with the verdict of the jury. *Kleinschmidt v. Greiser*, 14 M 484, 494, 37 P 5.

Where the pleadings present issues of fact, *prima facie* each party is entitled to have a jury determine them; but if,

9327
amended
L. 39 c. 61
sec. 1 p. 107

9327
98 P.(2d) 338

9327
108 P.(2d) 1048

9327
164 P. 2d
158, 159

9327
194 P.(2d)
258, 259, 263

9327
Amended
S.L. 49, C. 84
Sec. 1, P. 175

during the trial, it becomes apparent that there are no such issues in the evidence, the decision falls within the province of the court. Consolidated Gold & Sapphire Min. Co., 41 M 565, 573, 111 P 152.

Where the primary purpose of an action against a corporation was to recover on promissory notes aggregating the sum of \$27,000 and to enforce liability of its directors as co-makers and guarantors and for failure to file the annual statements required by statute, and the only equitable relief prayed for was the foreclosure of a mortgage given by one of the directors on two town lots as security for the notes, the answers of defendants consisting inter alia of denials and counterclaims which were put in issue by reply, the defendants were entitled to a trial by jury of the strictly legal issues presented by the

pleadings, and denial of such jury trial was error. Benson-Stabeck Co. v. Farmers' E. Co. et al., 66 M 395, 403, 214 P 600.

Held, that an action to compel the release of an oil and gas lease of record on the ground that the lessee had failed to commence drilling operations within the time fixed in the lease, by reason of which it became forfeited, and for the recovery of the statutory penalty, damages and attorney's fees, is one of law, entitling plaintiff to a jury trial. Solberg v. Sunburst Oil & Gas Co. et al., 70 M 177, 181, 225 P 612.

References

Cited or applied as section 241, First Division Revised Statutes 1879, in Mantle v. Noyes, 5 M 274, 287, 5 P 856; Best v. Beaudry, 62 M 485, 489, 205 P 239; Helena Adjustment Co. v. Predovich, 98 M 162, 37 P 2d 651.

9328. Court may direct separate trials and change order of disposing of issues. A separate trial, between the plaintiff and one or more defendants, of some or all of the issues of fact, or a trial of some or all the issues of law, or a change in the order of disposition of the issues, may be directed by the court, in its discretion.

History: En. Sec. 1035, C. Civ. Proc. 1895; re-en. Sec. 6725, Rev. C. 1907; re-en. Sec. 9328, R. C. M. 1921.

9329. Counterclaim to be deemed an action within the meaning of foregoing sections. Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same as if it arose in an action brought by the defendant against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment.

History: En. Sec. 1036, C. Civ. Proc. 1895; re-en. Sec. 6726, Rev. C. 1907; re-en. Sec. 9329, R. C. M. 1921.

Operation and Effect

Held under this section that where defendant sets up a counterclaim in his

answer and seeks an affirmative judgment thereon against the plaintiff, the issues arising are triable as if they arose in an action brought by the defendant against plaintiff. Continental Oil Co. v. Bell et al., 94 M 123, 132, 21 P 2d 65.

9330. Clerk must enter cause on the calendar, to remain until disposed of. The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; but causes may be dropped from the calendar by consent of parties, and may be again restored upon notice, or may be stricken from the calendar by the court for want of prosecution.

History: Ap. p. Sec. 242, p. 98, L. 1877; re-en. Sec. 242, 1st Div. Rev. Stat. 1879; re-en. Sec. 251, 1st Div. Comp. Stat. 1887; en. Sec. 1037, C. Civ. Proc. 1895; re-en. Sec. 6727, Rev. C. 1907; re-en. Sec. 9330, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 593.

References

Murray et al. v. Creese et al., 80 M 453, 462, 260 P 1051.

9331. Parties may bring issue to trial. Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party,

9329
101 Mont. 123
53 P (2d) 119

9330
101 Mont. 169
53 P (2d) 97

unless the court, for good cause, otherwise direct, may proceed with his cause, and take a dismissal of the action, or a verdict or judgment, as the case may require.

History: En. Sec. 129, p. 69, Bannack Stat.; re-en. Sec. 157, p. 163, L. 1867; re-en. Sec. 193, p. 65, Cod. Stat. 1871; re-en. Sec. 243, p. 98, L. 1877; re-en. Sec. 243, 1st Div. Rev. Stat. 1879; re-en. Sec. 252, 1st Div. Comp. Stat. 1887; re-en. Sec. 1038, C. Civ. Proc. 1895; re-en. Sec. 6728,

Rev. C. 1907; re-en. Sec. 9331, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 594.

References

Davenport v. Davenport, 69 M 405, 408, 222 P 422; Ward v. Strowd et al., 76 M 93, 103, 244 P 1007.

9332
110 P.(2d) 970
9332
131 P.(2d) 473

9332. Motion to postpone a trial for absence of testimony, requisites of. A motion to postpone a trial on grounds of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed; and upon terms the court may, in its discretion, upon good cause shown, and in furtherance of justice, postpone a trial or proceeding upon other grounds than the absence of evidence.

History: Ap. p. Sec. 130, Bannack Stat.; re-en. Sec. 158, p. 163, L. 1867; en. Sec. 194, p. 65, Cod. Stat. 1871; re-en. Sec. 244, p. 98, L. 1877; re-en. Sec. 244, 1st Div. Rev. Stat. 1879; re-en. Sec. 253, 1st Div. Comp. Stat. 1887; re-en. Sec. 1039, C. Civ. Proc. 1895; re-en. Sec. 6729, Rev. C. 1907; re-en. Sec. 9332, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 595.

Allowance or Refusal Discretionary

The power to grant or refuse a postponement on any ground is vested in the discretion of the court, and its exercise is not reviewable where no prejudice to the complaining party is shown. Downs v. Cassidy, 47 M 471, 475, 133 P.106.

A motion for a continuance on the ground of the absence of a witness is addressed to the discretion of the trial court, its action not being reviewable on appeal in the absence of an affirmative showing of prejudice to the movant. Hunt v. Van, 61 M 395, 399, 202 P 573.

Costs as a Condition to Continuance

This section, when construed with section 9793, confers jurisdiction upon the trial court to impose costs as a condition for a continuance, upon the ground of absence of evidence as well as other grounds. State ex rel. Congdon v. District Court, 10 M 456, 460, 26 P 182.

Other Grounds

A continuance ought to be granted whenever the facts shown upon the application therefor would authorize the court, under section 9187, to relieve a party from a judgment, order, or other proceeding

taken against him through his mistake, surprise, or excusable neglect. Meredith v. Roman, 49 M 204, 213, 141 P 643.

What the Affidavit Must Show

It is indispensably necessary that the affidavit for a postponement, on the ground that witnesses are absent, contain a showing of diligent effort to secure their presence. Meredith v. Roman, 49 M 204, 215, 141 P 643.

Affidavits for a continuance not showing when the subpoena for an absent witness was issued, why it was sent to the sheriff of a county other than that of the residence of the witness, or that there was probability or possibility that his personal attendance or deposition could be procured at a date later than that set for trial, were insufficient to show in overruling the motion. Hunt v. Van, 61 M 395, 399, 202 P 573.

The affidavit on application for a continuance on the ground of the absence of a necessary witness must show that due diligence was exercised by the applicant to procure the evidence of the witness, set forth the substance thereof, and that the witness if present will testify. Davenport v. Davenport, 69 M 405, 408, 409, 222 P 422.

Id. Where a continuance was sought in a divorce action on the ground that defendant, a necessary witness, was unable to be present because of her inability to defray the expense of travel, refusal thereof was proper in the absence of a showing that her financial condition would improve in the meantime, and of an excuse for failure to have her deposition taken.

In denying a motion for a continuance on the ground of absent witnesses the court did not abuse its discretion where movant did not show that he had used due diligence in procuring the desired evidence (this section), nor set forth that if a continuance were granted he would be able to secure the personal attendance of the witnesses or their evidence at a subsequent time, and his assertion of what he "believed" the witnesses would testify to was fairly met by counter-affidavits. *McCarthy v. Anaconda Copper Min. Co.*, 70 M 309, 312, 225 P 391.

When Denial of Continuance is Error

Where, in a prosecution for murder, the defendant's affidavit for a continuance to secure the testimony of an absent witness, who was present at the killing, shows that the utmost diligence was used to locate the witness and secure his testimony; that he had been located in another state about eighteen days before the trial, and a commission immediately issued to take his testimony, which was not secured in time for the trial; that his evidence was

material, and the same facts could not be proved by any other witness, and is corroborated as to the diligence used, the denial of a continuance is error. *State v. Metcalf*, 17 M 417, 424, 43 P 182. See also *Bean v. Missoula Lumber Co.*, 40 M 31, 34, 104 P 869.

When Properly Denied

Where counsel for plaintiff asked for a continuance on the ground that plaintiff was unable to attend because of illness, and counsel for defendant agreed that he would admit that, if present, plaintiff would testify to the matters set forth in her affidavit, the continuance was properly denied. *Ward v. Strowd et al.*, 76 M 93, 102, 244 P 1007.

Under this section, the trial court may properly deny an application for a continuance based upon the absence of a material witness, if the adverse party admits that the absent witness, if present, would testify to the matters set forth in the affidavits of movant. *Orem v. Hansen Packing Co.*, 91 M 222, 225, 7 P 2d 546.

9333. In cases of adjournment a party may have the testimony of any witness taken. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced.

History: En. Sec. 447, p. 133, *Bannack Stat.*; re-en. Sec. 604, p. 158, *Cod. Stat.* 1871; re-en. Sec. 245, p. 99, *L. 1877*; re-en. Sec. 245, 1st Div. *Rev. Stat.* 1879; re-en.

Sec. 254, 1st Div. *Comp. Stat.* 1887; amd. Sec. 1040, *C. Civ. Proc.* 1895; re-en. Sec. 6730, *Rev. C.* 1907; re-en. Sec. 9333, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 596.

CHAPTER 51

TRIAL BY JURY—FORMATION OF THE JURY

- Section 9334. Clerk to draw capsules containing ballot.
 9335. Mode of drawing capsule containing ballot.
 9336. Persons drawn to form jury.
 9337. Capsules containing ballots drawn—when deposited in another box.
 9338. When to be returned to box.
 9339. Capsules containing ballots of absentees returned to box.
 9340. New jury may be drawn when another is impaneled.
 9341. Ballots—when drawn from box No. 3.
 9342. New panel no objection.
 9343. Challenge.
 9344. Challenges for cause.
 9345. Challenges—how tried.
 9346. Order of challenge.
 9347. Vacancy to be filled.
 9348. Jury to be sworn—form of oath.

9334. Clerk to draw capsules containing ballot. When an issue of fact to be tried by a jury is brought to trial, the clerk, under the direction of

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amended
L. 37 c. 151
sec. 3 p. 489
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85 P. (2d) 353

9334
amended
L. 39 c. 3
sec. 3 p. 3

the court, must openly draw out of the trial juror box as many of the capsules containing ballots, with the names of jurors thereon, one after another, as are sufficient to form a jury.

History: En. Sec. 1050, C. Civ. Proc. 1895; re-en. Sec. 6731, Rev. C. 1907; amd. Sec. 10, Ch. 35, L. 1919; re-en. Sec. 9334, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 600.

References

State ex rel. Clark v. District Court, 86 M 509, 512, 284 P 266.

9335. Mode of drawing capsule containing ballot. Before the first capsule containing a ballot is drawn, the box must be closed and well shaken, so as to thoroughly mix the capsules therein; and the clerk must draw a capsule containing a ballot with the juror's name thereon, through an aperture made in the lid of the box large enough only to admit his hand conveniently, and without said clerk gazing into said box before or while drawing said capsule.

History: En. Sec. 1051, C. Civ. Proc. 1895; re-en. Sec. 6732, Rev. C. 1907; amd. Sec. 11, Ch. 35, L. 1919; re-en. Sec. 9335, R. C. M. 1921.

9336. Persons drawn to form jury. The first twelve persons who appear, as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn, and constitute the jury to try the issue.

History: En. Sec. 1052, C. Civ. Proc. 1895; re-en. Sec. 6733, Rev. C. 1907; re-en. Sec. 9336, R. C. M. 1921.

9337. Capsules containing ballots drawn—when deposited in another box. The capsules containing the ballots, with the names of the jurors so sworn, must be then deposited in another box, and there kept apart from the other capsules containing ballots with the names of jurors until that jury is discharged.

History: En. Sec. 1053, C. Civ. Proc. 1895; re-en. Sec. 6734, Rev. C. 1907; amd. Sec. 12, Ch. 35, L. 1919; re-en. Sec. 9337, R. C. M. 1921.

9338. When to be returned to box. After the jury is discharged, the capsules containing the ballots, with the names of the jurors thereon, must be returned to the box from which they were first taken, and the same course must be pursued as often as an issue is brought to trial by a jury.

History: En. Sec. 1054, C. Civ. Proc. 1895; re-en. Sec. 6735, Rev. C. 1907; amd. Sec. 13, Ch. 35, L. 1919; re-en. Sec. 9338, R. C. M. 1921.

9339. Capsules containing ballots of absentees returned to box. The capsule containing the ballot with the name of a juror who is absent when his name is drawn or called, or is set aside or excused from serving on that trial, must be again returned to the box containing the undrawn capsules as soon as the jury is sworn.

History: En. Sec. 1055, C. Civ. Proc. 1895; re-en. Sec. 6736, Rev. C. 1907; amd. Sec. 14, Ch. 35, L. 1919; re-en. Sec. 9339, R. C. M. 1921.

9340. New jury may be drawn when another is impaneled. If an issue is brought to trial by a jury while a jury is impaneled in another cause, and not then discharged, the court may order a jury for the trial of that issue to be drawn out of the box containing the capsules then undrawn; but, in any other case, the capsules containing the ballots with the names of all the trial jurors returned, and attending the court, must be placed together in the same box before a jury is drawn therefrom.

History: En. Sec. 1056, C. Civ. Proc. 1895; re-en. Sec. 6737, Rev. C. 1907; amd. Sec. 15, Ch. 35, L. 1919; re-en. Sec. 9340, R. C. M. 1921.

9341. Ballots—when drawn from box No. 3. If a sufficient number of jurors duly drawn and notified do not attend to form a jury, or a jury is impaneled in another cause and not discharged, the court shall, by an order to be entered in the minutes, direct the clerk to draw a sufficient number of ballots from box No. 3, specified in section 8907 of this code, to complete the jury. The sheriff must notify the persons thus drawn to attend forthwith, or at a time fixed by court. If for any reason a sufficient number of jurors to try the issue is not obtained, from the persons notified, under an order made as prescribed in this section, the court may make another order, or successive orders, until a sufficient number is obtained. Each person so notified must attend at a time required by the notice, and unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal so to do, he may be fined in the same manner as a trial juror, regularly drawn, and notified, as prescribed in this code; and he is subject to the same exceptions and challenges as any other trial juror.

History: En. Sec. 1057, C. Civ. Proc. 1895; re-en. Sec. 6738, Rev. C. 1907; re-en. Sec. 9341, R. C. M. 1921.

Operation and Effect

Held that the procedure prescribed by this section for drawing a special jury panel from box No. 3, which must be discharged upon conclusion of the par-

ticular case for which drawn, applies only where the regular panel has been exhausted because of an unusual number of disqualifications for cause in the particular case on trial, or where the jury impaneled in the case previously submitted is still in deliberation. *Lee et al. v. Hayden*, 63 M 589, 594, 208 P 596.

9342. New panel no objection. It is not a valid objection to a jury, that it contains none of the jurors originally returned to the court, or is only partially composed of such jurors.

History: En. Sec. 1058, C. Civ. Proc. 1895; re-en. Sec. 6739, Rev. C. 1907; re-en. Sec. 9342, R. C. M. 1921.

9343. Challenge. Each party may challenge the jury or jurors as follows:

1. The panel or array;
2. For cause;
3. Peremptory.

There can be only one challenge on a side to the array or panel, which may be made by one or more of the parties. A challenge to the array or panel may be made and the whole array or panel set aside by the court, when the jury was not selected, drawn, summoned, or notified as prescribed by law. Challenges to individual jurors are for cause or peremptory. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

History: Ap. p. Sec. 133, p. 69, Bannack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 301.

Court Cannot Deny the Right to Four Peremptory Challenges

Each party to a civil action may, by a mere objection, peremptorily challenge four jurors, and when these challenges are exercised the court has no discretion in the matter whatever. *State ex rel. Anaconda C. M. Co. v. Clancy*, 30 M 529, 541, 77 P 312.

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L. 37 c. 151
sec. 5 p. 490

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sec. 5 p. 4

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194 P.(2d) 234

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85 P.(2d) 353

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143 P.(2d) 895

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"Each Party" Defined

The provision of this section, that "each party" to a civil action shall be entitled to four peremptory challenges, means each side or party litigant, and not each person of whom the respective sides or parties litigant are made up. *Mullery v. Great Northern Ry. Co.*, 50 M 408, 416, 148 P 323. See also *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330.

Though each of two or more codefendants who are hostile to each other is entitled to the number of peremptory challenges of jurors allowed by this section to parties litigant, where neither their joint answer, which asserted defenses common to all, nor the evidence disclosed any conflict of interest, they constituted but one party, and as such were entitled to but four peremptory challenges. *Mullery v. Great Northern Ry. Co.*, 50 M 408, 417, 148 P 323. See also *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330.

Operation in General

In a prosecution for murder, the accused was properly compelled to exhaust alternately two peremptory challenges to each one taken by the state, where none were taken until the panel was full. *State v. Sloan*, 22 M 293, 298, 56 P 364. See also *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330.

When Challenges Are Deemed Waived and Effect of Waiver

Where either party fails to challenge in his turn, he is deemed to waive the challenge or challenges he might use at that time, but this rule goes no further than is necessary to preserve the alternation required by the statute. *State v. Peel*, 23 M 358, 362, 59 P 169, 75 Am. St. Rep. 529. See also *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330.

Where the state waived its fourth peremptory challenge, and the defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; the state's waiver of its fourth challenge was not a waiver of any subsequent challenge to which it was entitled. *State v. Peel*, 23 M 358, 363, 59 P 169.

Where a party plaintiff had used two of his four peremptory challenges, and waived his third and fourth, he was not thereafter entitled to challenge the juror placed in the box to fill the vacancy occasioned by the exercise of defendant's fourth challenge, especially in an equity case, where the findings were merely advisory, subject to be disregarded by the court. *O'Malley v. O'Malley*, 46 M 549, 555, 129 P 501.

References

State ex rel. Clark v. District Court, 86 M 509, 511, 284 P 266.

9344. Challenges for cause. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror;
2. Consanguinity or affinity within the sixth degree to any party;
3. Standing in the relation of guardian and ward, master and servant, debtor and creditor, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party;
4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;
5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;
6. Having an unqualified opinion or belief as to the merits of the action;
7. The existence of a state of mind in the juror evincing enmity against or bias in favor of either party.

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100 Mont. 59
46 P (2d) 706

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85 P.(2d) 353

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ref. to
L. 39 c. 185
sec. 4 p. 476

9344
156 P. 2d. 180

9344 subsec. 6
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History: En. Sec. 134, p. 70, Bannack Stat.; re-en. Sec. 162, p. 164, L. 1867; re-en. Sec. 198, p. 66, Cod. Stat. 1871; re-en. Sec. 249, p. 100, L. 1877; re-en. Sec. 249, 1st Div. Rev. Stat. 1879; re-en. Sec. 258, 1st Div. Comp. Stat. 1887; amd. Sec. 1060, C. Civ. Proc. 1895; re-en. Sec. 6741, Rev. C. 1907; re-en. Sec. 9344, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 602.

Operation and Effect

A juror, who hears and accepts as true the statement of a case by a party or witness, forms an "unqualified opinion" of the merits of the case. *Ruff v. Rader*, 2 M 211, 213.

A juror is not competent who testifies that he has formed an opinion concerning the merits of the case by talking with one of the parties and believing what he said regarding it; that he cannot say that it is an unqualified opinion; that sufficient evidence would change his opinion; that

he thinks he can render an impartial verdict; and that his opinion is dependent upon the truth of what he had heard. *Ruff v. Rader*, 2 M 211, 215.

A juror cannot be said to be fair and impartial, who has formed an opinion which will take evidence to remove, and who entertains a prejudice against the class to which the defendant belongs, although he states that his opinion is based on newspaper reports or common rumor, and he can fairly try the case according to the evidence. *Shane v. Butte Electric Ry. Co.*, 37 M 599, 601, 97 P 958.

In civil practice, the legislature has not changed the rule of the common law which excludes jurors upon the ground of actual bias, although a material change has been made in this respect, in criminal practice, by section 11962. *Shane v. Butte Electric Ry. Co.*, 37 M 599, 602, 97 P 958.

9345. Challenges—how tried. Challenges to the array or panel or for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

History: En. Sec. 135, p. 70, Bannack Stat.; re-en. Sec. 163, p. 164, L. 1867; re-en. Sec. 199, p. 66, Cod. Stat. 1871; re-en. Sec. 250, p. 101, L. 1877; re-en. Sec. 250, 1st Div. Rev. Stat. 1879; re-en. Sec. 259, 1st

Div. Comp. Stat. 1887; amd. Sec. 1061, C. Civ. Proc. 1895; re-en. Sec. 6742, Rev. C. 1907; re-en. Sec. 9345, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 603.

9346. Order of challenge. The plaintiff first, and afterwards the defendant, shall complete his challenges for cause.

History: En. Sec. 200, p. 66, Cod. Stat. 1871; re-en. Sec. 251, p. 101, L. 1877; re-en. Sec. 251, 1st Div. Rev. Stat. 1879; re-en. Sec. 260, 1st Div. Comp. Stat. 1887; re-en. Sec. 1062, C. Civ. Proc. 1895; re-en. Sec. 6743, Rev. C. 1907; re-en. Sec. 9346, R. C. M. 1921.

References

Cited or applied as section 1062, Code of Civil Procedure, in *State v. Sloan*, 22 M 293, 298, 56 P 364.

9347. Vacancy to be filled. After each challenge sustained the vacancy shall be filled before further challenges are made, and any new juror introduced may be challenged for cause, or if the party shall not have exhausted the number of peremptory challenges to which he is entitled, he may be challenged peremptorily.

History: En. Sec. 201, p. 66, Cod. Stat. 1871; re-en. Sec. 252, p. 101, L. 1877; re-en. Sec. 252, 1st Div. Rev. Stat. 1879; re-en. Sec. 261, 1st Div. Comp. Stat. 1887; re-en. Sec. 1063, C. Civ. Proc. 1895; re-en. Sec. 6744, Rev. C. 1907; re-en. Sec. 9347, R. C. M. 1921.

References

Cited or applied as section 1063, Code of Civil Procedure, in *State v. Sloan*, 22 M 293, 298, 56 P 364.

9348. Jury to be sworn—form of oath. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between _____, the plaintiff, and _____, the defendant, and a true verdict render according to the evidence.

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76 P (2d) 83
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History: En. Sec. 132, p. 69, Bannack Stat.; re-en. Sec. 160, p. 164, L. 1867; re-en. Sec. 196, p. 66, Cod. Stat. 1871; re-en. Sec. 247, p. 100, L. 1877; re-en. Sec. 247, 1st Div. Rev. Stat. 1879; re-en. Sec. 256, 1st Div. Comp. Stat. 1887; amd. Sec. 1064, C. Civ. Proc. 1895; re-en. Sec. 6745,

Rev. C. 1907; re-en. Sec. 9348, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 604.

References

Cited or applied as section 6745, Revised Codes, in *Kelley v. John R. Daily Co.*, 56 M 63, 77, 181 P 326; *State v. Le Due*, 89 M 545, 566, 300 P 919.

CHAPTER 52

CONDUCT OF THE TRIAL

- Section 9349. Order of trial.
 9350. View by jury of the premises.
 9351. Admonition when jury permitted to separate.
 9352. Jury may take with them certain papers.
 9353. Deliberation of jury—how conducted.
 9354. May come into court for further instructions.
 9355. Proceedings in case a juror becomes sick.
 9356. When prevented from giving verdict, the cause may be again tried.
 9357. When jury are absent, court may adjourn from time to time—sealed verdict.
 9358. Verdict—how declared—form of—polling the jury.
 9359. Proceedings when verdict is informal.

9349. Order of trial. When the jury has been sworn, the trial shall proceed in the following order, unless the court, for good cause and special reason, otherwise directs:

1. The party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it.
2. The adverse party may then, or at the opening of his case, briefly state his defense, and the evidence he expects to offer in support of it.
3. The party on whom rests the burden of the issues must first produce his evidence; the adverse party will then produce his evidence.
4. The parties will then be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permits them to offer evidence in their original case.
5. When the evidence is concluded, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing and numbered by the party, or his attorney, and, together with the written request asking the same, and signed by the party or his attorney, delivered to the court. At all times prior to charging the jury the instructions to be given shall be, without the presence of the jury, settled by the court, at which settlement counsel for the parties shall be allowed seasonable opportunity to examine the instructions requested and proposed to be given by the court, and to present and argue to the court objections and exceptions to the adoption or rejection of any instruction offered by counsel, or proposed to be given to the jury by the court. On such settlement of the instructions, the respective counsel, or the parties, shall specify and state the particular ground on which the instruction is objected or excepted to, and it shall not be sufficient, in stating the ground of such objection or exception, to state generally that the instruction does not state the law, or is against law, but such ground of objection or exception shall specify particularly wherein the instruction is insufficient or does not state the law, or what particular clause therein is objected to. The court shall pass upon the objections to the instructions requested, and also those

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50 P (2d) 247

proposed to be given by the court, and shall either give each instruction as requested, or positively refuse to do so, or give the instruction requested with a modification, and shall mark or indorse upon each instruction offered and requested by the parties in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused or modified, and if modified, wherein the modification consisted. The court shall also give the instructions, as originally proposed to be given by the court, or as modified, and all the instructions given by the court, together with those refused, must be filed as a part of the record of the cause. The court stenographer shall be present at such settlement, and shall take down all the objections and exceptions of the respective counsel to all or any of the instructions given by the court, together with the modifications made therein, and the ruling of the court thereon, and at the close of the trial such objections and exceptions taken during the settlement, together with the ruling of the court thereon, must be written out at length or printed in type by the stenographer and filed with the clerk forthwith, and thereafter such exceptions may be settled in a bill of exceptions or statement of the case, as provided in sections 9390, 9399, or 9402 of this code. No motion for a new trial, on the ground of errors in the instructions given, shall be granted by the district court, unless such errors were specifically pointed out and excepted to at the settlement of the instructions, as herein provided; and no cause shall be reversed by the supreme court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions, as herein specified, and such error and exception incorporated in and settled in the bill of exceptions or statement of the case as herein provided.

6. When the instructions have been passed upon and settled by the court, and before the arguments of counsel to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as are passed upon and settled at such settlement. In charging the jury, the court shall give to them all matters of law which it thinks necessary for its information in rendering a verdict.

7. When the jury has been charged, unless the case is submitted to the jury on either side, or on both sides, without argument, the party upon whom rests the burden of proof must commence and may conclude the argument. If several defendants, having several defenses, appear by different counsel, the court must determine their relative order, in the evidence and argument. Counsel, in arguing the case to the jury, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence in the case.

History: Earlier acts were Sec. 202, p. 67, Cod. Stat. 1871; amd. Sec. 1, p. 41, Ex. L. 1873; amd. Sec. 253, p. 101, L. 1877; re-en. Sec. 253, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 56, L. 1881; re-en. Sec. 262, 1st Div. Comp. Stat. 1887; amd. Sec. 1080, C. Civ. Proc. 1895; amd. Sec. 1080, p. 241, L. 1897; amd. Sec. 1, p. 160, L. 1901.

This section en. Sec. 1, Ch. 34, L. 1907; Sec. 6746, Rev. C. 1907; re-en. Sec. 9349,

R. C. M. 1921. Cal. C. Civ. Proc. Secs. 607-608.

Instructions

Duty of Counsel to Offer Instruction

Desired

A party who desires a more specific instruction than the one given must offer one to conform with his views of the law. This rule has not been changed by the

above section. *Mulligan v. Montana Union Ry. Co.*, 19 M 135, 141, 47 P 795; *State v. Broadbent*, 19 M 467, 473, 48 P 775; *Rand v. Butte Electric Ry. Co.*, 40 M 398, 411, 107 P 87; *Heitman v. Chicago, Milwaukee & St. Paul Ry. Co.*, 45 M 406, 414, 123 P 401.

Where an instruction in appropriate language calls the attention of the jury to the subject matter to be considered and fairly states and presents the questions to be determined, it is sufficient, and if in such a case a more specific instruction is required by a party, it is his duty to tender one or a modification of the one given, a demand that the court do so being insufficient. *Zanos v. Great Northern Ry. Co.*, 60 M 17, 22, 198 P 138.

Where in an action against a principal and his surety declarations of the former were admissible as to him but inadmissible as to the latter, failure of the surety to request an instruction that such evidence should be limited in its application to the principal barred the surety from complaining of the court's ruling admitting the evidence over objection. *Outlook F. E. Co. v. American S. Co.*, 70 M 8, 26, 223 P 905.

Duty of Counsel to Point Out Objections Specifically and Except to Them

To obtain a review of instructions given, or of instructions requested and refused, there must, in view of this section and of section 9388, be a bill of exceptions, specifically pointing out the particular objection made at the time of the settlement. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 247, 99 P 837.

An instruction given by the trial court, without being objected to at the time, is conclusive upon the parties on appeal. *Flathead County State Bank v. Ingham*, 51 M 438, 441, 153 P 1005.

Where no objection is interposed on the settlement of instructions, no error can be predicated thereon. *Sanborn Co. v. Powers*, 58 M 214, 219, 190 P 990.

A defect in a proposed instruction not pointed out at the settlement of the instructions will not be considered on appeal. *Morgan v. Hines et al.*, 65 M 306, 314, 211 P 778.

Under this section, subdivision 5, the supreme court may not reverse a judgment for error in instructions unless the error was specifically pointed out and excepted to at the settlement of the instructions. (Mr. Justice Galen dissenting.) *State v. Newman*, 66 M 180, 193, 213 P 805.

Under this section, the district court is precluded from granting a new trial for error in an instruction not specifically pointed out at the time of settlement of the instructions, and on appeal the su-

preme court will not consider any error not so pointed out. *Lundquist v. Jennison et al.*, 66 M 516, 526, 214 P 67.

Failure of appellant to object to alleged erroneous instructions at the time of their settlement precludes review of specifications of error based thereon. *Tripp v. Silver Dyke Min. Co.*, 70 M 120, 122, 224 P 272.

An objection to an instruction that it was an incorrect statement of the law and would have a tendency to mislead the jury held insufficient to entitle the alleged error to review, under this section, which requires the objector to point out wherein the proposed instruction is objectionable. *Brunnabend v. Tibbles*, 76 M 288, 303, 246 P 536.

An objection to an instruction that the evidence did not warrant its giving was insufficient under subdivision 5 of this section, which requires the objecting party to specify particularly wherein the instruction was insufficient or did not state the law. *State v. Daly*, 77 M 387, 392, 250 P 976.

Though the rule is that no judgment shall be reversed on appeal for any error in instructions not specifically pointed out and excepted to at their settlement, it does not go to the extent of requiring that the party interposing an objection must also state the correct principle of law upon which it is based; though the objection thereto was based on a wrong principle, if the instruction was actually erroneous, its review is nevertheless proper. *First Nat. Bank v. Perrine et al.*, 97 M 262, 268, 33 P 2d 997.

Indorsement by Judge

This section declares that all instructions, both those given and those refused, shall be indorsed by the judge and filed as a part of the record in the case; and was enacted, seemingly, without attention to, or notice of, the provisions of sections 9387 and 9409. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 246, 99 P 837.

Method of Objecting

Counsel must state his objection to any particular instruction, and, if the objection is overruled, reserve his exception; orderly procedure requires this to be done concerning all other rulings regarded as objectionable. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 246, 99 P 837.

Review by Supreme Court

The supreme court, in reviewing errors assigned on the giving or refusing of instructions, may only consider the particular objections presented to the trial court at the time the instructions were settled. *Lehane v. Butte Electric Ry. Co.*, 37 M 564, 567, 97 P 1038.

To insure review on appeal, the whole charge, or such parts of it as will illustrate the point upon which the objecting party relies as error in the charge, as well as the instructions requested and refused, should be incorporated in a bill of exceptions. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 247, 99 P 837.

The supreme court will not consider an assignment of error based upon the giving or refusing of an instruction, unless there was a timely and proper objection made, and an exception saved to the ruling of the court. *Yergy v. Helena Light & Ry. Co.*, 39 M 213, 240, 102 P 310.

Under subdivision 5 of this section, the supreme court cannot reverse a judgment and direct a new trial for error in an instruction, unless, at the time of settlement in the trial court, specific objection was made to it, pointing out the error alleged, and an exception preserved to the action of the court in overruling the objection. *Poor v. Madison River Power Co.*, 41 M 236, 240, 108 P 645.

In reviewing instructions, the supreme court is limited to objections made at the time the instructions were settled. *Fredrick v. Hale*, 42 M 153, 166, 112 P 70.

In civil cases, instructions cannot be reviewed on appeal, without a bill of exceptions specifically pointing out the particular objection made at the time of the settlement of the instructions. *State v. Cook*, 42 M 329, 331, 112 P 537.

The provision of this section, that at the settlement of the instructions the particular grounds of objection or exception to those deemed erroneous shall be stated, else a motion for a new trial shall not be granted nor a cause reversed by the supreme court for error in them, applies only to instructions given and not to those refused. *Billings Realty Co. v. Big Ditch Co.*, 43 M 251, 261, 115 P 828.

Errors in instructions, which were not called to the attention of the trial court at the settlement of the instructions, will not be considered on appeal. *Allen v. Bear Creek Coal Co.*, 43 M 269, 286, 115 P 673.

The supreme court is specifically prohibited by this section from reversing a case for any error in instructions not pointed out in the court below. *Stokes v. Long*, 52 M 470, 486, 159 P 28.

An assignment of error based on the refusal of an instruction may not be considered on appeal where the instruction is not identified or presented in the manner commanded by this section. *Roberts v. Sinnott*, 54 M 114, 119, 169 P 49.

Id. Section 9387, providing what shall be deemed excepted to, was not designed to modify the provision of subdivision 5

of this section, so as to do away with the necessity of identifying or authenticating, in the transcript on appeal, an instruction which was refused.

In its review of an alleged erroneous instruction, the supreme court is limited under this section to the particular objection to it urged upon the trial court at the time the instructions were settled. *Humber v. Marshall*, 60 M 267, 198 P 747.

Failure of counsel to reserve an exception to the refusal of an instruction bars review of the action of the court in refusing it. *Laird v. Berthelote et al.*, 63 M 122, 136, 206 P 445.

Under this section, the supreme court in its review of instructions is limited to the objections made by counsel for appellant at the time they were settled; hence though an instruction may be incorrect but not open to the particular objection urged against it, the court may not declare error on that account. *Outlook F. E. Co. v. American S. Co.*, 70 M 8, 26, 223 P 905.

Under this section, the supreme court is prohibited from taking cognizance of any objection to an instruction not specifically pointed out in the trial court. *Eablonski v. Close*, 70 M 292, 298, 225 P 129; *Stiemke v. Jankovich et al.*, 72 M 363, 373, 233 P 904; *Brunnabend v. Tibbles*, 76 M 288, 303, 246 P 536.

Treatment of Instruction When Not Indorsed at the Time of Trial

Where, in a criminal case, the indorsements on instructions, "given," "refused," or "modified," were not made at the time of the trial, they may be identified subsequently by an entry ordered to be made in the minutes. *State v. Lucey*, 24 M 295, 305, 61 P 994.

Right to Open and Close

In General

Where, at the close of plaintiff's case, it was stipulated that if plaintiff was entitled to judgment in an action on a contract of lease of sheep, it was to be for a certain amount, the defendant, relying on counter-claims for damages, had the burden of proof and the right to open and close the argument. *Power & Bro. v. Turner*, 37 M 521, 542, 97 P 950.

Defendant, in an action to recover the purchase price of machinery, who sought by his answer to defeat plaintiff's right to recover on the ground that fraud had been practiced upon him in making the sale and who had the affirmative of every issue raised by the pleadings, had the right to open and close. *Connolly Co. v. Schlueter Bros. et al.*, 69 M 65, 69, 220 P 103.

Rebuttal and Surrebuttal**In General**

Where plaintiff did not inject any new matter in rebuttal and defendants did not ask leave to offer evidence in their original case nor make any offer of proof, refusal to permit them to introduce testimony in surrebuttal was not an abuse of discretion. *First Nat. Bank of Saco v. Vagg et al.*, 65 M 34, 41, 212 P 509.

In the matter of order of proof (rebuttal) the trial court is permitted to exercise a reasonable discretion, subject to review only in case of abuse thereof. *Spurgeon v. Imperial Elevator Co.*, 99 M 432, 43 P 2d 891.

References

Cited or applied as section 253, First Division Revised Statutes 1879, in *McKinsstry v. Clark & Cameron*, 4 M 370, 392, 1 P 759; as section 1080, Code of Civil

Procedure, before amendment, in *State v. Gay*, 18 M 51, 60, 44 P 411; *State v. Fisher*, 23 M 540, 550, 59 P 919; in *Wastl v. Montana Union Ry. Co.*, 24 M 159, 173, 61 P 9; *Helena & Livingston S. & R. Co. v. Lynch*, 25 M 497, 502, 65 P 919; *Farleigh v. Kelley*, 28 M 421, 428, 72 P 756, 63 L. R. A. 319; *Maloney v. King*, 30 M 158, 165, 76 P 4; *Butte Mining & Milling Co. v. Kenyon*, 30 M 314, 321, 76 P 696, 77 P 319; *Gallick v. Bordeaux*, 31 M 328, 335, 78 P 583; *Storm v. City of Butte*, 35 M 385, 398, 89 P 726; as chapter 34, Laws of 1907, in *Lindsay v. Kroeger*, 37 M 231, 235, 95 P 839; as section 6746, Revised Codes, in *Doichinoff v. Chicago, Milwaukee & St. Paul Ry. Co.*, 51 M 582, 589, 154 P 924; *Surman et al. v. Cruse et al.*, 57 M 253, 265, 187 P 890; *General F. E. Co. v. Northwestern A. S. Co.*, 70 M 1, 7, 223 P 504; *Howe v. Messimer*, 84 M 304, 311, 275 P 281.

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9350. View by jury of the premises. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place at which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, and one person representing each party, to the place, which shall be shown to them by the persons appointed by the court for that purpose. While the jury are thus absent, no person, other than the persons so appointed, shall speak to them on any subject connected with the trial, and such persons shall not speak to the jury upon any matters connected with the subject of the action, but may point out to the jury the property in litigation, or the place at which any material fact occurred.

History: En. Sec. 204, p. 68, Cod. Stat. 1871; re-en. Sec. 254, p. 103, L. 1877; re-en. Sec. 254, 1st Div. Rev. Stat. 1879; re-en. Sec. 263, 1st Div. Comp. Stat. 1887; amd. Sec. 1081, C. Civ. Proc. 1895; re-en. Sec. 6747, Rev. C. 1907; re-en. Sec. 9350, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 610.

Allowing Jury to View Lands Sought to be Condemned Prior to Reception of Testimony Held Not Good Practice

While the matter of permitting the jury in eminent domain proceedings to view the lands sought to be condemned lies within the sound discretion of the trial court, and though permission to view prior to the reception of the testimony may not be held an abuse of discretion in all cases, the better practice is not to permit a view until the case has sufficiently progressed to the point where it is known what the various items of damages to be considered are. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 110, 43 P 2d 674.

Defendant May Waive Right to be Present

Since the only purpose of a view by the jury of the place where a homicide was

committed is to enable the jurors better to understand the evidence heard by them at the trial and testimony may not there be taken for any purpose, the defendant may waive his right to be present at the viewing, and where he did not make a request for permission to be present at the view of an automobile in and near which the shooting occurred, he will be held to have waived his right in that behalf. *State v. Cates*, 97 M 173, 192, 33 P 2d 578.

Operation and Effect

It is proper for a jury, who have viewed the property, which is the subject of litigation, to take into consideration the result of their observations in connection with the evidence in deliberating upon the verdict. *Ormund v. Granite Mountain Min. Co.*, 11 M 303, 308, 28 P 289. See also *State v. Landry*, 29 M 218, 227, 74 P 418; *White v. Barling*, 36 M 413, 416, 93 P 348.

The language of this section leaves the question whether the jury shall be allowed to inspect the premises in the discretion of the trial court, and its refusal to permit the inspection will not be reviewed by

the supreme court, in the absence of a clear showing of error. *Maloney v. King*, 30 M 158, 172, 76 P 4.

Where, in a personal injury suit, drawings of the machinery, the faulty condition of which plaintiff alleged as the cause of his injury, had been presented to the jury for inspection, and, upon inquiry by the court, the jurors all stated that they understood the situation, the court acted within its discretion when it refused to direct a view of the machinery itself, at a mine a considerable distance from the place of trial. *Stephens v. Elliott*, 36 M 92, 104, 92 P 45.

The purpose of the view provided for herein is to enable the jury to apply the testimony of the witnesses to the observed conditions about which they have spoken, and also to determine the truth of statements made by them with reference to these conditions. *Ferris v. McNally*, 45 M 20, 31, 121 P 889.

Since in ordinary civil actions where the jury has viewed the premises charged

by plaintiff to have been damaged, its verdict is not conclusive as to the amount awarded, the same rule prevails in condemnation proceedings, and therefore the trial court in such proceedings may set the verdict aside and grant a new trial if it appear that the verdict is excessive. *State et al. v. Anderson et al.*, 92 M 313, 318, 13 P 2d 228.

Waiver of Alleged Error in Permitting View

By failing to object to an order of the trial court, made in its discretion and at the close of the testimony in a prosecution for murder, permitting the jury to view an automobile in which the shooting occurred, defendant waived his right to secure a review of the propriety of the order urged on the ground that no proper foundation had been laid for the view in that it was not shown that the car was in the same condition as at the time of the killing. *State v. Cates*, 97 M 173, 192, 33 P 2d 578.

9351. Admonition when jury permitted to separate. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

History: En. Sec. 263, p. 104, L. 1877; re-en. Sec. 263, 1st Div. Rev. Stat. 1879; re-en. Sec. 272, 1st Div. Comp. Stat. 1887; re-en. Sec. 1082, C. Civ. Proc. 1895; re-en. Sec. 6748, Rev. C. 1907; re-en. Sec. 9351, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 611.

9352. Jury may take with them certain papers. Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

History: En. Sec. 139, p. 71, Bannack Stat.; re-en. Sec. 167, p. 166, L. 1867; amd. Sec. 207, p. 68, Cod. Stat. 1871; re-en. Sec. 257, p. 103, L. 1877; re-en. Sec. 257, 1st Div. Rev. Stat. 1879; re-en. Sec. 266, 1st Div. Comp. Stat. 1887; amd. Sec. 1083, C. Civ. Proc. 1895; re-en. Sec. 6749, Rev. C. 1907; re-en. Sec. 9352, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 612.

Operation and Effect

It was not error in an action against a railroad company for killing cattle on the track, to refuse to allow the jury to take with them a map of the place where the accident occurred, which was not admitted in evidence, but only used by the witnesses while testifying in explaining

their testimony. *Carman v. Montana Central Ry. Co.*, 32 M 137, 141, 79 P 690.

While the jury may be permitted to take with them to the jury-room the pleadings in the case, and, if they desire, study the issues for themselves, the practice of setting forth in the instructions a clear and concise statement of the nature of the case and the issues to be determined is to be commended. *Paxton v. Woodward*, 31 M 195, 213, 78 P 215; *Rand v. Butte Electric Ry. Co.*, 40 M 398, 409, 107 P 87; *Frederick v. Hale*, 42 M 153, 167, 112 P 70.

References

Cited or applied as section 266, First Division Compiled Statutes 1887, in *Freezer v. Sweeney*, 8 M 508, 511, 21 P 20.

9353. Deliberation of jury—how conducted. When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least two-thirds of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or two-thirds of them are agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

History: En. Sec. 138, p. 71, Bannack Stat.; re-en. Sec. 166, p. 165, L. 1867; re-en. Sec. 206, p. 68, Cod. Stat. 1871; re-en. Sec. 256, p. 103, L. 1877; re-en. Sec. 256, 1st Div. Rev. Stat. 1879; re-en. Sec. 265, 1st Div. Comp. Stat. 1887; amd. Sec. 1084, C. Civ. Proc. 1895; re-en. Sec. 6750, Rev. C. 1907; re-en. Sec. 9353, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 613.

Operation and Effect

This section, providing that two-thirds of a jury in a civil action may agree upon a verdict, is based upon constitutional authority. *Spencer v. Spencer*, 31 M 631, 639, 79 P 320.

Id. Special findings acquiesced in by the required two-thirds of a jury may not be set aside by reason of affidavits made by dissenting jurors that, in their opinion, the conclusion of the majority was reached by giving a wrong construction or too much weight to a part of the evidence.

9354. May come into court for further instructions. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or taken down by the stenographer.

History: En. Sec. 140, p. 71, Bannack Stat.; amd. Sec. 168, p. 166, L. 1867; re-en. Sec. 208, p. 68, Cod. Stat. 1871; re-en. Sec. 258, p. 103, L. 1877; re-en. Sec. 258, 1st Div. Rev. Stat. 1879; re-en. Sec. 267, 1st Div. Comp. Stat. 1887; amd. Sec. 1085, C. Civ. Proc. 1895; re-en. Sec. 6751, Rev. C. 1907; re-en. Sec. 9354, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 614.

Operation and Effect

Where, after having been charged, and having retired to consider their verdict, a jury, at its own request, was brought back into the court-room and permitted to hear read the testimony of two witnesses who

had testified, from the stenographer's notes, which action was objected to on the ground that it was improper and that the testimony as read was secondary and inadmissible, if the witnesses themselves could have been produced, it was held that no error had been committed, since the court had no authority to permit the examination of witnesses at such a time, and the notes taken by an official stenographer on a trial are presumably correct. *Freezer v. Sweeney*, 8 M 508, 512, 21 P 20.

This section is applicable to civil cases only. *State v. Fisher*, 23 M 540, 551, 59 P 919.

9355. Proceedings in case a juror becomes sick. If, after the impaneling of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged, and a new jury then or afterward impaneled.

History: En. Sec. 136, p. 70, Bannack Stat.; amd. Sec. 164, p. 165, L. 1867; re-en. Sec. 205, p. 68, Cod. Stat. 1871; re-en. Sec. 255, p. 103, L. 1877; re-en. Sec. 255, 1st Div. Rev. Stat. 1879; re-en. Sec.

264, 1st Div. Comp. Stat. 1887; re-en. Sec. 1086, C. Civ. Proc. 1895; re-en. Sec. 6752, Rev. C. 1907; re-en. Sec. 9355, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 615.

9356. When prevented from giving verdict, the cause may be again tried. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the case is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

History: En. Sec. 141, p. 71, Bannack Stat.; amd. Sec. 169, p. 166, L. 1867; re-en. Sec. 209, p. 68, Cod. Stat. 1871; re-en. Sec. 259, p. 104, L. 1877; re-en. Sec. 259, 1st Div. Rev. Stat. 1879; re-en. Sec. 268, 1st Div. Comp. Stat. 1887; re-en. Sec. 1087, C. Civ. Proc. 1895; re-en. Sec. 6753, Rev. C. 1907; re-en. Sec. 9356, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 616.

Operation and Effect

In an action at law to recover damages for the breach of a contract, after the case has been submitted to the jury, which failed to agree upon a verdict, the court cannot make findings of fact and conclusions of law and base a judgment thereon, but should direct that the case be tried again. *Murray v. Hauser*, 21 M 120, 127, 53 P 99.

9357. When jury are absent, court may adjourn from time to time—sealed verdict. While the jury are absent, the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day.

History: En. Sec. 142, p. 71, Bannack Stat.; re-en. Sec. 170, p. 166, L. 1867; re-en. Sec. 210, p. 68, Cod. Stat. 1871; re-en. Sec. 260, p. 103, L. 1877; re-en. Sec. 260, 1st Div. Rev. Stat. 1879; re-en. Sec. 269, 1st

Div. Comp. Stat. 1887; amd. Sec. 1088, C. Civ. Proc. 1895; re-en. Sec. 6754, Rev. C. 1907; re-en. Sec. 9357, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 617.

9358. Verdict—how declared—form of—polling the jury. When the jury, or two-thirds of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than one-third of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete, and the jury discharged from the case.

History: En. Sec. 143, p. 72, Bannack Stat.; re-en. Sec. 171, p. 166, L. 1867; re-en. Sec. 211, p. 69, Cod. Stat. 1871; amd. Sec. 261, p. 104, L. 1877; re-en. Sec. 261, 1st Div. Rev. Stat. 1879; re-en. Sec. 270,

1st Div. Comp. Stat. 1887; amd. Sec. 1089, C. Civ. Proc. 1895; re-en. Sec. 6755, Rev. C. 1907; re-en. Sec. 9358, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 618.

9359. Proceedings when verdict is informal. When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

History: En. Sec. 144, p. 72, Bannack Stat.; re-en. Sec. 172, p. 166, L. 1867; re-en. Sec. 212, p. 69, Cod. Stat. 1871;

re-en. Sec. 262, p. 104, L. 1877; re-en. Sec. 262, 1st Div. Rev. Stat. 1879; re-en. Sec. 271, 1st Div. Comp. Stat. 1887; amd. Sec.

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1090, C. Civ. Proc. 1895; re-en. Sec. 6756, Rev. C. 1907; re-en. Sec. 9359, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 619.

Purpose

The practice permitted by this section is to prevent irregular, informal, and insufficient verdicts from being received and recorded, and is not to be extended so far as to authorize the court to refuse to receive a verdict for the plaintiff for a sum less than that claimed by him, on the ground that, under the evidence, if the plaintiff is entitled to a verdict at all, it must be for the full amount claimed. The proper remedy in the latter case is to have the verdict set aside on motion for a new trial. *Morris v. Burke*, 15 M 214, 215, 38 P 1065. See also *State ex rel. Jones v. District Court*, 50 M 1, 5, 144 P 564.

This section is to some extent rather a declaration of existing principles than the introduction of any wholly new principles or doctrine. *Morris v. Burke*, 15 M 214, 216, 38 P 1065.

The plain purpose of this section is to prevent the receipt of informal or insufficient verdicts; it does not extend to matters going to the substance, that do not appear upon their face; if a verdict covers the issue and is complete on its face, the court must receive it. *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 36 M 478, 483, 93 P 640. See also *State ex rel. Jones v. District Court*, 50 M 1, 5, 144 P 564.

Verdict Without Stating the Amount When Sufficient

A verdict in favor of plaintiff is sufficient without stating the amount awarded,

where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due. *Joseph v. Mady Clothing Co.*, 13 M 195, 202, 33 P 1.

When Jury is Functus Officio

When a verdict is rendered and recorded, and the jury discharged, the jury is functus officio. Prior to that time the verdict is in the control of the jury in some respects, but after those events the province of the jury is exhausted. In *re Thompson*, 9 M 381, 388, 23 P 933; *Morris v. Burke*, 15 M 214, 215, 38 P 1065.

When Jury May Not be Sent Out to Correct

Where, upon the polling of the jury in a personal injury case, the court inquires whether the verdict for the plaintiff has been reached by chance, and, several of the jurors answering in the affirmative, the court then directs them to retire and find a verdict by "deliberation and reasoning," and to exclude the element of chance, the action of the court is unauthorized; the verdict returned should have been received, subject to be set aside only upon application under section 9397. *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 36 M 478, 483, 93 P 640.

After a verdict, which was neither informal nor insufficient, had been received and recorded, the trial court had no power to order it stricken from the files and direct the jury to return another, its authority over it being limited to setting it aside upon proper motion for a new trial. *Lish v. Martin*, 55 M 582, 585, 179 P 826.

CHAPTER 53

THE VERDICT

Section 9360. General and special verdicts defined.

9361. When a general or special verdict may be rendered.

9362. Verdict in actions for recovery of money or on establishing counterclaim.

9363. Verdict in actions for the recovery of specific personal property.

9364. Directed verdict—when.

9360. General and special verdicts defined. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented that nothing shall remain to the court but to draw from them conclusions of law.

History: En. Sec. 146, p. 72, Bannack Stat.; re-en. Sec. 174, p. 167, L. 1867; re-en. Sec. 214, p. 69, Cod. Stat. 1871;

re-en. Sec. 264, p. 105, L. 1877; re-en. Sec. 264, 1st Div. Rev. Stat. 1879; re-en. Sec. 274, 1st Div. Comp. Stat. 1887; re-en. Sec.

1100, C. Civ. Proc. 1895; re-en. Sec. 6757, Rev. C. 1907; re-en. Sec. 9360, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 624.

Bad Verdict

A verdict is bad which is not responsive to and decisive upon every material issue submitted to the jury. *McCleary v. Crowley*, 22 M 245, 248, 56 P 227; *Hamilton v. Murray*, 29 M 80, 84, 74 P 75; *Hickey v. Breen*, 40 M 368, 375, 106 P 881. See also *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 571, 111 P 152; *Olcott v. Gebo*, 54 M 35, 37, 166 P 300.

A verdict is bad if it varies from the issues in a substantial matter, or if it finds only a part of that which is in issue. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and, although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. *Hamilton v. Murray*, 29 M 80, 84, 74 P 75; *Hickey v. Breen*, 40 M 368, 373, 106 P 881.

9361. When a general or special verdict may be rendered. In all cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly. In no case shall special issues be submitted to the jury when, in the opinion of the court, a general verdict would be sufficient.

History: En. Sec. 148, p. 72, *Bannack Stat.*; re-en. Sec. 175, p. 167, *L. 1867*; re-en. Sec. 215, p. 70, *Cod. Stat. 1871*; re-en. Sec. 265, p. 104, *L. 1877*; re-en. Sec. 265, 1st Div. Rev. Stat. 1879; re-en. Sec. 275, 1st Div. Comp. Stat. 1887; amd. Sec. 1101, C. Civ. Proc. 1895; re-en. Sec. 6758, Rev. C. 1907; re-en. Sec. 9361, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 625.

Court May Predicate Judgment on Special Verdict

Since the district court is authorized by this section in all cases to direct the jury to find a special verdict in writing upon all or any of the issues in a case, it may properly predicate its judgment upon such a verdict. *Tannhauser v. Shea*, 88 M 562, 569, 295 P 268.

Verdict in Forcible Detainer

In forcible detainer a verdict is defective which fails to find that defendant detained the property. *McCleary v. Crowley*, 22 M 245, 248, 56 P 227.

What Special Verdict Should Find

A special verdict should find all the facts which are necessary to enable the court to determine by the consideration of the pleadings and the verdict alone which party is by law entitled to a judgment, without reference to the evidence. *Coburn Cattle Co. v. Small*, 35 M 288, 293, 88 P 953.

Id. In an action against a county treasurer to recover taxes paid on certain cattle, a special verdict is insufficient to warrant judgment for the plaintiff, where such verdict fails to find all the facts necessary to enable the court to determine, by a consideration of the pleadings and the verdict alone, which party is by law entitled to a judgment, without reference to the evidence.

References

Cited or applied as section 6757, Revised Codes, in *Johnson v. Butte Alex Scott Copper Co.*, 51 M 126, 132, 149 P 717; *McDonald v. Klenze*, 52 M 142, 144, 157 P 175; *Dalke v. Pancoast*, 63 M 524, 527, 208 P 589.

Court May Submit a Particular Question of Fact

The court may, in its discretion, submit to the jury a particular question of fact, and require them to find upon it; but it is not bound to do so. *Hollingsworth v. Davis-Daly E. C. Co.*, 38 M 143, 165, 99 P 142; *Poor v. Madison River Power Co.*, 41 M 236, 242, 108 P 645. See also *Michalsky v. Centennial Brewing Co.*, 48 M 1, 16, 134 P 307.

The practice of more frequently instructing juries to find upon particular questions of fact is recommended; thereby, the necessity for granting new trials would be greatly diminished, and much unnecessary expense and delay be avoided. *O'Meara v. McDermott*, 40 M 38, 58, 104 P 1049.

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The submission of special interrogatories to the jury is a matter addressed to the sound, legal discretion of the trial court; the observance of the practice, rather than constituting error, is to be commended, as tending to promote justice. *Rairden v. Hedrick*, 46 M 510, 517, 129 P 498.

The trial court is authorized in any case, in its discretion, to instruct the jury to find upon particular questions of fact, though they are required to render a general verdict; and the court is required, when a special finding is inconsistent with the general verdict, to recognize the finding as controlling, and to give judgment accordingly. *Johnson v. Butte Alex Scott Copper Co.*, 51 M 126, 132, 149 P 717.

Special Findings May be Submitted to the Jury

Special findings may be properly submitted to and passed upon by the jury in a divorce suit. *Morrison v. Morrison*, 14 M 8, 10, 35 P 1.

The court may not set aside a special finding and enter judgment on the general verdict, but must enter judgment on the special finding, leaving it to the defeated party to pursue his remedy by a motion for a new trial. *Martin v. City of Butte*, 34 M 281, 285, 86 P 264.

Special findings in a personal injury case control the general verdict. *Mitchell v. Boston & M. C. C. & Silver M. Co.*, 37 M 575, 590, 97 P 1033.

When the court has submitted special findings under this section and the jury has rendered a special verdict in conformity with the preceding section, it then becomes the duty of the court to render the proper judgment. *McDonald v. Klenze*, 52 M 142, 144, 157 P 175.

When General Findings and Special Are in Conflict

Where, in an action for injuries from a premature explosion of dynamite alleged to be due to using stronger explosives than proper or customary, without warning plaintiff, the jury returned a general verdict for plaintiff, and found specially that plaintiff had been warned, that he knew the stronger powder was used, and that the use of such powder was proper, the special findings were inconsistent with the general verdict, and the defendant was entitled to judgment upon such findings. *Johnson v. Butte Alex Scott Copper Co.*, 51 M 126, 132, 149 P 717.

When General Verdict is Sufficient

A general verdict alone is sufficient in an action in claim and delivery, if the issues warrant it. *Dalke v. Pancoast*, 63 M 524, 527, 208 P 589.

9362. Verdict in actions for recovery of money or on establishing counterclaim. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

History: En. Sec. 149, p. 73, *Bannack Stat.*; re-en. Sec. 176, p. 167, *L. 1867*; re-en. Sec. 216, p. 70, *Cod. Stat. 1871*; re-en. Sec. 266, p. 105, *L. 1877*; re-en. Sec. 266, 1st Div. Rev. Stat. 1879; re-en. Sec. 276, 1st Div. Comp. Stat. 1887; amd. Sec. 1102, *C. Civ. Proc. 1895*; re-en. Sec. 6759, *Rev. C. 1907*; re-en. Sec. 9362, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 626*.

Operation and Effect

A verdict in favor of plaintiff is sufficient without stating the amount awarded, where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due. *Joseph v. Mady Clothing Co.*, 13 M 195, 202, 33 P 1.

In entering judgment, it is the duty of the court to follow the verdict, and the allowance of interest in this case was error, the verdict indicating that the jury had followed the instructions and made all allowances, including interest, to which they thought defendants entitled. *Butte*

Electric Ry. Co. v. Mathews, 34 M 487, 493, 87 P 460. See also *Helena Power Transmission Co. v. Spratt*, 40 M 254, 255, 106 P 5.

Query: Whether, if the jury in an action for the recovery of money should find, under this section, the amount to which defendant is entitled, and specify in the verdict that the amount so found should draw interest from a certain date, the court may compute such interest and include it in the judgment upon the principle that that which can be made certain must be regarded as certain. *Butte Electric Ry. Co. v. Mathews*, 34 M 487, 493, 87 P 460.

Where in an action to recover the purchase price of fire-extinguishing apparatus the defendant interposed a counterclaim for \$10,000 for breach of the contract, the failure of plaintiff to introduce any testimony did not authorize the court to direct a verdict for defendant in that amount for unliquidated damages, the

weight to be given to the defendant's testimony and the amount recoverable by him having been within the exclusive

province of the jury. *General F. E. Co. v. Northwestern A. S. Co.*, 70 M 1, 7, 223 P 504.

9363. Verdict in actions for the recovery of specific personal property.

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property (but failure to find all the facts mentioned in this section shall not invalidate the verdict), and may at the same time assess the damages, if they are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

History: En. Sec. 150, p. 73, *Bannack Stat.*; re-en. Sec. 177, p. 167, L. 1867; re-en. Sec. 217, p. 70, *Cod. Stat.* 1871; re-en. Sec. 267, p. 105, L. 1877; re-en. Sec. 267, 1st Div. Rev. Stat. 1879; re-en. Sec. 277, 1st Div. Comp. Stat. 1887; re-en. Sec. 1103, C. Civ. Proc. 1895; re-en. Sec. 6760, Rev. C. 1907; re-en. Sec. 9363, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 627.*

Effect of Failure of Defendants to Demand Return of Property

Held, under this section and section 9406, that where defendant in an action in claim and delivery fails in his answer to demand the return of the property or its value, and the jury's verdict is in favor of plaintiff as to a portion thereof only, failure of the court to incorporate in the judgment a provision in favor of defendant as to the portion eliminated by the jury is not error. *Hayes v. Moffatt*, 83 M 185, 192, 271 P 452.

In an action to recover possession of personal property where plaintiff has secured temporary possession through the auxiliary remedy of claim and delivery, the court is without jurisdiction to award the successful defendant the return of the property if he fails to claim a return in his answer. *Fergus Motor Co. v. Schott et al.*, 95 M 249, 260, 26 P 2d 365.

Effect of Failure to Find All Facts

Under this section, a failure to find all the facts that should be found by a jury does not invalidate the verdict. *Miles v. Edsall*, 7 M 185, 195, 14 P 701; *Wheeler v. Jones*, 16 M 87, 89, 40 P 77.

Operation in General

The verdict, in an action of claim and delivery, should in terms, dispose of all the issues submitted to the jury. *Woods v. Latta*, 35 M 9, 22, 88 P 402; *Hickey v. Breen*, 40 M 368, 372, 106 P 881.

The verdict, in an action of claim and delivery, conforms substantially with the

requirements of this section, where it contains a general finding in favor of the plaintiff, together with a finding of value. *Sullivan v. Girson*, 39 M 274, 276, 102 P 320.

Power to Award Damages

Power of jury, in claim and delivery, to award damages. *Chestnut v. Sales*, 49 M 318, 323, 141 P 986.

This section and section 9406 recognize the right of the defendant in a claim and delivery action, who is awarded a return of the property, to recover damages for the wrongful taking and detention of it. *Hammond v. Thompson*, 54 M 609, 611, 173 P 229.

Verdict Need Not be in the Alternative

In a claim and delivery action the verdict of the jury need not be in the alternative, but the judgment must be in the alternative, as provided by section 9406. The verdict must support the judgment, and both verdict and judgment must conform to the law. *Hynes v. Barnes*, 30 M 25, 26, 75 P 523. See *Hickey v. Breen*, 40 M 368, 374, 106 P 881.

In an action of claim and delivery, a judgment that the party entitled to the possession of the property in controversy shall have it, or, in case the property itself cannot be recovered, then such party to have its value, is proper under this section. *Chestnut v. Sales*, 44 M 534, 547, 121 P 481; *Id.* 49 M 318, 323, 141 P 986.

When Jury Need Not Find Value

The provision of this section that in claim and delivery the jury shall find the value of the property, does not apply where the value is conceded by both parties to be a certain amount. *Dalke v. Pancoast*, 63 M 524, 527, 528, 208 P 589.

References

Wilber v. Wilber, 63 M 587, 588, 207 P 1002; *Hennessy Co. v. Wagner et al.*, 69 M 46, 48, 220 P 101.

9363
143 P.(2d) 902

9364
101 Mont. 438,
443, 447
54 P (2d) 863,
866, 867
102 Mont. 586
59 P (2d) 1179

9364. Directed verdict—when. Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict in favor of the party entitled thereto.

History: En. Sec. 1104, C. Civ. Proc. 1895; re-en. Sec. 6761, Rev. C. 1907; re-en. Sec. 9364, R. C. M. 1921.

9364
155 P. 2d 204

Effect of Motion by Both Parties

Where both parties to an action move for a directed verdict and the unsuccessful one does not request the court to submit any issue to the jury, he cannot complain on appeal that the right of trial by jury was denied him. *Moore et al. v. Crittenden et al.*, 62 M 309, 312, 204 P 1035.

How Viewed on Appeal

In reviewing an order directing a verdict for the defendant, the supreme court will consider only the evidence of the plaintiff, excluding a bare scintilla but including every fair inference which may be drawn from the facts proved, as well as any evidence introduced by defendant which tends to support the plaintiff's case, and if the evidence viewed in the most favorable light tends to establish the case made by plaintiff's pleadings, the order will be reversed. *Johnson v. Chicago etc. Ry. Co.*, 71 M 390, 394, 230 P 52.

Procedure of Effecting Result Immaterial

It is not important in cases of failure of proof, whether the court directs the jury to render a verdict for either party, or discharges the jury and renders judgment; in either case the result is the decision of the court. *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 573, 111 P 152.

Id. It cannot prejudice the rights of the parties, though the formal procedure prescribed by this section is not pursued; the decision is, in any event, that of the court.

What Must be Established to Withdraw Case From Jury and Direct Verdict

No cause should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish. *Cain v. Gold Mountain Min. Co.*, 27 M 529, 535, 71 P 1004; *Michener v. Fransham*, 29 M 240, 246, 74 P 448; *Nord v. Boston & M. C. C. & S. M. Co.*, 30 M 48, 58, 75 P 681; *McCabe v. Montana Central Ry. Co.*, 30 M 323, 337, 76 P 701; *Shaw v. New Year Gold Mines Co.*, 31 M 138, 146, 77 P 515.

A verdict should not be directed unless the case presents "only" questions of law. *Michener v. Fransham*, 29 M 240, 246, 74 P 448.

A verdict cannot be directed for defendant where substantial evidence is introduced prior to the motion for direction which in any way tends to support plaintiff's contention, the weight of such evidence being a question for the jury. *Ball v. Gussenhoven*, 29 M 321, 334, 74 P 871; *Lehane v. Butte Electric Ry. Co.*, 37 M 564, 574, 97 P 1038; *Moran v. Ebey*, 39 M 517, 520, 104 P 522.

Where the evidence of the plaintiff in support of his claim was clear and satisfactory, and that of the defendant consisted of an affidavit which was hearsay, a case was presented in which the court was authorized to direct a verdict in plaintiff's favor. *Bean v. Missoula Lumber Co.*, 40 M 31, 37, 104 P 869.

This section permits a directed verdict when the case presents only questions of law, but it does not, in any way, enlarge the powers of the court as applied to the facts. *Dunseth v. Butte Electric Ry. Co.*, 41 M 14, 25, 108 P 567.

When one side of a case is without proof, the case is stripped of questions of fact, and presents only a question of law for decision by the court. *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 573, 111 P 152; *Moore et al. v. Crittenden et al.*, 62 M 309, 312, 204 P 1035.

Whether there is any substantial evidence in the case, made by the party upon whom the burden rests, is always a question of law; if there is not, the court ought to withdraw the case from the jury and direct judgment. *Escallier v. Great Northern Ry. Co.*, 46 M 238, 252, 127 P 458.

If a case is being tried to a jury, and the evidence is such that reasonable men can come to but one conclusion thereon, the court may, as the case requires, direct a verdict for the party entitled to it, or withdraw the case from the jury and render judgment. *Milwaukee Land Co. v. Ruesink*, 50 M 489, 498, 148 P 396; *Old Ky. Distillery v. Stromberg-Mullins Co.*, 54 M 285, 292, 169 P 734.

The fact that testimony is uncontradicted is not alone sufficient to warrant a directed verdict, where the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men. *First National Bank of Lewistown v. Wilson et al.*, 57 M 384, 188 P 371.

A cause should never be withdrawn from the jury unless the conclusion from the facts follows necessarily, as a matter of

law, that a recovery cannot be had upon any view which can reasonably be drawn from the facts which the evidence tends to establish. *Johnson v. Chicago etc. Ry. Co.*, 71 M 390, 394, 230 P 52.

When Directed Verdict is a Judgment on the Merits

A judgment on a directed verdict may or may not be a judgment on the merits, dependent upon the question decided by the court and the scope of the ruling. *Dunseth v. Butte Electric Ry. Co.*, 41 M 14, 21, 108 P 567.

When Directed Verdict is Error

Where in an action by a bank to recover a balance alleged due from defendant on a check given it some five years prior to the bringing of the action, defendant contending that the check had been paid but after cancellation had never been returned to him, the evidence, conflicting in character, showing inter alia that, though defendant was a large depositor in the bank, the check had never been charged to his account nor a record made of it upon plaintiff's books, the court erred in directing a verdict in favor of plaintiff, the showing made by defendant having been sufficient to sus-

tain a judgment in favor of defendant. *Rosebud State Bank v. Kesi*, 68 M 518, 219 P 814.

Where in an action to recover the purchase price of fire-extinguishing apparatus the defendant interposed a counterclaim for \$10,000 for breach of the contract, the failure of plaintiff to introduce any testimony did not authorize the court to direct a verdict for defendant in that amount for unliquidated damages, the weight to be given to the defendant's testimony and the amount recoverable by him having been within the exclusive province of the jury. *General F. E. Co. v. Northwestern A. S. Co.*, 70 M 1, 7, 223 P 504.

Evidence in an action by a section-hand for personal injuries sustained by reason of a defective pick which had become so dull that instead of breaking a rock it scattered particles thereof causing one of such particles to strike him in the eye, held sufficient to justify a jury in finding that the pick was not in a reasonably safe condition for use, and that therefore the court erred in ordering a directed verdict for defendant railway company. *Johnson v. Chicago etc. Ry. Co.*, 71 M 390, 394, 230 P 52.

CHAPTER 54

TRIAL BY THE COURT

- Section 9365. When and how trial by jury may be waived.
 9366. Upon trial by court, decision to be in writing and filed within twenty days.
 9367. Facts found and conclusions of law must be separately stated—judgment on.
 9368. Findings may be waived, how.
 9369. Want of findings—judgment not reversed.
 9370. Exception for defective findings—particular defect to be pointed out.
 9371. Exceptions to be filed and served on opposite party.
 9372. Trial upon agreed statement of facts.
 9373. Proceedings after determination of issue of law.

9365. When and how trial by jury may be waived. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. By failing to appear at the trial;
2. By written consent, in person or by attorney, filed with the clerk;
3. By oral consent, in open court, entered in the minutes.

History: En. Sec. 152, p. 73, Bannack Stat.; re-en. Sec. 179, p. 168, L. 1867; amd. Sec. 219, p. 70, Cod. Stat. 1871; amd. Sec. 269, p. 106, L. 1877; re-en. Sec. 269, 1st Div. Rev. Stat. 1879; re-en. Sec. 279, 1st Div. Comp. Stat. 1887; re-en. Sec. 1110, C. Civ. Proc. 1895; re-en. Sec. 6762, Rev. C. 1907; re-en. Sec. 9365, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 631.

Operation and Effect

Plaintiff's right to a jury trial in an action for damages for a nuisance could only be waived in one of the modes specified in this section, and was not waived by his failure to demand a trial by jury, or to submit to the court the question as to whether he had a right to a jury trial, or by endeavoring to maintain his claim un-

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89 P.(2d) 1027

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der the theory of the case which the court, by its ruling that it was an action in equity, compelled him to adopt. *Chessman v. Hale*, 31 M 577, 590, 79 P 254, 68 L. R. A. 410. See *Fifty Associates Co. v. Quigley*, 56 M 348, 354, 185 P 155.

The parties may waive a jury, but only in the manner prescribed by law. Con-

solidated *Gold & Sapphire Min. Co. v. Struthers*, 41 M 565, 572, 111 P 152.

References

Cited or applied as section 6762, Revised Codes, in *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 599, 144 P 159; *Shea v. North Butte Min. Co.*, 55 M 522, 535, 179 P 499.

9366. Upon trial by court, decision to be in writing and filed within twenty days. Upon a trial of a question of fact by the court, its decision or findings must be given in writing and filed with the clerk within twenty days after the case is submitted for decision.

History: Secs. 9366-9372, R. C. M. 1921, ap. p. Sec. 180, p. 168, L. 1867; re-en. Sec. 220, p. 71, Cod. Stat. 1871; re-en. Sec. 270, p. 106, L. 1877; re-en. Sec. 270, 1st Div. Rev. Stat. 1879; re-en. Sec. 280, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1111, C. Civ. Proc. 1895; re-en. Sec. 6763, Rev. C. 1907; re-en. Sec. 9366, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 632.

Appeal Requisites

This section and succeeding sections recognize the system of implied findings, which applies to equity as well as law cases, and, under this system, where there are defective findings the judgment appealed from will not be reversed unless requests and exceptions were made and saved. *Haggin v. Saile*, 23 M 375, 380, 59 P 154; *Yellowstone Nat. Bank v. Gagnon*, 25 M 268, 271, 64 P 664.

Directory Provision

This section is directory only, and the court's failure to render a decision within the time limited does not deprive it of jurisdiction to decide at a later date. *Toole v. Weirick*, 39 M 359, 364, 102 P 590.

While it is, under this section and section 9368, incumbent upon the trial court, in every case tried without a jury, to make findings unless they are waived by the parties, yet the party who fails to pursue the course pointed out in sections 9370 and 9371 cannot complain either that the duty enjoined by section 9367 has been omitted, or that the result of an effort to perform it is defective. *Featherman v. Hennessy*, 43 M 310, 314, 115 P 983; *In re Bradfield's Estate*, 69 M 247, 258, 221 P 531; *Hoppin v. Long*, 74 M 558, 576, 241 P 636.

Effect of Filing After Time

Where the trial judge made his findings and conclusions of law within twenty days as required by this section, and before his term of office expired and directed his stenographer to file them but the latter delayed doing so until expiration of that time, they will not be ordered stricken on

that ground. *Hoppin v. Long*, 74 M 558, 576, 241 P 636.

Request That Court Make Findings Necessary

Under this section, a judgment will not be reversed for failure of the trial court to make specific findings where the complaining party did not, at the close of the evidence and argument, make request therefor in writing and cause such request to be entered in the minutes. *Hoskins v. Scottish Union & National Ins. Co.*, 59 M 50, 53, 195 P 837.

Where Refusal to Make Finding Constitutes Error

In a suit for divorce, though tried with a jury, it was the duty of the judge, under this section, to make findings upon all material issues of fact made by the pleadings, whether requested or not. This duty became imperative where timely request was made, and refusal constituted reversible error. *Bordeaux v. Bordeaux*, 43 M 102, 108, 115 P 25.

Id. Section 9370 does not excuse the judge from making findings when timely request is made therefor.

This section requires the district court in an equity case to make findings of fact, whether requested to do so or not. While it is true that error cannot be predicated upon the trial court's refusal to make findings, unless requested under section 9369, the failure of counsel to make the request does not relieve the court of its duty. *Billings Realty Co. v. Big Ditch Co.*, 43 M 251, 262, 115 P 828.

When the record contains requests for findings, and no findings are found in the record, the case must be remanded for further proceedings. *Rogers-Templeton Lumber Co. v. Welch*, 56 M 321, 326, 184 P 838.

References

Cited or applied as section 6763, Revised Codes, in *City of Helena v. Hale*, 38 M 481, 484, 100 P 611; *Farwell v. Farwell*, 47 M 574, 578, 133 P 958; *Security Trust etc. Bank v. Reser*, 58 M 501, 503, 193 P 532.

9367. Facts found and conclusions of law must be separately stated—judgment on. In giving the decision or making its findings, the facts found and the conclusions of law must be separately stated, and judgment must thereupon be entered accordingly.

9367
86 P.(2d) 757

9367
103 P. (2d) 311
105 P. (2d) 663

9367
172 F.(2d) 387

History: Secs. 9366-9372, R. C. M. 1921, ap. p. Sec. 180, p. 168, L. 1867; re-en. Sec. 220, p. 71, Cod. Stat. 1871; re-en. Sec. 270, p. 106, L. 1877; re-en. Sec. 270, 1st Div. Rev. Stat. 1879; re-en. Sec. 280, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1112, C. Civ. Proc. 1895; re-en. Sec. 6764, Rev. C. 1907; re-en. Sec. 9367, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 633.

Operation and Effect

In every case specific findings should be made upon all material issues of fact raised by the pleadings, followed by the appropriate conclusions of law, indicating the judgment to be entered thereon. *Bordeaux v. Bordeaux*, 43 M 102, 108, 115 P 25.

While the clerk of the district court may enter, that is, record a decree, he had no power to sign and enter, thus virtually rendering, one in a suit to foreclose mortgages on real and personal property, adjudging, among other things, that plaintiff recover principal, interest, and attor-

neys' fees, holding defendants personally liable therefor, etc., where the trial judge had done no more than transmit to him his findings of fact and conclusions of law, without any further directions in the matter. *State ex rel. Reser v. District Court*, 53 M 235, 237, 163 P 1149.

Id. Findings of fact and conclusions of law are not the judgment, but merely the foundation for the judgment.

Findings of fact and conclusions of law made by the district court do not constitute its judgment; they are merely the foundation for a judgment. *Galiger et al. v. McNulty et al.*, 80 M 339, 351, 260 P 401.

References

Cited or applied as section 1112, Code of Civil Procedure, in *Quinlan v. Calvert*, 31 M 115, 118, 77 P 428; as section 6764, Revised Codes, in *City of Helena v. Hale*, 38 M 481, 484, 100 P 611; *Featherman v. Hennessy*, 43 M 310, 314, 115 P 983; *Rogers-Templeton Lumber Co. v. Welch*, 56 M 321, 327, 184 P 838; *In re McCue*, 80 M 537, 261 P 341.

9368. Findings may be waived, how. The findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial;
2. By consent in writing, filed with the clerk;
3. By oral consent in open court, entered in the minutes.

History: Secs. 9366-9372, R. C. M. 1921, ap. p. Sec. 180, p. 168, L. 1867; re-en. Sec. 220, p. 71, Cod. Stat. 1871; re-en. Sec. 270, p. 106, L. 1877; re-en. Sec. 270, 1st Div. Rev. Stat. 1879; re-en. Sec. 280, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1113, C. Civ. Proc. 1895; re-en. Sec. 6765, Rev. C. 1907; re-en. Sec. 9368, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 634.

References

Cited or applied as section 1113, Code of Civil Procedure, in *Quinlan v. Calvert*, 31 M 115, 118, 77 P 428; as section 6765, Revised Codes, in *Featherman v. Hennessy*, 43 M 310, 314, 115 P 983; *State ex rel. Case v. Bolles et al.*, 74 M 54, 60, 238 P 586.

9369. Want of findings—judgment not reversed. No judgment shall be reversed (on appeal for want of findings at the instance of any party who, at the close of the evidence and argument in the cause, shall not have requested findings in writing, and had such request entered in the minutes of the court; nor in cases tried by the court shall the judgment be reversed on appeal for defects in the findings, unless exceptions be made in the court below for a defect in the findings or in a finding.

9369
97 P.(2d) 589

9369
103 P. (2d) 311
105 P. (2d) 663

9369
120 P.(2d) 577

9369
177 P.(2d) 871

History: Secs. 9366-9372, R. C. M. 1921, ap. p. Sec. 180, p. 168, L. 1867; re-en. Sec. 220, p. 71, Cod. Stat. 1871; re-en. Sec. 270, p. 106, L. 1877; re-en. Sec. 270, 1st Div. Rev. Stat. 1879; re-en. Sec. 280, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1114, C. Civ. Proc. 1895; re-en. Sec. 6766, Rev. C. 1907; re-en. Sec. 9369, R. C. M. 1921.

Defective Findings—Effect of

It is the duty of the district court to make findings upon a proper request

therefor; if, however, they are so lacking in substance, when given, as to amount to no findings at all, the case is one not of defective findings, but one demanding a reversal of the decree for want of findings to justify it. *City of Helena v. Hale*, 38 M 481, 484, 100 P 611; *Rogers-Templeton Lumber Co. v. Welch*, 56 M 321, 327, 184 P 838.

Though a finding is defective, the decree will not for that reason be reversed, where no exception was made in the trial court because of such defect, and the exception reserved in a bill, if, by any reasonable construction, the finding supports the decree. *Featherman v. Hennessy*, 43 M 310, 314, 115 P 983.

The provisions of this section and the next section, relative to the necessity of taking exceptions to alleged defective findings and their settlement by the trial judge, refer only to findings which are defective in the sense that they omit matters which are necessary or proper to be stated and not to what they contain, and therefore do not apply to a case where the court makes sufficient findings to warrant the relief prayed for but does not make the correct conclusions of law from the facts found. *Louis v. Theatorium Co. et al.*, 69 M 50, 56, 222 P 1062.

Duty of Judge to Make Findings

Notwithstanding this section, the duty of the judge, under section 9366, to make findings, becomes imperative when timely request is made therefor. *Bordeaux v. Bordeaux*, 43 M 102, 108, 115 P 25.

Effect of Failure to Request Findings

A party failing to make a request for findings cannot allege error because of the omission to obey the command of the statute. Every finding necessary to support the judgment will then be implied. *Morse v. Swan*, 2 M 306, 308; *Ingalls v. Austin*, 8 M 333, 335, 20 P 637; *Vreeland v. Edens*, 35 M 413, 423, 89 P 735; *Bordeaux v. Bordeaux*, 43 M 102, 108, 115 P 25; *Farwell v. Farwell*, 47 M 574, 578, 133 P 958; *Croft v. Bain*, 49 M 484, 487, 143 P 960; *State v. Farmers' etc. State Bank*, 85 M 256, 262, 278 P 828.

Where it does not appear from the record that appellant requested findings in writing by a referee, as required by this section, he cannot complain of the referee's failure to make findings. *Gallagher v. Cornelius*, 23 M 27, 29, 57 P 447.

A defective finding of an abandonment of a water right, in an injunction suit, is not ground for reversal on appeal, when the losing party has failed to follow this section. *Haggin v. Saile*, 23 M 375, 379, 59 P 154.

Where appellant claims that the trial court erred in its conclusions of law de-

duced from its findings of fact, but failed to point out the particular defects in the findings made by the court, and to save his exceptions, the supreme court will not examine into that question. *Currie v. Montana Central Ry. Co.*, 24 M 123, 124, 60 P 989.

Id. Under the doctrine of implied findings prevalent in this state, a judgment appealed from will not be reversed unless requests and exceptions were made and saved in accordance with the requirements of the Code of Civil Procedure.

Under the express provision of this section, no judgment can be reversed on appeal for want of a finding at the instance of a party who has not requested the findings, nor in case of defect in the findings, unless exceptions have been made in the trial court as provided in the following section. *Grogan v. Valley Trading Co.*, 30 M 229, 236, 76 P 211.

Under the doctrine of implied findings, a judgment will not be reversed for want of findings, unless the party aggrieved shall have requested them in writing, caused such request to be entered in the minutes of the court, and made and saved exceptions to the action. *Bordeaux v. Bordeaux*, 32 M 159, 163, 80 P 6.

Where no requests in writing were made for special findings in a water right contest, the failure of the court to make them is not under this section, cause for reversal of the judgment. *Gans & Klein Inv. Co. v. Sanford*, 35 M 295, 300, 88 P 955.

In order to render it the imperative duty of the trial court to make special findings, it is incumbent upon a party, at the conclusion of the evidence and argument in the cause, to make request in writing for findings, and to have the request entered in the minutes of the court; if this is not done, a judgment may not be reversed for want of findings. *State ex rel. Quintin v. Edwards*, 40 M 287, 299, 106 P 695.

Where a suit to fix the rights of the parties to the waters of a stream was tried to the court without a jury, the trial court cannot be put in error for failure to make findings not requested. *Joyce v. McDonald*, 51 M 163, 165, 149 P 953.

Claimant under the Workmen's Compensation Act cannot, under this section, predicate error upon the court's failure to make findings on the trial of his cause on appeal from an order of the Industrial Accident Board, in the absence of a request for such findings. *Nicholson v. Roundup Coal Min. Co. et al.*, 79 M 358, 368, 257 P 270.

Under this section, the supreme court may not reverse a judgment in a cause tried without a jury for defects in the findings unless "exceptions be made in

the court below for a defect in the findings." In an action to quiet title the only assignment of error was that the court erred in entering judgment upon the findings made. No exception was taken in the district court, and no defect in the findings was pointed out to the supreme court by appellant. The record on appeal consisted merely of the judgment-roll. Held, that under such circumstances the supreme court will not consider the correctness of the findings made, every presumption being in favor of their propriety. *Leake v. Hooten*, 88 M 70, 72, 289 P 1043.

Under this section, a party who fails to point out particular defects claimed to exist in the findings and save his exceptions will not be heard to complain on appeal that the court erred in its conclusions of law from the findings as made. *Park Saddle Horse Co. v. Cook*, 89 M 414, 419, 300 P 242.

Effect of Statement by the Court That It Would Make Findings

Where the court stated that it would make findings of fact, defendant was relieved from making any request for findings, and the submission of written findings had the effect of requesting findings in writing on the material facts involved. *Quinlan v. Calvert*, 31 M 115, 117, 77 P 428.

Failure of Court to Find After Due Request is Error

The failure of the trial court to find specifically upon a material issue of fact, upon which a finding was properly requested in writing, is ground for reversal, although the judgment would not have been altered had such finding been made, as an affirmance of the judgment would require the bringing of another suit to adjudicate the issue in question. *Estill v. Irvine*, 10 M 509, 514, 26 P 1005.

Not Affected by the Amendment of 9387

This section and the two following sections were not affected in the least by the amendment made to section 9387. *Babcock v. Gregg*, 55 M 317, 324, 178 P 284.

Presumption of Implied Findings

In the absence of a compliance with this section and the following section, a judgment will not be reversed on appeal though the express findings do not support it, since in such case the presumption obtains that the court impliedly found for the prevailing party upon the issues of fact not covered by the express findings. *Yellowstone Nat. Bank v. Gagnon*, 25 M 268, 271, 64 P 664. See also *Slater Brick*

Co. v. Shackleton, 30 M 390, 392, 76 P 805; *Conrow v. Huffine*, 48 M 437, 443, 138 P 1094.

Under the provision of this section, every finding necessary to support the judgment will be presumed, and the failure of the court to make specific findings upon the issues made upon affirmative matter alleged in an answer is not ground for reversal of the judgment, in the absence of a specific showing by way of bill of exceptions reserved upon the court's ruling, and made a part of the record. *Bordeaux v. Bordeaux*, 32 M 159, 163, 80 P 6.

Under the doctrine of implied findings, in an action tried without a jury, it will be presumed, where no findings are made and none were requested, that the court found in favor of the prevailing party upon every issue necessary to support the judgment; and where the court has made findings which are deficient, but the defects were not pointed out, the presumption will be indulged that the court found upon other facts in issue, by supplementing the facts found, sufficient to sustain the judgment; it will not be presumed that the court impliedly found facts inconsistent with its express findings. *Park Saddle Horse Co. v. Cook*, 89 M 414, 419, 300 P 242.

Request to be Entered on the Minutes

The presumption on appeal is that the trial court did not commit error; therefore, where error was assigned on the failure of the court to make findings as requested but the record did not disclose when the request was made or that the request had been entered in the minutes as required by this section, the assignment will not be considered. *Edwards et al. v. Muri*, 73 M 339, 353, 237 P 209.

Time for Request for Findings

Requests for findings made after the filing of the findings and conclusions of law are presented too late, and the want of such findings cannot be made ground for reversal. *Schilling v. Curran*, 30 M 370, 377, 76 P 998.

Under this section, providing that a judgment shall not be reversed for want of findings unless request therefor shall have been made at the close of the argument, where findings were not requested until three days after argument—treating the expiration of the time within which to file the memoranda of authorities as the close of the argument—the court did not err in failing to make findings. *Doering v. Selby et al.*, 75 M 416, 423, 244 P 485.

What is Covered by Findings

This section and the two succeeding sections have to do only with findings which

omit matters necessary or proper to be stated, and relate to exceptions for deficiencies or omissions, and not for what is contained in the findings. *Cobban v. Hecklen*, 27 M 245, 256, 70 P 805.

When a Finding Will be Implied

Where the court's findings are general in terms, any finding not specifically made, but necessary to support the judgment, will be implied. This rule is in effect declared by the statute. *Thorp v. Freed*, 1 M 651, 664; *Ingalls v. Austin*, 8 M 333, 335, 20 P 637; *Haggin v. Saile*, 23 M 375, 380, 59 P 154; *Currie v. Montana Central Ry. Co.*, 24 M 123, 124, 60 P 989; *Slater Brick Co. v. Shackleton*, 30 M 390, 392, 76 P 805; *Bordeaux v. Bordeaux*, 32 M 159, 163, 80 P 6; *Esselstyn v. Holmes*, 42 M 507, 515, 114 P 118; *State ex rel. Case v. Bolles et al.*, 74 M 54, 60, 238 P 586; *Ward v. Ward*, 81 M 587, 600, 264 P 667.

Under the doctrine of implied findings, a particular fact the existence of which is necessary to support the decree will be deemed to have been found by implication, the issues warranting such finding, where the record on appeal does not disclose a request for an express finding as to such fact. *Haggin v. Saile*, 23 M 375, 379, 59 P 154; *Yellowstone Nat. Bank v. Gagnon*, 25 M 268, 271, 64 P 664; *Slater Brick Co. v. Shackleton*, 30 M 390, 393, 76 P 805; *Bordeaux v. Bordeaux*, 32 M 159, 163, 80 P 6; *Hansen v. Larsen*, 44 M 350, 352, 120 P 229.

Under the provisions of this section, the doctrine of implied findings prevails, but that doctrine is not broad enough to cover the contingency where the findings actually made do not support the decree, upon the theory that in such a case it will be presumed that the court made findings supplemental to the express findings sufficient to support the decree. *Crosby v. Robbins*, 56 M 179, 193, 182 P 122.

Id. The doctrine of implied findings is limited to cover the following cases: (a) If no findings are made and none requested, it will be presumed that the court found in favor of the prevailing party upon every issue necessary to support the judgment; and (b) if the court makes findings which are deficient, but the defects are not pointed out, it will be presumed that the court found upon other facts in

issue sufficient, by supplementing the facts found, to sustain the judgment; but it will not be presumed that the court impliedly found facts inconsistent with the express findings.

Id. Where the court expressly found upon every fact necessary to support the judgment, there was no room for the application of the doctrine of implied findings.

The trial court's finding in an action for the foreclosure of a mechanic's lien that the excessive amount stated in the lien filed was due to mistake and was inserted without any intent to injure or defraud defendant, held one of fact, and not a conclusion, and that any further findings necessary to support the judgment in favor of plaintiff must be implied under the doctrine of implied findings. *Eskestrand v. Wunder*, 94 M 57, 64, 20 P 2d 622.

When Not Necessary

If a case is submitted to the court without a jury, and the evidence justifies but one conclusion, formal findings are unnecessary, though a request be made for them in conformity with this section. *Milwaukee Land Co. v. Ruesink*, 50 M 489, 498, 148 P 396.

Id. If a case is submitted to the court without a jury, and the evidence justifies but one conclusion, judgment will not be reversed where a request for findings was disregarded.

When Statute is Not Applicable

This and the next sections, providing that a judgment shall not be reversed for want of findings where no request for them was made, or for defective findings if the particular defect was not pointed out and exception taken, refer to omissions and have no application where findings are attacked for what they declare, i. e., that the evidence does not support them. *Ferguson v. Standley*, 89 M 489, 495, 300 P 245.

References

Cited or applied as section 6766, Revised Codes, in *Billings Realty Co. v. Big Ditch Co.*, 43 M 251, 262, 115 P 828; *Hoskins v. Scottish Union & National Ins. Co.*, 59 M 50, 53, 195 P 837.

9370. Exception for defective findings—particular defect to be pointed out. In cases of exceptions for defective findings, the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specifically and particularly designated;

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97 P.(2d) 589

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103 P. (2d) 311

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112 P.(2d) 1064

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120 P.(2d) 577

and upon failure of the court to remedy the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases.

History: Secs. 9366-9372, R. C. M. 1921, ap. p. Sec. 180, p. 168, L. 1867; re-en. Sec. 220, p. 71, Cod. Stat. 1871; re-en. Sec. 270, p. 106, L. 1877; re-en. Sec. 270, 1st Div. Rev. Stat. 1879; re-en. Sec. 280, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1115, C. Civ. Proc. 1895; re-en. Sec. 6767, Rev. C. 1907; re-en. Sec. 9370, R. C. M. 1921.

Effect of Defects on Appeal

Judgment will not be reversed by the supreme court because of defects in findings made, or in any of them, though exceptions were reserved because of such defects; that court will simply ignore the formal findings, and, upon examination of the whole of the evidence, determine whether the conclusion reached thereon by the trial court was correct. *Milwaukee Land Co. v. Ruesink*, 50 M 489, 498, 148 P 396.

Findings Must be Specifically Excepted To

Where a suit to fix the rights of the parties to the waters of a stream was tried to the court without a jury, the trial court cannot be put in error because of defective findings not specifically excepted to. *Joyce v. McDonald*, 51 M 163, 165, 149 P 953.

Necessity for Settling Bill of Exceptions

Unless objections and exceptions to findings of a referee, for defects therein, are settled in a bill or statement, as required by this section, they are not properly a part of the transcript on appeal, and will not be considered. *Gallagher v. Cornelius*, 23 M 27, 29, 57 P 447.

Time for Correction of Defective Findings

While before entry of judgment the trial court may, under this section, upon timely application, correct defective findings, after its entry, the only remedy of the party who claims that the findings made are not supported by the evidence and desires others substituted and the judgment amended accordingly, is by appeal from the judgment on refusal of the court to amend. *Merhar v. Powers et al.*, 73 M 451, 453, 236 P 1076.

What is an Insufficient Finding

Where affirmative matter is set out in the answer, and a request made for a finding thereon, a finding that all the material allegations of the complaint are true, and directing that judgment be entered for plaintiff, is insufficient. *Quinlan v. Calvert*, 31 M 115, 117, 77 P 428.

When Not Applicable

The provisions of the preceding section and this, relative to the necessity of taking exceptions to alleged defective findings and their settlement by the trial judge, refer only to findings which are defective in the sense that they omit matters which are necessary or proper to be stated and not to what they contain, and therefore do not apply to a case where the court makes sufficient findings to warrant the relief prayed for but does not make the correct conclusions of law from the facts found. *Louis v. Theatorium Co. et al.*, 69 M 50, 56, 222 P 1062.

The preceding section and this, providing that a judgment shall not be reversed for want of findings where no request for them was made, or for defective findings if the particular defect was not pointed out and exception taken, refer to omissions and have no application where findings are attacked for what they declare, i. e., that the evidence does not support them. *Ferguson v. Standley*, 89 M 489, 495, 300 P 245.

References

Cited or applied as section 1115, Code of Civil Procedure, in *Yellowstone Nat. Bank v. Gagnon*, 25 M 268, 271, 64 P 664; *Cobban v. Hecklen*, 27 M 245, 256, 70 P 805; *Grogan v. Valley Trading Co.*, 30 M 229, 236, 76 P 211; *Quinlan v. Calvert*, 31 M 115, 117, 77 P 428; *Gans & Klein Inv. Co. v. Sanford*, 35 M 295, 300, 88 P 955; as section 6767, Revised Codes, in *Featherman v. Hennessy*, 43 M 310, 314, 115 P 983; *Conrow v. Huffine*, 48 M 437, 447, 138 P 1094; *Babcock v. Gregg*, 55 M 317, 324, 178 P 284; *Samuell v. Montana-Holland Colonization Co.*, 69 M 111, 220 P 1093; *Eskestrand v. Wunder*, 94 M 57, 64, 20 P 2d 622; *In re Baxter's Estate*, 94 M 257, 264, 22 P 2d 182.

9371. Exceptions to be filed and served on opposite party. Such exceptions shall be filed in the court and served on the attorney of the adverse party within five days after receiving from or giving to the adverse party a written notice of the filing of the findings.

History: Secs. 9366-9372, R. C. M. 1921, ap. p. Sec. 180, p. 168, L. 1867; re-en. Sec. 200, p. 71, Cod. Stat. 1871; re-en. Sec. 270, p. 106, L. 1877; re-en. Sec. 270, 1st Div. Rev. Stat. 1879; re-en. Sec. 280, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1116, C. Civ. Proc. 1895; re-en. Sec. 6768, Rev. C. 1907; re-en. Sec. 9371, R. C. M. 1921.

Operation and Effect

This section does not declare that a decree cannot be entered until at least five days, or any other period, after the filing of findings of fact and conclusions of law; no interval of time is required to elapse between the making of the finding and conclusion and the entering of

the decree. *Gans & Klein Inv. Co. v. Sanford*, 35 M 295, 301, 88 P 955.

Id. The fact that the findings, conclusions, and decree were made simultaneously does not bar appellant from any right conferred upon him by statute to take his exceptions to any alleged defective findings.

References

Cited or applied as section 1116, Code of Civil Procedure, in *Cobban v. Hecklen*, 27 M 245, 256, 70 P 805; as section 6768, Revised Codes, in *Featherman v. Hennessy*, 43 M 310, 314, 115 P 983; *Conrow v. Huffine*, 48 M 437, 447, 138 P 1094; *Babcock v. Gregg*, 55 M 317, 324, 178 P 284.

9372. Trial upon agreed statement of facts. When any cause is tried and submitted upon a written statement of facts agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts; and in such case no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement.

History: Secs. 9366-9372, R. C. M. 1921, ap. p. Sec. 180, p. 168, L. 1867; re-en. Sec. 220, p. 71, Cod. Stat. 1871; re-en. Sec. 270, p. 106, L. 1877; re-en. Sec. 270, 1st Div. Rev. Stat. 1879; re-en. Sec. 280, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1117, C. Civ. Proc. 1895; re-en. Sec. 6769, Rev. C. 1907; re-en. Sec. 9372, R. C. M. 1921.

Insufficiency of Agreed Statement of Facts Cause for Further Proceedings

On submission of a cause to the court on an agreed statement of facts, the statement must show all the facts necessary to a decision, i. e., ultimate facts presenting only questions of law, and not circumstances which may tend to prove such facts; and if in the judgment of the trial court the statement is not sufficient to enable it to render judgment, it may disregard it and continue the cause for further proceedings. *McCarthy v. Employers' Fire Ins. Co.*, 97 M 540, 553, 37 P 2d 579.

Operation and Effect

In a cause decided by the district court upon an agreed statement of facts, the office of the supreme court on appeal goes no further than to ascertain and determine whether the trial court drew the correct inference from the facts stipulated and rendered the proper judgment. *Read v. Lewis and Clark County*, 55 M 412, 418, 178 P 177.

Id. Where a statement of facts has been voluntarily made, agreed to, and sub-

mitted to the trial court, it is binding upon the parties and the court.

A conclusion of law contradictory of the agreed statement is sufficient to vitiate the judgment. *Birney v. Warren*, 28 M 64, 69, 72 P 293.

An agreed statement of facts, upon which a case is tried, has the effect of a finding of facts. *Hale v. County of Jefferson*, 39 M 137, 141, 101 P 973.

An agreed statement of facts has the force of a special verdict or finding of fact, and becomes a part of the judgment roll under section 9409. *Conklin v. Cullen*, 25 M 214, 217, 64 P 502. See also *In re Klein's Estate*, 35 M 185, 203, 88 P 798.

The purpose of a stipulation that a certain thing is a fact is to relieve the parties from the necessity of introducing evidence as to it; if such fact is material, the court is, as to it, bound by the stipulation; it is equivalent to a special finding. *Spaulding v. Stone*, 46 M 483, 487, 129 P 327.

Where a cause is tried and submitted on an agreed statement of facts, the statement becomes the court's findings of fact and has the effect of a special verdict, and in pronouncing judgment the court is bound by the stipulation of the parties. *McCarthy v. Employers' Fire Ins. Co.*, 97 M 540, 553, 37 P 2d 579.

An agreed statement of facts upon which a cause was submitted has the effect of findings of fact on which the judgment is pronounced, and on appeal the

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supreme court will go no further than to ascertain whether the trial court drew the correct inferences from the stipulated facts; a conclusion contrary thereto vitiates the judgment. *Warren v. Chouteau County*, 82 M 115, 121, 265 P 676.

9373. Proceedings after determination of issue of law. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section 9322, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account, or the proof of any fact, be necessary to enable the court to complete the judgment, a reference may be ordered, as in that section provided.

History: En. Sec. 272, p. 107, L. 1877; re-en. Sec. 272, 1st Div. Rev. Stat. 1879; re-en. Sec. 282, 1st Div. Comp. Stat. 1887; re-en. Sec. 1118, C. Civ. Proc. 1895; re-en. Sec. 6770, Rev. C. 1907; re-en. Sec. 9373, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 636.

References

Cited or applied as section 1117, Code of Civil Procedure, in *Quinlan v. Calvert*, 31 M 115, 119, 77 P 428.

CHAPTER 55

REFERENCE AND TRIAL BY REFEREES

- Section 9374. Reference ordered upon agreement of parties, in what cases.
 9375. Reference ordered on motion, in what cases.
 9376. Number of referees, qualifications, etc.
 9377. Oath of referee.
 9378. Witnesses may be subpoenaed.
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 9380. Proceedings regulated where there are several referees.
 9381. Either party may object to referee—grounds of objection.
 9382. Objections—how disposed of.
 9383. Referee must report findings and conclusions in writing.
 9384. Finding must stand as finding of court.
 9385. Exceptions—findings have effect of special verdict, when.

9374. Reference ordered upon agreement of parties, in what cases. A reference may be ordered upon the agreement of the parties, filed with the clerk or entered in the minutes:

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1. To try any or all of the issues in an action or proceeding, whether of fact or law, and to report a finding and judgment thereon;

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

History: En. Sec. 182, p. 169, L. 1867; re-en. Sec. 222, p. 72, Cod. Stat. 1871; re-en. Sec. 273, p. 108, L. 1877; re-en. Sec. 273, 1st Div. Rev. Stat. 1879; re-en. Sec. 283, 1st Div. Comp. Stat. 1887; amd. Sec. 1130, C. Civ. Proc. 1895; re-en. Sec. 6771, Rev. C. 1907; re-en. Sec. 9374, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 638.

Operation and Effect

Where under an order of reference, a referee has no power to decide any of the issues made by the pleadings, his findings are not conclusive on the court, but advisory merely, and being advisory it is not necessary for the court to make a formal order setting aside the findings of the referee before proceeding to make findings of its own. *Murphy v. Patterson*, 24 M 575, 582, 63 P 375.

A writ of supervisory control will not be granted to compel the vacation of an or-

der of reference made by the district court, in an action on a contract in which plaintiff claimed to be entitled to certain commissions, and alleged that an examination of a long and complicated account was necessary to a determination of the cause, before it had ascertained whether in fact a contract existed between the parties, where the return showed that plaintiff had already examined the books of the relator company at its invitation, that some of the books and accounts had been produced, though under protest, and examined before the referee, and where no claim was made that books or accounts not pertinent or material to the inquiry were required to be produced. *State ex rel. Butte L. & I. Co. v. District Court*, 37 M 226, 229, 95 P 843.

References

In re *McCue*, 80 M 537, 541, 261 P 341.

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9375. Reference ordered on motion, in what cases. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side, in which the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

4. When it is necessary for the information of the court in a special proceeding.

History: En. Sec. 157, p. 74, Bannack Stat.; amd. Sec. 183, p. 169, L. 1867; amd. Sec. 223, p. 72, Cod. Stat. 1871; re-en. Sec. 274, p. 108, L. 1877; re-en. Sec. 274, 1st Div. Rev. Stat. 1879; re-en. Sec. 283, 1st Div. Comp. Stat. 1887; amd. Sec. 1131, C. Civ. Proc. 1895; re-en. Sec. 6772, Rev. C. 1907; re-en. Sec. 9375, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 639.

References

Cited or applied as section 223, p. 72, Codified Statutes 1871, in *Fabion v. Collins*, 2 M 510; as section 1131, Code of Civil Procedure, in *Murphy v. Patterson*, 24 M 575, 581, 63 P 375; *State ex rel. Butte Land & Investment Co. v. District Court*, 37 M 226, 229, 95 P 843.

9376. Number of referees, qualifications, etc. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection.

History: En. Sec. 159, p. 74, Bannack Stat.; amd. Sec. 184, p. 169, L. 1867; re-en. Sec. 224, p. 72, Cod. Stat. 1871; re-en. Sec. 275, p. 108, L. 1877; re-en. Sec. 275, 1st Div. Rev. Stat. 1879; re-en. Sec. 285, 1st Div. Comp. Stat. 1887; re-en. Sec. 1132, C. Civ. Proc. 1895; re-en. Sec. 6773, Rev.

C. 1907; re-en. Sec. 9376, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 640.

References

Cited or applied as section 224, p. 72, Codified Statutes 1871, in *Fabion v. Collins*, 2 M 510.

9377. Oath of referee. Every referee, before acting as such, shall take and subscribe an oath (or affirmation), before some authorized officer, which shall be filed with the clerk of the court by which he is appointed, that he will honestly, impartially, and faithfully perform the duties of referee in the action or matter referred to him, as required by law, to the best of his knowledge and ability.

History: En. Sec. 224, p. 72, Cod. Stat. 1871; re-en. Sec. 275, p. 108, L. 1877; re-en. Sec. 275, 1st Div. Rev. Stat. 1879; re-en. Sec. 285, 1st Div. Comp. Stat. 1887; re-en.

Sec. 1133, C. Civ. Proc. 1895; re-en. Sec. 6774, Rev. C. 1907; re-en. Sec. 9377, R. C. M. 1921.

9378. Witnesses may be subpoenaed. A witness may be subpoenaed to attend before a referee to testify, and, in a proper case, to bring with him a book, document, or other paper, as upon a trial by the court.

History: En. Sec. 1134, C. Civ. Proc. 1895; re-en. Sec. 6775, Rev. C. 1907; re-en. Sec. 9378, R. C. M. 1921.

9377
ref. to
L. 39 c. 185
sec. 4 p. 476

9378
ref. to
L. 39 c. 185
sec. 4 p. 476

9379. Powers of referee on the trial. The trial by a referee of an issue of fact, or of an issue of law, may be brought on for hearing upon notice of the referee and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner as where the trial is by the court without a jury. The referee exercises, upon such a trial, the same power as the court to grant adjournments, to preserve order, and punish the violation thereof. Upon the trial of an issue of fact, the referee exercises also the same power as the court, to allow amendments to the summons or to the pleadings; to compel the attendance of witnesses by attachment; and to punish a witness for contempt of court, for non-attendance, or refusal to be sworn, or to testify. Upon the trial of an issue of law, the referee exercises the same power as the court, to permit a party in fault to plead anew or amend; to direct the action to be divided into two or more actions; to award costs, and otherwise to dispose of any questions arising upon the decision of the issue referred to him. The powers conferred by this section are exercised in like manner and upon like terms as similar powers are exercised by the court upon a trial.

9379
ref. to
L. 39 c. 185
sec. 4 p. 476

History: En. Sec. 1135, C. Civ. Proc. 1895; re-en. Sec. 6776, Rev. C. 1907; re-en. Sec. 9379, R. C. M. 1921.

9380. Proceedings regulated where there are several referees. Where the reference is to more than one referee, all must meet together and hear all the allegations and proofs of the parties; but a majority may appoint a time and place for the trial, decide any question that arises upon the trial, sign a report, or settle a case. Either of them may administer an oath to a witness; and a majority of those present, at a time and place appointed for the trial, may adjourn the trial to a future day.

9380
ref. to
L. 39 c. 185
sec. 4 p. 476

History: En. Sec. 1136, C. Civ. Proc. 1895; re-en. Sec. 6777, Rev. C. 1907; re-en. Sec. 9380, R. C. M. 1921.

9381. Either party may object to referee—grounds of objection. Either party may object to the appointment of any person as referee, on the same grounds that he might object to him as a trial juror, as provided in section 9344 of this code.

History: Ap. p. Sec. 185, p. 169, L. 1867; re-en. Sec. 225, p. 72, Cod. Stat. 1871; re-en. Sec. 276, p. 109, L. 1877; re-en. Sec. 276, 1st Div. Rev. Stat. 1879; re-en. Sec. 286, 1st Div. Comp. Stat. 1887; en. Sec. 1137, C. Civ. Proc. 1895; re-en. Sec. 6778, Rev. C. 1907; re-en. Sec. 9381, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 641.

9382. Objections—how disposed of. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

9382
ref. to
L. 39 c. 185
sec. 4 p. 476

History: En. Sec. 186, p. 170, L. 1867; re-en. Sec. 226, p. 73, Cod. Stat. 1871; re-en. Sec. 277, p. 109, L. 1877; re-en. Sec. 277, 1st Div. Rev. Stat. 1879; re-en. Sec. 287, 1st Div. Comp. Stat. 1887; re-en. Sec. 1138, C. Civ. Proc. 1895; re-en. Sec. 6779, Rev. C. 1907; re-en. Sec. 9382, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 642.

9383. Referee must report findings and conclusions in writing. The referees must report their findings in writing to the court within ten days after the testimony is closed, or such other time as the court may allow, and the facts and the conclusions of law must be separately stated therein.

History: En. Sec. 187, p. 170, L. 1867; re-en. Sec. 227, p. 73, Cod. Stat. 1871; re-en. Sec. 278, p. 109, L. 1877; re-en. Sec. 278, 1st Div. Rev. Stat. 1879; re-en. Sec. 288, 1st Div. Comp. Stat. 1887; amd. Sec. 1139, C. Civ. Proc. 1895; re-en. Sec. 6780, Rev. C. 1907; re-en. Sec. 9383, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 643.

Operation and Effect

This section being directory only, the failure of a referee to file his report within ten days after the closing of the testimony, as therein provided, does not invalidate the report or the judgment rendered thereon. *Emerson v. Bigler*, 21 M 200, 203, 53 P 621.

9384. Finding must stand as finding of court. The finding of the referee upon the issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.

History: En. Sec. 187, p. 170, L. 1867; re-en. Sec. 227, p. 73, Cod. Stat. 1871; re-en. Sec. 278, p. 109, L. 1877; re-en. Sec. 278, 1st Div. Rev. Stat. 1879; re-en. Sec. 288, 1st Div. Comp. Stat. 1887; amd. Sec. 1139, C. Civ. Proc. 1895; re-en. Sec. 6781, Rev. C. 1907; re-en. Sec. 9384, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 644.

Operation and Effect

The terms of an order of reference determine the scope of the referee's authority, and a referee who is appointed to

state an account between parties has no authority to determine the whole issue; the court can disregard the findings of the referee, allowing or disallowing specific items in the account. *Bradshaw v. Morse*, 20 M 214, 218, 50 P 554. See also *Murphy v. Patterson*, 24 M 575, 581, 583, 63 P 375.

References

Cited or applied as section 1140, Code of Civil Procedure, in *State ex rel. Nissler v. Donlan*, 32 M 256, 267, 80 P 244.

9385. Exceptions—findings have effect of special verdict, when. The finding of the referee may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the findings reported have the effect of a special verdict.

History: En. Sec. 187, p. 170, L. 1867; re-en. Sec. 227, p. 73, Cod. Stat. 1871; re-en. Sec. 278, p. 109, L. 1877; re-en. Sec. 278, 1st Div. Rev. Stat. 1879; re-en. Sec. 288, 1st Div. Comp. Stat. 1887; amd. Sec. 1139, C. Civ. Proc. 1895; re-en. Sec. 6782, Rev. C. 1907; re-en. Sec. 9385, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 645.

Operation and Effect

Where the reference provided that a referee should take testimony, and state a

complete account between the parties, but did not authorize him to hear and to determine the issues, his findings cannot be given the effect of a special verdict, since the force to be given to the report of a referee depends not only upon the nature of the action, but upon the terms of the order of reference. *Murphy v. Patterson*, 24 M 575, 583, 63 P 375.

References

Miles v. Miles, 86 M 19, 282 P 37.

CHAPTER 56

PROVISIONS RELATING TO TRIALS IN GENERAL—EXCEPTIONS

- Section 9386. Exception defined—time when taken, etc.
 9387. What deemed excepted to.
 9388. Exceptions and objections.
 9389. Exceptions signed by a judge and filed with the clerk.
 9390. Exceptions not presented at time of ruling—notice to adverse party, how settled upon, etc.
 9391. Exceptions after judgment, etc.
 9392. When exception is refused—application to supreme court to prove the same, etc.
 9393. Provisions concerning settlement—proceedings when judge ceases to hold office.
 9394. Bills of exception may contain all material rulings.

9386. Exception defined—time when taken, etc. An exception is an objection upon a matter of law to a decision made, either before or after

judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as is provided in the next section.

History: Ap. p. Sec. 164, p. 75, Ban-nack Stat.; re-en. Sec. 188, p. 170, L. 1867; re-en. Sec. 228, p. 73, Cod. Stat. 1871; re-en. Sec. 279, p. 110, L. 1877; re-en. Sec. 279, 1st Div. Rev. Stat. 1879; re-en. Sec. 289, 1st Div. Comp. Stat. 1887; en. Sec. 1150, C. Civ. Proc. 1895; re-en. Sec. 6783, Rev. C. 1907; re-en. Sec. 9386, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 646.

Operation and Effect

An order refusing to modify a prior order is a decision upon a matter of law to which an exception may be taken. *Beach v. Spokane Ranch & Water Co.*, 21 M 7, 9, 52 P 560.

9387. What deemed excepted to. Every order, ruling, and decision of every kind and nature made and entered by any court, judge, or referee, and every verdict, finding, decree, or judgment of a court is deemed excepted to, and it shall not be necessary to ask for or note an exception, but nothing herein contained shall be deemed to dispense with the necessity of making objections, nor to dispense with the preparation of a bill of exceptions in all cases in which the same is required by law, nor shall this act dispense with the making and settlement of exceptions to defective findings as required by sections 9370 and 9371 of this code. This act shall not affect the procedure for the settlement of instructions, save that no exception need be noted to any instruction, nor to any order of the court relating thereto.

History: Ap. p. Sec. 280, p. 110, L. 1877; re-en. Sec. 280, 1st Div. Rev. Stat. 1879; re-en. Sec. 290, 1st Div. Comp. Stat. 1887; amd. Sec. 1151, C. Civ. Proc. 1895; re-en. Sec. 6784, Rev. C. 1907; amd. Sec. 1, Ch. 135, L. 1915; amd. Sec. 1, Ch. 225, L. 1921; re-en. Sec. 9387, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 647.

Operation and Effect

Though an order denying a motion for continuance is deemed excepted to by operation of law, the motion therefor and the affidavit in support thereof, when found in a judgment-roll, will not be considered, unless incorporated in a bill of exceptions. *Barber v. Briscoe*, 8 M 214, 224, 19 P 589.

This section, except as therein provided, dispenses with the necessity of formal exceptions in civil cases, but has no application to criminal cases. The purpose of the statute was to enlarge the application of section 9387, which relates to exceptions in civil cases only. *State v. Lewis*, 52 M 495, 501, 159 P 415.

This statute was not designed to modify the provision of subdivision 5 of section 9349, so as to do away with the

Errors alleged to have been committed by the trial court in excluding offered testimony will not be considered on appeal, unless proper exceptions were reserved to the rulings or decisions complained of. *Borden v. Lynch*, 34 M 503, 508, 87 P 609.

References

Cited or applied as section 1150, Code of Civil Procedure, in *Conklin v. Cullen*, 25 M 214, 216, 64 P 502; *Lane v. Bailey*, 29 M 548, 556, 75 P 191; *Girard v. McClernan*, 39 M 523, 527, 105 P 224; *State ex rel. Pereira v. District Court*, 83 M 349, 351, 272 P 242.

necessity of identifying or authenticating, in the transcript on appeal, an instruction which was refused. *Roberts v. Sinnott*, 54 M 114, 124, 169 P 49.

The provisions of this statute do not affect sections 9369, 9370, or 9371. *Babcock v. Gregg*, 55 M 317, 324, 178 P 284.

The rule declared by this section, inter alia, providing that every ruling or decision of the district court on the admissibility of evidence shall be deemed excepted to, has reference to civil, not criminal, cases. *State v. Prouty*, 60 M 310, 314, 60 M 310.

Under this section providing that every order, ruling or decision of the district court shall be deemed excepted to and it shall not be necessary to ask for or note an exception, an objection and exception to an order granting a motion for a directed verdict were not necessary to warrant review of the order on appeal. *General F. E. Co. v. Northwestern A. S. Co.*, 70 M 1, 6, 223 P 504.

Where a party objects to the introduction of evidence the trial court should rule thereon and the ruling should go into the record; where it does not but reserves its

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ruling, or admits it subject to the objection, and thereafter, in a cause tried without a jury, considers it in arriving at its conclusion, it will be held to have impliedly overruled the objection, which ruling, under this section, is deemed excepted to, and is subject to review on appeal. *Gilcrest et al. v. Bowen et al.*, 95 M 44, 53, 24 P 2d 141.

References

Cited or applied as section 1151, Code of Civil Procedure, before amendment, in *Emerson v. Eldorado Ditch Co.*, 18 M 247, 250, 44 P 969; *Parrin v. Montana Central Ry. Co.*, 22 M 290, 292, 56 P 315; *Wastl v. Montana Union Ry. Co.*, 24 M 159, 174, 61 P 9; *State v. Lucey*, 24 M 295, 305, 61

P 994; *Carr, Ryder & Adams Co. v. Closser*, 27 M 94, 98, 69 P 560; *Lane v. Bailey*, 29 M 548, 556, 75 P 191; *Butte Mining & Milling Co. v. Kenyon*, 30 M 314, 321, 76 P 696, 77 P 319; *Chessman v. Hale*, 31 M 577, 593, 79 P 254; *Borden v. Lynch*, 34 M 503, 507, 87 P 609; *Passavant v. Arnold*, 34 M 513, 515, 87 P 905; as section 6784, Revised Codes, before amendment, in *Mettler v. Adamson*, 38 M 198, 200, 99 P 441; *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 246, 99 P 837; *Bordeaux v. Bordeaux*, 43 M 102, 106, 115 P 25; *Conrow v. Huffine*, 48 M 437, 447, 138 P 1094; *De Sandro v. Missoula Light & Water Co.*, 52 M 333, 337, 157 P 641; *Laird v. Berthelote et al.*, 63 M 122, 136, 206 P 445; *McAboy v. Junk*, 68 M 198, 204, 216 P 1111.

9388. Exceptions and objections. In the cases mentioned in the preceding section, no exception need be taken, but the grounds of the objection shall be particularly stated. The objection must be stated with so much of the evidence taken from the stenographer's notes, or so much other matter as is necessary to explain it, and no more. Documents on file in the action or proceedings may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made when necessary to present the objection.

History: Ap. p. Sec. 166, p. 76, *Bannack Stat.*; re-en. Sec. 230, p. 74, *Cod. Stat.* 1871; re-en. Sec. 282, p. 111, *L.* 1877; re-en. Sec. 282, 1st Div. Rev. Stat. 1879; re-en. Sec. 292, 1st Div. Comp. Stat. 1887; amd. Sec. 1152, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 92, *L.* 1905; re-en. Sec. 6785, Rev. C. 1907; amd. Sec. 2, Ch. 225, *L.* 1921; re-en. Sec. 9388, R. C. M. 1921. *Cal. C. Civ. Proc.* Sec. 648.

Operation and Effect

This statute has no application to bills or statements settled prior to its enactment. *Martin v. Corseadden*, 34 M 308, 316, 86 P 33.

It is no longer necessary for a party to specify in his notice of intention to move for a new trial the particulars in which the evidence is claimed to be insufficient to justify the verdict. *Ettien v. Drum*, 35 M 81, 88 P 659.

A bill of exceptions is not required to contain any specifications of error. *Milwaukee Gold Extraction Co. v. Gordon*, 37 M 209, 223, 95 P 995.

In a condemnation proceeding, the court having decided which side shall open and close on the question of damages, a party dissatisfied with the action of the court should make timely and appropriate objection, stating the grounds thereof, as required by this section. *Interstate Power Co. v. Anaconda Copper Min. Co.*, 52 M 509, 512, 159 P 408.

References

Cited or applied as section 1152, Code of Civil Procedure, before amendment, in *Emerson v. Eldorado Ditch Co.*, 18 M 247, 250, 44 P 969; *Parrin v. Montana Central Ry. Co.*, 22 M 290, 292, 56 P 315; *State ex rel. Heinze v. District Court*, 28 M 227, 236, 72 P 613; *State ex rel. Power v. Napton*, 28 M 336, 339, 72 P 676; *Ball v. Gusenhoven*, 29 M 321, 332, 74 P 871; *Lane v. Bailey*, 29 M 548, 556, 75 P 191; *Bond v. Hurd*, 31 M 314, 316, 78 P 579; *Gillies v. Clarke Fork Coal Min. Co.*, 32 M 320, 324, 80 P 370; *Pirrie v. Moule*, 33 M 1, 6, 81 P 390; as section 6785, Revised Codes, in *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 247, 99 P 837; *Lesage v. Largey Lumber Co.*, 99 M 372, 43 P 2d 896.

9389. Exceptions signed by a judge and filed with the clerk. A bill containing an exception to any decision may be presented to the court or judge for settlement, at the time the decision is made, and after having been settled shall be signed by the judge and filed by the clerk; but this shall not delay the trial or hearing. When the decision excepted to is made

by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to, and settled and signed by, such tribunal or officer.

History: En. Sec. 1154, C. Civ. Proc. 1895; re-en. Sec. 6787, Rev. C. 1907; re-en. Sec. 9389, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 649.

Permissive Statute

This section, authorizing settlement of a bill of exceptions at the time of an adverse decision, is permissive, not exclusive, and if the right is not availed of at that time by the party against whom the decision is made, it may be exercised under the next section within fifteen days after entry of judgment. *Apple v. Edwards et al.*, 92 M 524, 534, 16 P 2d 700.

Scope of Section

This section regulates the settlement of bills of exception presented at the time the decision was made; it dispenses with notice to the adversary party; but in all other cases, the procedure prescribed by section 9390 control, and notice is essential. *State ex rel. Pilot Butte Min. Co. v. District Court*, 50 M 585, 589, 148 P 383.

When Motion to Strike Is Too Late

Where a bill of exceptions is prepared and settled under the provisions of this

section and the following section, it is part of the judgment-roll described in section 9409, and when a copy thereof, certified as correct, is included in the transcript filed on appeal, it should not be stricken from the record on the ground that it was not served or filed in time. *Kranich v. Helena Cqnsolidated Water Co.*, 26 M 379, 380, 68 P 408, 71 P 672. See also *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 236, 99 P 837.

References

Cited or applied as section 1154, Code of Civil Procedure, in *Ogle v. Potter*, 24 M 501, 504, 62 P 920; *Wyman v. Jensen*, 26 M 227, 240, 67 P 114; *Kranich v. Helena Consolidated Water Co.*, 26 M 379, 380, 68 P 408, 71 P 672; as section 6787, Revised Codes, in *Ferrat v. Adamson*, 53 M 172, 177, 163 P 112; *Harrison v. Riddell et al.*, 64 M 466, 210 P 460; *O'Donnell v. City of Butte*, 72 M 449, 453, 235 P 707; *Watts v. Billings Bench Water Assn.*, 78 M 199, 205 et seq., 253 P 260; *Russell v. Sunburst Refining Co.*, 83 M 452, 462, 272 P 998; *In re Baxter's Estate*, 94 M 257, 262 et seq., 22 P 2d 182.

9390. Exceptions not presented at time of ruling—notice to adverse party, how settled upon, etc. Whenever a motion for a new trial is pending, no bill of exceptions need be prepared or settled until the decision of the court upon motion for a new trial has been rendered, but a bill shall be prepared and settled in the same manner and within the same length of time after the decision on the motion for a new trial as is hereinafter provided for the making and settling of bills of exceptions. Except as above provided, the party appealing from a final judgment, if he desires to present on appeal the proceedings had at the trial, must, within fifteen days after the entry of judgment if the action was tried with a jury, or after receiving notice of the entry of judgment if the action was tried without a jury, or within such further time as the court or judge thereof may allow, not to exceed sixty days, except upon affidavit showing the necessity for further time, prepare and file with the clerk of the court and serve upon the adverse party a bill of exceptions, containing all of the proceedings had at the trial upon which he relies, in which bill the evidence shall, unless otherwise prescribed by a rule of the supreme court, be stated in narrative form, except that the particular portion of the record showing objections to the admission or rejection of testimony upon which the party preparing the bill expects to rely, shall be set out verbatim. Within ten days after such service, the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to

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the clerk of the court or judge. When received by the clerk, he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and either party desire the papers to be forwarded to the judge, the clerk must, upon notice in writing of either party, immediately forward them by mail, or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received, the judge must designate the time and place at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill. If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with amendments, if any, to the judge or referee, for settlement without notice to the adverse party. It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter, so that the objections may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

History: En. Sec. 1155, C. Civ. Proc. 1895; re-en. Sec. 6788, Rev. C. 1907; amd. Sec. 3, Ch. 225, L. 1921; re-en. Sec. 9390, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 650.

NOTE.—See *Girard v. McClernan*, 39 M 523, 105 P 224, for history of earlier acts.

Duty of Called in Judge to Settle Bill of Exceptions

Where a judge from another district was called in between the time a motion for new trial was made and the hearing, he was the only one who was in position to certify to what was before him and what he considered as the basis of his ruling thereon, i. e., he was the "judge who tried or heard the case," within the meaning of this section, providing for the settlement of bills of exceptions; and a motion to strike the bill from the files because not settled and signed by a proper judge does not lie. *Russell v. Sunburst Refining Co.*, 83 M 452, 461 et seq., 272 P 998; *Pincus v. Davis*, 95 M 375, 381, 26 P 2d 986.

Duty of Judge to Settle Not the Duty of Court

It is the duty of the judge to settle statements and bills of exceptions, and they must be presented to him for this purpose, and not to the court as such. *State, ex rel. Stromberg-Mullins Co. v. District Court*, 28 M 123, 127, 72 P 412.

Effect of Failure to Have Settled Bill of Exceptions, on Appeal

On appeal from a final judgment the evidence and proceedings had at the trial can only be reviewed if incorporated in a

bill of exceptions settled as provided in this section, and therefore where there was no such bill and the evidence and proceedings were simply certified by the judge and clerk as provided in section 9745 on appeal from an order, review thereof cannot be had. In *re Bitter Root Irr. Dist.*, 67 M 436, 441, 218 P 945.

Under this section, the appellant from a final judgment desiring to have the proceedings at the trial reviewed, must have them incorporated in a bill of exceptions; if not so incorporated, the appeal may be dismissed. *Atkinson v. Roosevelt County et al.*, 71 M 165, 175, 227 P 811.

Under this section, where appellant from a final judgment desires to present for review the proceedings had at the trial, he must have the same incorporated in a bill of exceptions and settled as therein provided; in the absence of a bill so settled, matter containing a recital of the proceedings, including the testimony introduced, incorporated in the record cannot be considered on appeal. *Putnam v. Doney*, 78 M 190, 191, 253 P 270; *Bohon v. Bitter Root Sales Co. et al.*, 82 M 260, 262, 266 P 645; *Bond Lumber Co. v. Timmons et al.*, 82 M 497, 500, 267 P 802.

Where on appeal from the judgment in a mortgage foreclosure suit the evidence was stricken from the record on motion of respondent on the ground that it had not been incorporated in a bill of exceptions, the supreme court is limited to a review of the remaining judgment-roll; therefore objections to the trial court's findings and conclusions of law may not

be considered by it, and the evidence must be presumed sufficient to warrant the judgment. *Thelen v. Vogel et al.*, 86 M 33, 35, 281 P 753.

Effect of Failure to Present Bill Within Time Limited by Statute

Where a proposed bill of exceptions and amendments proposed by the adverse party, but not adopted, were neither presented to the judge within ten days after the proposed amendments were served, nor delivered to the clerk for him within that time, the court properly refused to settle the bill, the time not having been extended, and no excuse for the delay being shown. *Burns v. Napton*, 26 M 360, 362, 68 P 17. See also *Wright v. Matthews*, 28 M 442, 445, 72 P 820; *State ex rel City of Walkerville v. District Court*, 29 M 176, 178, 74 P 414; *Girard v. McClerman*, 39 M 523, 525, 105 P 224.

Where a party, who seeks the settlement of a bill of exceptions, fails to present the bill, with amendments, which are objected to, to the judge, within ten days after service of the amendments and upon five days' notice to the adverse party, the defect is not cured by the withdrawal of his objections to the amendments, after the lapse of ten days and on the day designated in the notice of settlement. *Freeman v. Weare*, 42 M 472, 474, 113 P 466.

Where defendant did not present his bill of exceptions to the trial judge for settlement until 172 days after plaintiff had served upon him its proposed amendments, in violation of this section, which requires presentment of the bill within ten days after service of the proposed amendments, the record being barren of any excuse for the delay, the supreme court will disregard the bill together with all the questions sought to be presented for review thereby. *Commercial Nat. Bank v. Thrasher*, 61 M 242, 243, 201 P 1009.

Under this section, held that where a bill of exceptions appears on the face of the record, to have been filed after the time allowed by law, the record must affirmatively show that additional time was allowed upon the filing of an affidavit disclosing necessity for further time; in the absence of such a showing the questions sought to be presented for review by the bill cannot be considered. *O'Donnell v. City of Butte*, 72 M 449, 451 et seq., 235 P 707.

Id. Timely presentation, settlement and signing a bill of exceptions is a jurisdictional question; on the expiration of the time allowed by statute (whether original or extended) the court loses jurisdiction to settle or sign the bill, and if settled or signed thereafter is a nullity and cannot be

considered on appeal even though opposing counsel should agree to its consideration.

Id. That a bill of exceptions was presented, settled and signed within the time provided by statute must be made to appear affirmatively in the record and may not be supplied by the presumption that the trial court in settling and signing it was acting in the lawful exercise of its jurisdiction.

Effect of Naming Statement in Certain Manner Immaterial

The fact that a statement on motion for a new trial, in an action for personal injuries, was denominated, by the moving party, "a statement of the case and bill of exceptions," did not render it objectionable; it being immaterial what a paper is called. *Friel v. Kimberly-Montana Gold Min. Co.*, 34 M 54, 59, 85 P 734.

Extending Time for Preparation of Bill Prior to Entry of Judgment—Motion to Strike From Record Denied

Under the liberal construction of this section, relative to the settlement of bills of exceptions heretofore adopted, a motion to strike a bill from the record because it was not filed within time, based on the ground that while the judgment was not entered until the 15th of a certain month, an order made on the 5th of the same month extending the time within which to prepare, serve and file the bill for sixty days in addition to the time allowed by law was premature and therefore inoperative, will be denied. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Limits to the Elimination of Redundant Matter

While all redundant and useless matter should be eliminated from a proposed bill of exceptions, it should not be so far abbreviated as to omit facts without a presentation of which the correctness of the action of the trial court cannot be determined. *State ex rel. Pilot Butte Min. Co. v. District Court*, 50 M 585, 588, 148 P 383.

No Jurisdiction to Settle Where Motion for a New Trial Does Not Lie

The court has no jurisdiction to settle a statement and bill of exceptions in support of a motion for a new trial in a proceeding where such motion does not lie. *State ex rel. Heinze v. District Court*, 28 M 227, 236, 72 P 613.

Operation in General

A party complies with the law if, within ten days after the amendments to a bill of exceptions are served, he either presents the proposed bill and amendments to the judge, upon five days' notice to the ad-

verse party, or delivers them to the clerk, or delivers them to the judge. *Girard v. McClernan*, 39 M 523, 528, 105 P 224; *Freeman v. Weare*, 42 M 472, 474, 113 P 466; *Best Mfg. Co. v. Hutton*, 49 M 78, 88, 141 P 653; *State ex rel. Thelen v. District Court*, 51 M 337, 339, 152 P 475.

Where a party proceeded to settlement of his bill of exceptions under the first mode provided by this section, namely, by presenting it, with amendments, which were objected to, to the judge, but not within ten days after service of the amendments, nor upon five days' notice to the adverse party, the bill must be disregarded. *Freeman v. Weare*, 42 M 472, 474, 113 P 466.

Where a proposed bill of exceptions had been handed by the moving party to the clerk of the district court and by him delivered to the judge, with whom opposing counsel had lodged amendments within time, so that the judge was in possession of both bill and amendments within ten days after the latter were proposed, this section was satisfied, and the fact that appellant's counsel did not personally present them together to the clerk or the judge did not render the method pursued ineffectual. *Best Mfg. Co. v. Hutton*, 49 M 78, 88, 141 P 653.

The moving party has the duty of presenting the proposed statement on motion for new trial and amendments to the judge within ten days from the date upon which the amendments were served. *State ex rel. Coleman v. District Court*, 51 M 195, 198, 149 P 973.

The statute, as to settlement of a bill of exceptions, provides alternative plans of procedure; the moving party, for a new trial, is clearly within the law if he serves upon his adversary either the original draft of his proposed bill or a copy of it. *State ex rel. Thelen v. District Court*, 51 M 337, 340, 152 P 475.

Presentation for Settlement—When Timely—Liberal Construction of Statute

Where, at the time the district court made an order in a will contest fixing the fee of an attorney employed by one of the devisees, the appellants were granted sixty days within which to prepare, serve and file a bill of exceptions, and two days later the order was merged in the judgment appealed from, dismissing the contest and allowing the attorney's fee out of funds of the estate, a bill of exceptions presented for settlement within the sixty-day period but not within fifteen days after entry of judgment, held timely, under a liberal construction of this section. *In re Baxter's Estate*, 94 M 257, 262, 22 P 2d 182.

Presumption That Bill Was Settled According to Law

Where the record is silent as to what steps were taken to procure the settlement of a statement on motion for a new trial, the presumption will be indulged that it was settled according to law. *Friel v. Kimberly-Montana Gold Min. Co.*, 34 M 54, 59, 85 P 734.

Circumstances under which the certificate of a judge, attached to a bill of exceptions, though informal and indefinite in failing to specifically state that the bill "is allowed," may be assumed, in all respects, to be in substantial compliance with the statute. *Ferguson v. Parrott*, 36 M 352, 354, 92 P 965.

Section May Be Complied With in Four Ways

This section may be complied with in three ways; but when the moving party has lost his standing by failing to pursue one of these methods selected by him, he cannot restore it by claiming that he has substantially pursued either of the other prescribed methods. *Freeman v. Weare*, 42 M 472, 474, 113 P 466.

Inasmuch as this section provides four different methods for bringing a proposed bill of exceptions to settlement, three of which do not require a notice of five days to the adverse party, an attorney adjudged guilty of contempt of court in refusing to obey an order requiring him to return the draft of a proposed bill at a time certain, was not in position to defend his disobedience on the assumption that his adversary would proceed upon the plan which did not require such notice, and that a return of the bill at the time specified would have been useless because the time within which settlement could be had had expired. *State ex rel. Thelen v. District Court*, 51 M 337, 338, 152 P 475.

Settled Bill of Exceptions May Be Used on Appeal

Any settled bill of exceptions, whether settled at the trial or subsequently, and whether or not had at the hearing of a motion for a new trial, may be used on appeal from a final judgment. *Ferrat v. Adamson*, 53 M 172, 177, 163 P 112.

"Settlement" Defined

Since "settlement" of a bill of exceptions, as required by this section, means the elimination of all unnecessary matter and the incorporation of all matter necessary to present the exceptions, the judge to whom a bill is presented cannot refuse to settle it merely because it does not contain all the proceedings or the evidence and contains misstatements of facts, but in such case he must require the bill to state the truth and fairly exhibit the exceptions

saved, strike out useless matter, and then sign the bill with his certificate, as required by the statute. *State ex rel. Lindsey v. District Court*, 52 M 62, 64, 155 P 276.

Settlement May be Compelled by Mandamus

Where a party pursues the statute in the preparation, service and presentation of his proposed bill of exceptions, he is entitled to have it settled as a matter of right, and settlement may be compelled by mandamus. *Montana Ore Purchasing Co. v. Lindsay*, 25 M 24, 28, 63 P 715; *State ex rel. Lindsey v. Ayers*, 52 M 62, 64, 155 P 276.

It is improper for the court to refuse to settle a bill of exceptions tendered in due time. *State ex rel. Heinze v. District Court*, 28 M 227, 235, 72 P 613.

Signing Bill of Exceptions Not Part of Settlement

The signing of a bill of exceptions is not a part of its settlement; therefore where a bill was actually settled in the county in which the cause was tried by a judge called in from another district, the fact that the bill, not then ready to be signed, was later transmitted to him and signed in the county of his residence, did not render the bill subject to a motion to strike from the files; if the action was irregular, failure of the judge to follow the law cannot defeat the rights of appellant. *Hale et al. v. Belgrade Co., Ltd., et al.*, 75 M 99, 104, 242 P 425.

Time May be Granted When

The court may grant extensions of time for the preparation of the documents to be made the basis of a motion for new trial. *Evans v. Oregon Short Line R. R. Co.*, 51 M 107, 111, 149 P 715.

Unlawful Interference is Contempt

Where a party litigant serves upon his adversary the original draft of his proposed bill of exceptions, instead of a copy thereof, as he may do under this section, such draft does not become the property of the latter, but is, though not technically so until settled as the bill of exceptions and filed with the clerk, a record in the case, and if, by withholding it, the settlement of the bill is prevented, such an act constitutes an unlawful interference with the new trial proceedings and a contempt of court, within the meaning of subdivision 9 of section 9908. *State ex rel. Thelen v. District Court*, 51 M 337, 340, 152 P 475.

When an Extension of Time May be Granted

Under this section, dealing especially with bills of exceptions, their preparation

and settlement, the district court has authority, on a proper showing made by affidavit, to grant an extension in excess of ninety days for preparation and service of a bill of exceptions. *Langston et al. v. Currie et al.*, 95 M 57, 69, 26 P 2d 160.

The discretion lodged in district judges by this section, upon a proper showing to extend the time within which to prepare and serve bills of exception beyond that prescribed therein, may not be held to have been abused so as to warrant the striking of a bill from the supreme court files, where the appellant's excuse for waiting forty-five days after denial of his motion for new trial before ordering a transcript, was that he was unable to secure the necessary funds to pay for it. *Dubie v. Batani*, 97 M 468, 475, 37 P 2d 662.

Showing made by appellant sheriff in an action in conversion against him, in aid of his application for an extension of time for preparation of his bill of exceptions, to the effect that due to press of business and illness of attorneys representing the indemnity company acting as surety on his official bond, who had to be consulted, the additional time, asked for was necessary for the preparation of the bill, held sufficient to move the discretion of the court in granting further time. *Costello v. Shields*, 99 M 335, 43 P 2d 879.

When Bill May be Corrected

A bill of exceptions or statement, once settled and filed, becomes a part of the record, not subject to correction, except upon a showing that some mistake has been committed, in which case it should be corrected, and not stricken from the files. *York v. Steward*, 30 M 367, 369, 76 P 756.

When Judge Must Settle

It is clearly implied, under this section, when a bill of exceptions and amendments thereto have been delivered to the judge, that he shall settle the same immediately, or fix a subsequent date for settlement, and, when delivered to him within the time limited by statute, it becomes his duty to settle and sign the bill at that time, or at such future time as he may designate. *Girard v. McClernan*, 39 M 523, 529, 105 P 224.

When Time Begins to Run for the Filing of Bill of Exceptions

Since the abolishment of an appeal from a new trial order all questions formerly raised on motion for a new trial are reviewable on appeal from the judgment, and the court's ruling on the motion relates back to and becomes a part of the judgment; hence the time within which the bill of exceptions must be prepared and settled

begins to run from the date of the decision on the motion and not from the time of filing the notice of appeal. *Hoppin v. Long*, 74 M 558, 571, 573, 241 P 636.

The fifteen-day period within which, after receiving notice of the entry of judgment in a cause tried without a jury, the party appealing must prepare, file and serve his bill of exceptions, does not commence to run until after he receives formal, i. e., written notice of such entry, served in the manner prescribed by law, mere knowledge on the part of his counsel that judgment had been entered not amounting to "notice." *Kelly v. Kelly et al.*, 89 M 226, 297 P 475.

References

Cited or applied as section 1155, Code of Civil Procedure, in *State ex rel. Kranich v. Supple*, 22 M 184, 187, 56 P 20; *Harding v. McLaughlin*, 23 M 334, 336, 58 P 865; *Whalen v. Harrison*, 26 M 316, 327, 67 P 934; *Kranich v. Helena Consolidated Water Co.*, 26 M 379, 380, 68 P 408,

71 P 672; *Bond v. Hurd*, 31 M 314, 316, 78 P 579; *Passavant v. Arnold*, 34 M 513, 516, 87 P 905; as section 6788, Revised Codes, in *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 234, 99 P 837; *Canning v. Fried*, 48 M 560, 562, 139 P 448; *Batchoff v. Butte Pacific Copper Co.*, 60 M 179, 190, 198 P 132; *Harrison v. Riddell et al.*, 64 M 466, 210 P 460; *Stabler v. Adamson et al.*, 73 M 490, 495, 237 P 483; *Thompson v. Chicago etc. R. R. Co. et al.*, 78 M 170, 176, 253 P 313; *Watts v. Billings Bench Water Assn.*, 78 M 199, 204 et seq., 253 P 260; *Clifton-Applegate-Toole v. Drain Dist. No. 1*, 82 M 312, 319, 267 P 207; *Loncar v. National Union Fire Ins. Co.*, 84 M 141, 148, 274 P 844; *Apple v. Edwards et al.*, 92 M 524, 534, 16 P 2d 700; *Benema v. Union Cent. Life Ins. Co.*, 94 M 138, 144, 21 P 2d 69; *Helena Adjustment Co. v. Predovich*, 98 M 162, 37 P 2d 651; *Great Northern Ry. Co. v. Hatch et al.*, 98 M 269, 38 P 2d 976.

9391. Exceptions after judgment, e'c. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted, as provided in section 9389, and a bill thereof may be presented and settled afterward, as provided in section 9390, and within like periods after entry of the order, upon appeal from which such decision is reviewable.

History: En. Sec. 1156, C. Civ. Proc. 1895; re-en. Sec. 6789, Rev. C. 1907; re-en. Sec. 9391, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 651.

References

Cited or applied as section 1156, Code of Civil Procedure, in *State ex rel. Pierson v. Millis*, 19 M 444, 449, 48 P 773.

9392. When exception is refused—application to supreme court to prove the same, etc. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same; the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

History: En. Sec. 1157, C. Civ. Proc. 1895; re-en. Sec. 6790, Rev. C. 1907; re-en. Sec. 9392, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 652.

Operation and Effect

This section has in contemplation those instances only where the judge, while willing to settle a statement or bill, refuses to allow an exception in accordance with what the party aggrieved claims are the facts. It does not have reference to the action of the judge refusing to settle any bill or statement whatever upon the ground of unreasonable delay in seeking settlement. Application of *Plume*, 23

M 41, 42, 57 P 408. See also *Beach v. Spokane Ranch & Water Co.*, 25 M 367, 369, 65 P 106.

An original petition in the supreme court for leave to prove exceptions, the application being based upon the ground that certain amendments, not in accord with the facts, were allowed by the trial judge to the bill of exceptions as served, will be dismissed where the amendments allowed are immaterial. *Forrester v. Boston & M. C. C. & S. M. Co.*, 23 M 122, 123, 58 P 40.

The remedy given by this section does not apply to a mere refusal of the judge

to settle any bill whatsoever. *Harding v. McLaughlin*, 23 M 334, 336, 58 P 865.

Where the trial court refuses to incorporate the successful party's amendments in the bill of exceptions prepared by his appealing opponent, the former may petition the supreme court for leave to prove his exceptions under this section. *Watts*

v. Billings Bench Water Assn., 78 M 199, 205, 253 P 260.

References

Cited or applied as section 1157, Code of Civil Procedure, in *Montana Ore Purchasing Co. v. Lindsay*, 25 M 24, 28, 63 P 715.

9393. Provisions concerning settlement—proceedings when judge ceases to hold office. When the decision excepted to was made by any judicial officer, other than a judge, the bill of exceptions shall be presented to such judicial officer, and be settled and signed by him, in the same manner as is required to be presented to, settled, and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after, as well as before, he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct. Judges, judicial officers, and the supreme court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions.

History: En. Sec. 1158, C. Civ. Proc. 1895; re-en. Sec. 6791, Rev. C. 1907; re-en. Sec. 9393, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 653.

Operation and Effect

Under this section, providing that a judge "may" settle and sign a bill of exceptions after he ceases to be a judge, he may be compelled to do so. *Montana Ore Purchasing Co. v. Lindsay*, 25 M 24, 26, 63 P 715.

Where the record on appeal contains a bill of exceptions embodying all of the evidence certified as correct by the trial judge, the mere fact that his successor in passing upon a motion for a new trial denied it because no transcript

of the evidence had been made which he could consult and the stenographer who reported the trial was no longer in office will not prevent the supreme court from reviewing the evidence as presented by the bill of exceptions. *Rickard v. Aultman & Taylor M. Co.*, 64 M 394, 402, 210 P 82.

References

Cited or applied as section 1158, Code of Civil Procedure, in *Conklin v. Cullen*, 25 M 214, 216, 64 P 502; *Lane v. Bailey*, 29 M 548, 556, 75 P 191; *State ex rel. Stiefel v. District Court*, 37 M 298, 304, 96 P 337; *Girard v. McClernan*, 39 M 523, 527, 105 P 224.

9394. Bills of exception may contain all material rulings. Hereafter all district courts and judges, on settlement and allowance of any bill of exceptions at any stage of the trial of a cause, shall, upon demand of either party, or, in the discretion of said court or judge upon its or his own motion, incorporate into such bill of exceptions all rulings, or orders, or proceedings made in the cause against either of the parties, affecting the substantial rights of either, together with the objections and exceptions thereto properly made and reserved, and the same shall be settled and allowed as a part of such bill.

History: En. Sec. 1, Ch. 35, L. 1907; Sec. 6792, Rev. C. 1907; amd. Sec. 4, Ch. 225, L. 1921; re-en. Sec. 9394, R. C. M. 1921.

Operation and Effect

By virtue of this section and of section 9751, the exceptions of both parties may

be incorporated in the record, and the prevailing party is always in a position to inform the supreme court that he has not been permitted to introduce all of his evidence. *State ex rel. La France Copper Co. v. District Court*, 40 M 206, 210, 105 P 721.

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L. 41 c. 19
sec. 1 p. 27

Since the enactment of this section all matters affecting the substantial rights of both plaintiff and defendant with relation to any order, ruling or proceeding had in the trial court at any stage of the trial of the cause may, under proper exception, be included in the bill of exceptions prepared by the appellant under the codes, whether during the actual trial, on a preliminary matter, on motion for a new trial or on appeal from the judgment. *Watts v. Billings Bench Water Assn.*, 78 M 199, 207 et seq., 253 P 260.

Id. Where after defendant had rested, plaintiff moved for permission to reopen his case for the introduction of further testimony on the ground that such testimony had only then been discovered, taking an exception to the court's adverse ruling, the court's refusal to incorporate the matter in defendant's bill of exceptions as an amendment at the time of its settle-

ment, held error, since, though not technically an amendment, the matter proposed as such may, under this section be properly incorporated in a bill prepared in accordance with law.

The purpose of the legislature in enacting this section relative to the settlement of bills of exceptions at any stage of the trial of a cause, was to simplify the procedure in that behalf and provide for the inclusion in the only bill of exceptions ordinarily necessary on appeal of those matters which might affect the substantial rights of either party. *Apple v. Edwards et al.*, 92 M 524, 534, 16 P 2d 700.

References

Cited or applied as Laws of 1907, page 66, in *Carwile v. Jones*, 38 M 590, 594, 101 P 153; *Hale et al. v. Belgrade Co., Ltd.*, et al., 75 M 99, 111, 242 P 425.

CHAPTER 57

PROVISIONS RELATING TO TRIALS IN GENERAL—NEW TRIALS

- Section 9395. New trial defined.
 9396. New trial in equity cases.
 9397. When a new trial may be granted.
 9398. New trials—on what papers made.
 9399. Notice of intention—contents and service.
 9400. Hearing of motion—continuance—papers used.
 9401. Stay of proceedings, when.
 9402. Contents of record on appeal.

9395. New trial defined. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

History: Ap. p. Sec. 168, p. 76, *Bannack Stat.*; en. Sec. 192, p. 171, L. 1867; re-en. Sec. 232, p. 74, *Cod. Stat.* 1871; re-en. Sec. 284, p. 111, L. 1877; re-en. Sec. 284, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 295, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 1170, *C. Civ. Proc.* 1895; re-en. Sec. 6793, *Rev. C.* 1907; re-en. Sec. 9395, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 656.

"Issue of Fact"

An issue of fact on which a new trial can be granted is raised by the pleadings, and a statement on motion for new trial is confined to such issues. A new trial of a motion is not authorized. *Beach v. Spokane Ranch & Water Co.*, 21 M 7, 9, 52 P 560.

The expression "issue of fact," used in its broader sense, would include every issue of fact, whether arising upon formal pleadings or upon a motion. As used here, however, it refers only to issues of fact raised by formal pleadings, as defined in section 9326. *State ex rel. Heinze v. District Court*, 28 M 227, 235, 72 P 613; *In re Antonioli's Estate*, 42 M 219, 223,

111 P 1033; *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 597, 144 P 159.

The court's action in ordering the damages to be assessed by a jury, in actions ex delicto, where the defendant has failed to answer or the plaintiff to reply, is not the trial of an issue of fact raised by the pleadings. *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 599, 144 P 159.

Id. There can be no new trial where there is no issue of fact presented by the pleadings to be re-examined.

New Trial as to One of Several Causes May be Granted

A new trial can be granted as to one or more of several causes of action included and tried in the same suit, where the issues have not been blended, and each cause of action remains distinguishable and separable even after verdict. *Ramsdell v. Clark*, 20 M 103, 106, 49 P 591.

Where the issue or issues in one cause of action have been properly tried, and those in another cause of action in the

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same suit have been improperly tried, a new trial should be granted only as to those issues which have been improperly tried, if it can be done without confusion resulting upon the retrial. *Ramsdell v. Clark*, 20 M 103, 106, 49 P 591; *Hamilton v. Nelson*, 22 M 539, 540, 57 P 146.

What is Contemplated by This Section

This section contemplates a case in which the evidence has been submitted to, and has been passed upon by, the proper tribunal provided by law to try an issue of fact. *Kleinschmidt v. McAndrews*, 4 M 8, 33, 5 P 281.

A new trial lies for the re-examination of an issue of fact created in the manner prescribed by section 9326, but not under any other circumstances. *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 599, 144 P 159.

A motion for a new trial lies where an issue of fact was wrongfully or erroneously determined by the jury or by direction of the court. *Buckhouse v. Parsons*, 60 M 156, 162, 198 P 443.

9396. New trial in equity cases. No new trial shall be granted in equity cases, or in cases tried by the court without a jury, except on the grounds mentioned in the first, third, and fourth subdivisions of section 9397 of this code.

History: En. Sec. 5, Ch. 225, L. 1921; re-n. Sec. 9396, R. C. M. 1921.

Operation and Effect

Since under this section, a motion for a new trial on the ground of insufficiency of the evidence does not lie in an equity suit, the rule that the supreme court, in the absence of such a motion, will go no further than to determine whether there is any substantial evidence to sustain the decision of the court does not apply. *Shepard & Pierson Co. v. Baker*, 81 M 185, 192, 262 P 887.

While the fact that a notice of appeal in an equity case does not contain any of the grounds mentioned in this section, for

What is Not Contemplated by This Section

Controversies which do not arise upon written pleadings authorized or required by statute do not fall within the purview of this section. In *re Antonioli's Estate*, 42 M 219, 222, 111 P 1033; *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 598, 144 P 159.

References

Cited or applied as section 1170, Code of Civil Procedure, in *Conklin v. Cullen*, 25 M 214, 216, 64 P 502; *Schatzlein Paint Co. v. Passmore*, 26 M 500, 502, 68 P 1113; In *re Davis' Estate*, 27 M 235, 241, 70 P 721; *State ex rel. Carleton v. District Court*, 33 M 138, 150, 82 P 789; In *re Stinger's Estate*, 61 M 173, 182, 201 P 693; *Brunnabend v. Tibbles*, 76 M 288, 296, 246 P 536; *Calvert et al. v. Anderson et al.*, 78 M 334, 341, 254 P 184; *Clifton-Applegate-Toole v. Drain Dist. No. 1*, 82 M 312, 319, 267 P 207.

which a new trial may be granted in such a case, but does contain grounds for which a new trial may be granted in a law case, may warrant denial of a new trial, it does not deprive the trial court of jurisdiction to settle a bill of exceptions. *Pincus v. Davis*, 95 M 375, 381, 26 P 2d 986.

References

In *re Stinger's Estate*, 61 M 173, 182, 201 P 693; *Morrow v. Dahl et al.*, 66 M 251, 256, 213 P 602; *Stabler v. Adamson et al.*, 73 M 490, 495, 237 P 483; *Baker v. Citizens' State Bank et al.*, 81 M 543, 547, 264 P 675; *Clifton-Applegate-Toole v. Drain Dist. No. 1*, 82 M 312, 319, 267 P 207.

9397. When a new trial may be granted. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party.

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

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101 Mont. 138
54 P (2d) 1180
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subsec. 5
103 P. (2d) 674

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129 P.(2d) 94

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181 F.(2d) 759

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147 P.(2d) 428

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3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law; 9397, Subs. 6
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7. Error in law, occurring at the trial and excepted to by the party making the application;

8. That the right to have a bill of exceptions has been lost, either through the death or incapacity of the court reporter or in any manner that was not the fault of the losing party.

History: En. Sec. 169, p. 76, Bannack Stat.; amd. Sec. 193, p. 171, L. 1867; re-en. Sec. 233, p. 74, Cod. Stat. 1871; amd. Sec. 285, p. 111, L. 1877; re-en. Sec. 285, 1st Div. Rev. Stat. 1879; amd. Sec. 7, p. 10, L. 1881; re-en. Sec. 296, 1st Div. Comp. Stat. 1887; re-en. Sec. 1171, C. Civ. Proc. 1895; re-en. Sec. 6794, Rev. C. 1907; re-en. Sec. 9397, R. C. M. 1921; amd. Sec. 1, Ch. 68, L. 1935. Cal. C. Civ. Proc. Sec. 657.

Subd. 1

Includes Remarks by the Court

Remarks made by the court during a trial, if errors at all, fall within subdivision 1 of this section; they do not constitute errors of law within the meaning of subdivision 7. Hopkins v. Kitts, 37 M 26, 28, 94 P 201.

Irregularity in the Proceedings

The action of a party in secreting and forcibly keeping in hiding a witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted misconduct or irregularity for which a new trial should be granted. Buntin v. Chicago, Milwaukee & St. Paul Ry. Co., 54 M 495, 496, 172 P 330.

Where counsel without objection or exception acquiesced in an order limiting the time for argument to the jury, they were precluded from urging as a ground of motion for new trial undue limitation thereof, thereby depriving them of a fair trial. Norton v. Great Northern Ry. Co. et al., 78 M 273, 254 P 165.

Subd. 2

Includes a Quotient Verdict

An agreement by a jury to return a "quotient verdict," whereby each member was to indicate the amount for which he thought the verdict should be, and the sum of such amounts divided by twelve should be the verdict, with an agreement to

abide by such quotient, shown by the affidavits of jurymen who were induced to assent to a verdict so reached on account of such agreement, is a resort to the determination of chance, and within subdivision 2 of this section, allowing a new trial for such misconduct on the part of the jury. Gordon v. Trevarthan, 13 M 387, 391, 34 P 185.

A verdict arrived at by taking the aggregate of the amounts representing the views of the jurors and dividing that sum by the number of jurors as a means for further consideration is valid, unless the jurors agree in advance that the quotient thus obtained shall constitute the amount of their verdict, and such agreement is carried into effect. Great Northern Ry. Co. v. Benjamin, 51 M 167, 172, 149 P 968.

A quotient verdict, rendition of which constitutes misconduct of the jury and is ground for a new trial, is one arrived at by adding the amounts each juror thinks should be awarded and dividing the sum by twelve, with the agreement in advance to return a verdict for the quotient so found. Benjamin v. Helena Light & Ry. Co. et al., 79 M 144, 147, 255 P 20.

Id. To vitiate a verdict arrived at by chance it is not necessary that all of the jurors joining in it, or a majority of them, must have been induced to assent to the method employed in arriving at the verdict, it being sufficient under this section if any one of them assented thereto.

In General

Where in an action for personal injuries sustained in a collision between a street-car and a railway train, the operation of air-brakes on a street-car was not involved, the fact that a motorman demonstrated its operation to two of the jurors in the case while the trial was in progress was insufficient to warrant the granting of a

new trial on the ground of misconduct of the jurors. *Norton v. Great Northern Ry. Co. et al.*, 78 M 273, 254 P 165.

Jurors Cannot be Heard to Impeach Their Own Verdict

Jurors should not be heard to impeach their own verdict, and the single exception, found in subdivision 2 of this section, that they may do so where the verdict has been reached by a resort to chance, is the only one in which it will be permitted; this express exception, under the rule "expressio unius est exclusio alterius," seems to exclude all other exceptions. *State v. Beesskove*, 34 M 41, 52, 85 P 376; *Sutton v. Lowry*, 39 M 462, 471, 104 P 545; *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 486, 148 P 330; *State v. Lewis*, 52 M 495, 504, 159 P 415.

The provision of this section, that the affidavits of jurors may be used to impeach a verdict only when it was reached by resort to chance, is exclusive; hence, an affidavit of a juror, relating to a conversation had with another juror touching the latter's misconduct, was incompetent, as was also that of one, not a juror, as to the contents of an affidavit of the offending juror, for the same and the additional reason that it was hearsay. *Sutton v. Lowry*, 39 M 462, 470, 104 P 545. See also *Snyder v. Town of Chinook*, 48 M 484, 489, 138 P 1090.

Under this section, the jury can impeach their verdict only when arrived at by resort to chance; hence affidavits by six jurors filed in support of a motion for new trial to the effect that two-thirds of the jury were in favor of denying plaintiff the relief sought and would have found in favor of defendant if they had been advised as to a fact the defendant proposed to establish if a new trial was granted, were properly ignored by the trial court. *Komposh v. Powers et al.*, 75 M 493, 511, 244 P 298.

Under this section, jurors may not impeach their verdict by affidavit in support of a motion for new trial except where it was reached by a "resort to chance"; hence the court properly denied a new trial the motion for which was based on the affidavits of four jurors that another juror, after retirement to the juryroom, had stated that he knew plaintiff, was conversant with one phase of the transaction giving rise to the suit, and that the only proper thing to do was to find for him. *Hough v. Shishkowsky*, 99 M 28, 30, 43 P 2d 247.

Treatment by Court of Chance Verdict

Where, upon the polling of the jury in a personal injury case, the court inquires whether the verdict for the plaintiff has

been reached by chance, and, several of the jurors answering in the affirmative, the court then directs them to retire and find a verdict by "deliberation and reasoning," and to exclude the element of chance, the action of the court is unauthorized; the verdict returned should have been received subject to be set aside only upon an application under this section. *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 36 M 478, 483, 93 P 640.

Weight Given to Evidence by Jury is Not Proper Inquiry Under This Subdivision

In the absence of a statute, and in order to secure freedom of thought, thorough discussion, and independence of action, as well as to prevent undue influence and fraud, the construction or weight given by the jury to evidence submitted to it is not a subject of inquiry upon a motion for a new trial. Subdivision 2 of this section does not change this rule. *Spencer v. Spencer*, 31 M 631, 640, 79 P 320.

Subd. 3

What is Sufficient Surprise or Accident

Where a trial court found certain counterclaims to have been sufficiently pleaded, and defaulted the plaintiff as to the same, on failure to reply, relying on which default defendant introduced no evidence, on reference of the case, to prove the counterclaims, and the court adopted the findings of the referee, but declared that part of the counterclaims only were sufficiently pleaded, a new trial was properly granted to defendant, as such action of the court was surprise and accident which ordinary prudence could not have guarded against. *Porter v. Industrial Printing Co.*, 26 M 170, 182, 66 P 839, 67 P 67.

Subd. 4

Newly Discovered Evidence in General

An offer of compromise not being admissible in evidence against the party making it, it cannot be regarded as material within the requirement of the statute authorizing the granting of a new trial on the ground of newly discovered evidence. *Huffine v. Lincoln*, 53 M 474, 480, 164 P 888.

Newly discovered evidence which is a mere repetition of testimony of another witness is cumulative and furnishes no basis for a motion for new trial. *Jenkins v. Kitsen*, 62 M 515, 518, 205 P 243.

Id. For evidence to be produced by a new witness which, if offered, would be irrelevant and immaterial, a new trial may not be granted.

Where respondent knew of the testimony an absent witness would give, and should have known that his whereabouts were unknown but did not ask for a continuance, he was in no position to urge his evidence as newly discovered. *Ebaugh v. Burns et al.*, 65 M 15, 210 P 892.

Id. Where defendant himself had testified to a conversation had between himself and plaintiff with respect to the matter in controversy in an action for rescission of contract, evidence on the same subject which would be given by a witness who was absent at the trial, if a new trial were granted, was cumulative and therefore did not warrant the granting of the motion.

A new trial on the ground of newly discovered evidence was properly denied where the only excuse offered by movant was that while he knew of the alleged new evidence prior to and at the time of the trial, he thought that the fact sought to be brought out on retrial had been sufficiently covered by the testimony given and deemed it unnecessary to introduce it. *Komposh v. Powers et al.*, 75 M 493, 511, 244 P 298.

Alleged newly discovered evidence which is cumulative only does not warrant the granting of a new trial; nor may the court be put in error for refusing a retrial on that ground where movant made no attempt to show due diligence on his part to produce the newly discovered witness on the trial of his case. *State v. Gies*, 77 M 62, 64, 249 P 573.

One moving for a new trial on the ground of newly discovered evidence must show by affidavit that the evidence is material to him, that it could not, with reasonable diligence, have been discovered and produced at the trial and that it was not known to affiant at the time the trial was had. *Sutton v. Masterson*, 86 M 530, 534, 284 P 264.

In an action for debt claimed by plaintiff to have been incurred by defendant by having a number of his checks cashed at the former's business place (payment on which was subsequently stopped) and alleged by defendant to have resulted from a gambling game between the parties and hence was illegal, and in which defendant had judgment, held, that the court abused its discretion in denying a new trial, asked for on the ground of newly discovered evidence tending to show that plaintiff was at his place of business at the time the game was said to have been played and could not have been at the place of its occurrence, it being evident that one or the other testified to a falsehood, each swearing to matters diametrically opposed to those testified to by the other, the new evidence thus being

of the utmost importance to court and jury in determining the credibility of these witnesses and meting out justice. *Gould et al. v. Lynn*, 88 M 501, 505, 293 P 968.

What Party Must Show to be Able to Get a New Trial

The party moving for a new trial on the ground of newly discovered evidence must show by his own affidavit that the new evidence was not known to him at the time of the trial, and the affidavits of other persons on that question are not sufficient. *Smith v. Shook*, 30 M 30, 34, 75 P 513; *Spencer v. Spencer*, 31 M 631, 639, 79 P 320; *Roberts v. Oechsli*, 54 M 589, 593, 172 P 1037.

Affidavit in support of a motion for a new trial, on the ground of newly discovered evidence, examined and held insufficient to show diligence required by this section. *Nicholson v. Metcalf*, 31 M 276, 278, 78 P 483.

Every presumption will be indulged that the movant for a new trial on the ground of newly discovered evidence could have secured the testimony for the former trial, and he must negative any negligence on his part. Affidavits filed in support of a motion for a new trial on this ground should state with particularity what was done toward obtaining the new evidence, and how and when it was discovered, so as to give the adverse party an opportunity to traverse the statements made in the affidavits. *In re Colbert's Estate*, 31 M 477, 482, 80 P 248.

To warrant the granting of a new trial on the ground of newly discovered evidence it must appear to the court that there is reasonable probability that upon a retrial the evidence proposed will change the result. *Gould et al. v. Lynn*, 88 M 501, 505, 293 P 968.

Subd. 5

Excessive Damages

Where, in a personal injury case, excessive damages have been awarded, the defeated party has the right to insist that the amount of the verdict be reduced by the court. *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 486, 148 P 330. See also *Conway v. Monidah Trust*, 51 M 113, 118, 149 P 711.

In an action for personal injuries, the court has power to grant a new trial where excessive damages have been awarded, if they appear to have been given under the influence of passion or prejudice. *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 486, 148 P 330. See also *Conway v. Monidah Trust*, 51 M 113, 118, 149 P 711.

A new trial will not be granted on the ground that damages awarded appear to be excessive unless it further appears that they were given under the influence of passion or prejudice. *Kelley v. John R. Daily Co.*, 56 M 63, 80, 181 P 326.

Where in an action in claim and delivery the complaint had fixed the value of the property in question at \$2,195, and the evidence of plaintiff established it at \$1,983, but the jury fixed it at \$2,686.20, an order granting a new trial asked for on the ground, among others, of excessive damages appearing to have been given under the influence of passion and prejudice, will not be disturbed on appeal. *Wilber v. Wilber*, 63 M 587, 207 P 1002.

In personal injury actions, where the amount of compensation cannot be arrived at by mere calculation, determination as to the amount of the verdict rests in the sound discretion of the jury and its verdict, attacked as excessive, is conclusive unless it is such as to shock the conscience and understanding, in which event the trial court, as well as the supreme court, may order a new trial, unless the plaintiff shall consent to a scaling of the verdict to an amount considered just and reasonable. *Simpson v. Miller*, 97 M 328, 340, 34 P 2d 528.

Id. Verdict for \$5,000 for injuries sustained by a boy sixteen years of age in an automobile collision resulting in a permanent injury to an eye, scarring the iris and thus preventing normal contraction of the pupil, which in the course of years may weaken the other, a cut on the cheek requiring eight stitches which injured the lachrymal duct, leaving a stricture causing tears to flow in excessive light or on excessive use of the eye, and laceration of the lower lid, causing it to gap open, held properly reduced by the trial court to \$3,800, with \$200 for doctor and hospital expenses, and as so reduced affirmed on appeal, the reviewing court assuming that the trial court, with superior knowledge of the injuries sustained, made the proper reduction to meet the ends of justice.

Voluntary Remission of Excessive Damages—Effect

While, under this section, the trial court may remit a portion of a verdict on condition that unless the remission be accepted by the successful party a new trial would be granted, such practice is unwarranted where the verdict was influenced by passion and prejudice; the same rule being applicable, under like circumstances, where the successful party makes voluntary remission of all damages awarded him. *Blessing v. Angell et al.*, 66 M 482, 485, 214 P 71.

What is Sufficient Passion or Prejudice

Where an amount awarded by the jury for personal injuries, claimed by defendant to have been so excessive as to amount to an abuse of discretion lodged in it, may have been the result of a miscalculation, or based upon a wrong standard, the award cannot be said to have been the result of passion or prejudice so as to entitle the defendant to a new trial under subdivision 5 of this section. *Lewis v. Northern Pacific Ry. Co.*, 36 M 207, 224, 92 P 469.

Since a new trial may be ordered when it appears that the jury have acted under the influence of passion and prejudice, it follows that when the award is so large that it cannot be accounted for on any other theory, and is wholly out of proportion to the wrong done and the cause of it, the conclusion is irresistible that it was measured by the passion and prejudice of the jury, rather than by an estimate made in the exercise of their discretion, and it becomes the duty of the court to set it aside. *De Celles v. Casey*, 48 M 568, 576, 139 P 586.

Where plaintiff sought to recover a balance of \$570.80 due upon a building contract, defendant interposing a counterclaim for \$429.21, and the jury returned a verdict in favor of the defendant in the exact amount asked for by plaintiff, and \$141.60 more than defendant claimed was due him, the verdict could only be accounted for on the theory of passion and prejudice on the part of the jury, entitling plaintiff to a new trial as a matter of right. *Blessing v. Angell et al.*, 66 M 482, 485, 214 P 71.

In personal injury actions, each case must of necessity, so far as damages recoverable are concerned, depend upon its own peculiar facts; there is no measuring stick by which to determine the amount to be awarded other than the intelligence of a fair and impartial jury governed by a sense of justice and a wide latitude is allowed for the exercise of its judgment; it is only when excessive damages appear to have been given under the influence of passion or prejudice that a new trial may be awarded, and unless it appears that the amount is so grossly out of all proportion to the injury received as to shock the conscience, the supreme court on appeal will not substitute its judgment for that of the jury. *Sullivan v. City of Butte*, 87 M 98, 101, 285 P 184.

When Assignment of Error Not Entered on Appeal

Where defendant in a personal injury action fails to incorporate in his motion for new trial the ground of excessive

damages having been given under the influence of passion or prejudice, and thus deprives the trial court of an opportunity to pass upon the question, the supreme court on appeal will not entertain an assignment of error based upon that ground. *Lesage v. Largey Lumber Co.*, 99 M 372, 387, 43 P 2d 896.

Subd. 6

"Against Law"

A verdict is "against law," within the meaning of this section, only when it is contrary to the law of the case as given to the jury in the instructions. *Bush v. Baker*, 51 M 326, 331, 152 P 750.

The trial of a matter before the court, without a jury, resulting in findings of fact warranted by the evidence, conclusions of law based upon the findings, and a judgment following both, presents no example of "a verdict or other decision" which is "against law." In *re Riley's Estate*, 54 M 17, 20, 165 P 1105.

Operation in General

Under subdivision 6 of this section, no ground for a new trial is specified in a notice of motion which recites that "the judgment is contrary to law." *Froman v. Patterson*, 10 M 107, 111, 24 P 692. See also *State v. Gawith*, 19 M 48, 51, 47 P 207; *Hamilton v. Murray*, 29 M 80, 86, 74 P 75.

One who has recovered a verdict in his favor in a sum less than he deems himself entitled to under the evidence, may, under subdivision 6 of this section, ask for a new trial on the ground of insufficiency of the evidence to sustain the verdict. *Flaherty v. Butte Electric Ry. Co.*, 42 M 89, 93, 111 P 348.

Sufficiency of Notice of Intention to Move for New Trial

A notice of intention to move for a new trial on the ground that the evidence was insufficient "to justify the findings and judgment" is sufficient. Since the words "and judgment" serve no purpose, they may be rejected, and so far as the question of the insufficiency of the evidence to justify the decision is ground for new trial, the word "findings" is equivalent to the word "decision." *Cobban v. Hecklen*, 27 M 245, 256, 70 P 805.

Treatment of Excess Verdict When Not Grounds for New Trial

Where, in an action for conversion, the trial court regards the verdict as in excess of the value of the property, it is not error to give the plaintiff the option of remitting the excess, and, if he does so, to order the verdict to stand for the residue, instead of granting a new trial

absolutely, under subdivision 6 of this section. *Chicago Title & Trust Co. v. O'Marr*, 25 M 242, 245, 64 P 506.

Verdict Contrary to Instructions Grounds for a New Trial

The instructions are the law of the case and binding upon the jury; a verdict contrary thereto is a verdict contrary to law, which, under subdivision 6 of this section, justifies a new trial. *Lynes v. Northern Pac. Ry. Co.*, 43 M 317, 325, 117 P 81.

When "Insufficiency of Evidence" is Sufficient Grounds

In civil actions, where a new trial may be granted under this section for "insufficiency of the evidence to justify the verdict," the court is required to grant a new trial if, in its judgment, the weight of the evidence does not justify the verdict. *State v. Schoenborn*, 55 M 517, 519, 179 P 294.

The advantageous position occupied by the jury and the lower court in weighing the testimony of witnesses who appear before them in a personal injury action does not prevent a reversal of the order denying a new trial on the ground of insufficiency of the evidence, where the testimony supporting the verdict is highly improbable or incredible or is inherently impossible in view of the physical facts. *Casey v. Northern Pacific Ry. Co.*, 60 M 56, 57, 198 P 141.

When Supreme Court Will Order a Retrial

In passing upon a motion for new trial on the ground of insufficiency of the evidence to justify the verdict, the trial court must weigh the evidence and, if not sufficient, a new trial should be ordered; if not ordered, the supreme court on appeal must then determine the same question, and if there be not substantial evidence to support the verdict, order a retrial. *West v. Wilson*, 90 M 522, 527, 4 P 2d 469.

Subd. 7

Includes Error in Granting Motion for a Nonsuit

An order granting a motion for a nonsuit, if erroneously made, is an error in law occurring at the trial, and is subject to review on motion for a new trial, as well as on direct appeal. *McKay v. Montana Union Ry. Co.*, 13 M 15, 20, 31 P 999; *Emerson v. Eldorado Ditch Co.*, 18 M 247, 254, 44 P 969.

Includes Errors in Instructions

Subdivision 7 of this section embraces error in instructions. *Kleinschmidt v. McDermott*, 12 M 309, 312, 30 P 393.

A motion for a new trial lies where an issue of fact was wrongfully or erroneously determined by the jury or by direction of the court. *Buckhouse v. Parsons*, 60 M 156, 162, 198 P 443.

"Error in law, occurring at the trial and excepted to," enumerated in this section, as one of the grounds for which a new trial may be granted, includes error in instructions. *Maki v. Murray Hospital*, 91 M 251, 260, 7 P 2d 228.

Misapplication of Law to Facts is Grounds for New Trial

Under this section, a new trial—a re-examination of the facts—lies where an error of law has been committed by reason of misapplication of law to the facts. In re *Stinger's Estate*, 61 M 173, 182, 201 P 693.

Id. Held, that where a guardian petitioned the court in a probate proceeding for an order directing an administrator to pay certain claims allowed against the estate as due his wards to himself personally, on the ground that he had become subrogated to their rights, to which petition objections in the nature of answers were filed, petitioner filing replies, raising issues of fact, the court denying the petition for lack of jurisdiction to determine the equitable claim of subrogation, a motion for new trial lay.

Unchallenged Sufficiency of Complaint Not Error in Law so as to Justify New Trial

Where the sufficiency of the complaint was not challenged during the trial, and there was no ruling in reference to it, there is nothing, as to that matter, which can be regarded as an "error of law occurring during the trial," upon which a motion for a new trial might be made; in such a case, the sufficiency of the complaint can be examined only on appeal from the judgment. *Schatzlein Paint Co. v. Passmore*, 26 M 500, 503, 68 P 1113; *Campbell v. City of Great Falls*, 27 M 37, 39, 69 P 114; *O'Rourke v. Grand Opera House Co.*, 47 M 459, 464, 133 P 965.

The review on appeal from an order denying a new trial, being limited to the consideration of such matter as may be presented to the trial court as grounds for a new trial under the provisions of this section, among which are "errors of law occurring at the trial and excepted to by the party making the application," the question whether the complaint states a cause of action cannot be considered on such an appeal where it does not appear from the record that its sufficiency was questioned during the trial. *Campbell v. City of Great Falls*, 27 M 37, 39, 69 P 114. See also *Ayotte v. Nadeau*, 32 M

498, 509, 81 P 145; *Leggat v. Gerrick*, 35 M 91, 93, 88 P 788; *Murray v. City of Butte*, 35 M 161, 172, 8 P 789; *Glendenning v. Slayton*, 55 M 586, 593, 189 P 817.

In General

Scope of Remedy in General

A motion for a new trial is a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes. *Whitbeck v. Montana Central Ry. Co.*, 21 M 102, 107, 52 P 1098; *Ogle v. Potter*, 24 M 501, 504, 62 P 920; *State ex rel. Stromberg-Mullins Co. v. District Court*, 28 M 123, 125, 72 P 412; *Wright v. Matthews*, 28 M 442, 444, 72 P 820; *State ex rel. City of Walkerville v. District Court*, 29 M 176, 178, 74 P 414; *Vreeland v. Edens*, 35 M 413, 421, 89 P 735; *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 36 M 478, 483, 93 P 640; *Jackway v. Hymer*, 42 M 168, 169, 111 P 720; *Canning v. Fried*, 48 M 560, 564, 139 P 448; *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 599, 144 P 159; *State ex rel. Jones v. District Court*, 50 M 1, 5, 144 P 564; *Evans v. Oregon Short Line R. R. Co.*, 51 M 107, 111, 149 P 715; *State ex rel. Smith v. District Court*, 55 M 602, 604, 179 P 831.

The rule that a motion for a new trial is a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes, applies indifferently to law and equity cases. *Ogle v. Potter*, 24 M 501, 504, 62 P 920.

New trials are statutory; if granted, they must be granted upon statutory grounds, and none other. *Porter v. Industrial Printing Co.*, 26 M 170, 183, 66 P 839, 67 P 67.

A new trial cannot be granted upon any other ground than one named in this section. *Canning v. Fried*, 48 M 560, 564, 139 P 448.

The statute prescribes the grounds upon which a motion for new trial may be made, and its provisions are exclusive. *Evans v. Oregon Short Line R. R. Co.*, 51 M 107, 111, 149 P 715.

Treatment on Appeal Where Judge Gave a Ground for New Trial Not in This Section

Though the ground on which a new trial had been asked was stated by the judge in his certificate authenticating the record on appeal in an equity case to have been that the evidence failed to support the judgment, and such ground is not one of those enumerated in this section, yet where the appellants in their brief made the statutory assignment that the evidence

was insufficient to justify the court's decision, and counsel for respondent argued the assignment on its merits, the supreme court will assume that the trial judge intended to state that the matter was properly submitted to him. *Foster v. Winstanley*, 39 M 314, 324, 102 P 574.

What is Not Grounds for a New Trial

The fact that a referee had absconded, and failed to return the transcript of the evidence, was not ground for a new trial. *Ogle v. Potter*, 24 M 501, 505, 62 P 920.

In an equity case and in one tried by the court without a jury, the insufficiency of the evidence to justify the decision and errors at law occurring at the trial are not available as grounds for a new trial. *Davenport v. Davenport*, 69 M 405, 410, 22 P 422.

When Motion for New Trial May be Made

A motion for a new trial may be made before or after entry of judgment, the motion not being directed against the judgment but against the verdict or decision on which a judgment might be based; hence the contention made on appeal from a judgment rendered on a retrial that respondent's motion should not have been made until after entry of judgment and that by making the motion before entry thereof he waived his right to costs incurred on the first trial in which he was successful but deemed the verdict in his favor inadequate, has no merit. *Brunnabend v. Tibbles*, 76 M 288, 296 et seq., 246 P 536.

When Motion for New Trial on Several Grounds Will be Sustained on Appeal

Where the notice of intention to move for a new trial specified all but one of the statutory grounds, the order granting it in general terms will be sustained on appeal if it can be upon any one of the grounds mentioned in the notice. *McVey v. Jemison et al.*, 63 M 435, 207 P 633.

Where a new trial was asked for on several grounds, among them newly discovered evidence in support of which affidavits have been filed, and the order granting it recited that the motion "came on for hearing upon the affidavits filed by the respective parties," etc., the order

held to have been based upon the ground of newly discovered evidence alone, excluding the other grounds specified. *Ebaugh v. Burns et al.*, 65 M 15, 210 P 892.

Id. Where a new trial was properly granted on one of the grounds stated in the motion but not upon the one specified by the court, the order granting it will not be disturbed on appeal, since a wrong reason for a correct conclusion will not invalidate it.

When Supreme Court Will Not Interfere on Refusal to Grant New Trial

A trial court cannot be put in error for denying a motion for new trial on a matter not brought to its attention in the notice of motion. *Gardiner v. Eclipse Grocery Co.*, 72 M 540, 547, 234 P 490.

Id. In the district court is lodged a sound legal discretion to grant or refuse a new trial in a case where the evidence is conflicting, and its action will not be disturbed on appeal except for a manifest abuse of discretion.

References

Cited or applied as section 233, page 74, Codified Statutes 1871, in *Taylor v. Holter*, 2 M 476; as section 296, First Division Compiled Statutes 1887, in *Sweeney v. City of Butte*, 15 M 274, 39 P 286; as section 1171, Code of Civil Procedure, in *Rehberg v. Greiser*, 24 M 487, 491, 62 P 820, 63 P 41; *Coleman v. Perry*, 28 M 1, 8, 72 P 42; *Tague v. John Caplice Co.*, 28 M 51, 61, 72 P 297; *King v. Pony Gold Min. Co.*, 28 M 74, 80, 72 P 309; *Finlen v. Heinze*, 28 M 548, 577, 73 P 123; *Hickey v. Anaconda Copper Min. Co.*, 33 M 46, 55, 81 P 806; as section 6794, Revised Codes, in *Bliss v. Wolcott*, 40 M 491, 497, 107 P 423; *Molt v. Northern Pacific Ry. Co.*, 44 M 471, 477, 120 P 809; as section 6794, Revised Codes, in *Post v. Liberty*, 45 M 1, 10, 121 P 475; *Lenahan v. Casey*, 46 M 367, 376, 128 P 601; *Roberts v. Oechsli*, 54 M 589, 172 P 1037; *Sell v. Sell*, 58 M 329, 336, 193 P 561; *Rickard v. Aultman & Taylor M. Co.*, 64 M 394, 210 P 82; *Clifton-Applegate-Toole v. Drain Dist. No. 1*, 82 M 312, 319, 267 P 207; *Wallace v. Wallace*, 85 M 492, 516, 279 P 374; *Brown v. Columbia Amusement Co.*, 91 M 174, 193, 6 P 2d 874; *Fulton v. Chouteau County Farmers' Co.*, 98 M 48, 37 P 2d 1025.

9398. New trials—on what papers made. Motions for new trials shall be made as follows: For causes mentioned in the first subdivision of the preceding section, the motion shall be made on affidavits or on the minutes of the court; for causes mentioned in the second, third, fourth or eighth subdivisions of said section, the motion shall be made only on affidavits; for causes mentioned in the fifth, sixth, or seventh subdivisions

of said section, the motion shall be made only on the minutes of the court. The official stenographic reports of the trial may be referred to as a part of the minutes of the court.

History: Ap. p. Sec. 170, p. 77, Bannack Stat.; re-en. Sec. 234, p. 75, Cod. Stat. 1871; amd. Sec. 286, p. 112, L. 1877; re-en. Sec. 286, 1st Div. Rev. Stat. 1879; re-en. Sec. 297, 1st Div. Comp. Stat. 1887; re-en. Sec. 1172, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 41, L. 1907; Sec. 6795, Rev. C. 1907; amd. Sec. 6, Ch. 225, L. 1921; re-en. Sec. 9398, R. C. M. 1921; amd. Sec. 2, Ch. 68, L. 1935. Cal. C. Civ. Proc. Sec. 658.

Exclusive Provisions

The statute prescribes the course of proceedings to be observed on motion for new trial, and its provisions are exclusive. *Evans v. Oregon Short Line R. R. Co.*, 51 M 107, 111, 149 P 715.

Operation in General

A motion for a new trial on the ground of irregularity in the proceedings of the court, jury, or adverse party, may be made either upon affidavit or bill of exceptions, or both. *Bliss v. Wolcott*, 40 M 491, 497, 107 P 423.

One intending to move for a new trial upon any ground other than those mentioned in the first four subdivisions of the preceding section may, under this section, do so either upon the minutes of the court or a bill of exceptions; if he have several grounds, he may select one method for one ground of his motion, and another for the remaining ground or grounds. *Moore v. Butte Electric Ry. Co.*, 47 M 214, 216, 131 P 635.

Party May Include in Motion All Modes Specified

The moving party may employ in the same motion all the modes specified in this section in making his motion for a new trial. *Sell v. Sell*, 58 M 329, 336, 193 P 561.

Party May Not Elect One Procedure and Follow Another

The party desiring a new trial may not designate the minutes of the court and affidavits to be thereafter filed as moving papers, then secure an extension of time in which to prepare them, afterward abandon the affidavits by failing to prepare them within the time allowed, and then insist that the motion should be heard on the minutes of the court. *Sell v. Sell*, 58 M 329, 336, 193 P 561.

"Upon the Minutes of the Court"

A notice of intention to move for a new trial was not rendered abortive by the

statement that the motion would be based "upon the minutes of said cause," instead of "upon the minutes of the court," the former phrase, so far as imparting the information intended by this section to be given to the opposing party is concerned, being substantially equivalent to the latter. *Moore v. Butte Electric Ry. Co.*, 47 M 214, 216, 131 P 635.

What Court May Consider Upon a Motion for a New Trial

The district court may, upon a motion for a new trial made "upon the minutes of the court," take into consideration all the pleadings, records, minute entries, and the evidence offered at the trial, and, from the entire case thus presented, determine the motion; and if the judge can remember the evidence and proceedings sufficiently to enable him to pass upon the motion, it is not necessary that the stenographer's notes of the trial proceedings be transcribed. *State ex rel. Cohn v. District Court*, 38 M 119, 125, 99 P 139.

Since the passage of the act of 1907, there has been no provision in the code authorizing a statement of the case to be used as the basis of a motion for a new trial. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 234, 99 P 837.

Where an application for a new trial is made on the minutes of the court, the trial court is presumed, in the absence of a bill of exceptions, to have considered all of the pleadings, records, minute entries, and the evidence offered at the trial, and to have determined the motion on the case thus presented. *Sanden v. Northern Pacific Ry. Co.*, 39 M 209, 211, 102 P 145. See also *Sutton v. Lowry*, 39 M 462, 469, 104 P 545; *Cummings v. Reins Copper Co.*, 40 M 599, 611, 107 P 904.

References

Cited or applied as section 1172, Code of Civil Procedure, before amendment, in *Coleman v. Perry*, 28 M 1, 8, 72 P 42; *Tague v. John Caplice Co.*, 28 M 51, 61, 72 P 297; *King v. Pony Gold Min. Co.*, 28 M 74, 80, 72 P 309; *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 36 M 478, 483, 93 P 640; *State ex rel. Sinko v. District Court*, 64 M 181, 208 P 952; *Rickard v. Aultman & Taylor M. Co.*, 64 M 394, 401, 210 P 82; *Clifton-Applegate-Toole v. Drain Dist. No. 1*, 82 M 312, 319, 267 P 207; *Russell v. Sunburst Refining Co.*, 83 M 452, 272 P 998.

9399. Notice of intention—contents and service. The party desiring a new trial must, within ten days after the return of the verdict or within

ten days after receiving notice of the decision of the court, serve upon the adverse party and file with the clerk a notice of motion for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court, or both. The time above specified shall not be extended by order or by stipulation. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or within such further time not to exceed thirty days in all, as the court in which an action is pending or a judge thereof may allow, file such affidavits with the clerk, and serve a copy thereof upon the adverse party, who shall have ten days thereafter, or such further time not exceeding thirty days in all, as the court may allow, to serve and file counter affidavits.

History: Ap. p. Sec. 171, p. 77, Bannack Stat.; amd. Sec. 235, p. 75, Cod. Stat. 1871; re-en. Sec. 287, p. 112, L. 1877; re-en. Sec. 287, 1st Div. Rev. Stat. 1879; re-en. Sec. 298, 1st Div. Comp. Stat. 1887; re-en. Sec. 1173, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 92, L. 1905; en. Sec. 2, Ch. 41, L. 1907; Sec. 6796, Rev. C. 1907; amd. Sec. 7, Ch. 225, L. 1921; re-en. Sec. 9399, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 659.

Date From Which Time Runs for Service of Notice

Where the record on appeal did not affirmatively show that counsel for appellant was present when judgment was entered, or that it was entered before an extension of time in which to file his bill of exceptions on motion for new trial and stay of execution were asked for and granted on May 2d, and the clerk of the district court on May 6th attempted to advise him that the entry had been made two days before, and on May 15th counsel for respondent served formal notice upon him to that effect, appellant's notice of intention to move for new trial, served on May 21st, was in time. *Best Mfg. Co. v. Hutton*, 49 M 78, 86, 141 P 653.

Effect of Notice Before Judgment

Notice of motion for a new trial, given ten days before entry of judgment, is premature, and therefore ineffective as a basis for the motion. *Power & Bro. v. Turner*, 37 M 521, 543, 97 P 950.

Where a notice of intention to move for a new trial was served and filed before entry of judgment, the opposing party waived the point that the notice was premature, by stipulating with movant that the latter might have additional time in which to file his bill of exceptions in support of his motion, by thereafter accepting service thereof without objection, and by raising no objection at the argument, other than that there had been delay in calling it up. *Kenyon-Noble Co. v. School District*, 40 M 123, 125, 105 P 551.

The notice of intention to move for a new trial must be given within the time

prescribed by statute; if given either after the time has expired or before the time has commenced to run, it is ineffective for the purpose of conferring jurisdiction. *Calvert et al. v. Anderson et al.*, 78 M 334, 340 et seq., 254 P 184.

Id. Held, that the clear intendment of this section, providing that notice of motion for a new trial must be served and filed within ten days after return of the verdict (referring to a jury trial), or within ten days after receiving notice of the decision of the court (referring to a trial without a jury), is that the notice shall only be given after all the issues of fact necessary to a determination of the whole case upon the pleadings have been determined.

Effect of Stipulation Extending Time for Notice

Effect of stipulation, as to extension of time in which notice of motion for a new trial must be given. *Hill v. McKay*, 36 M 440, 445, 93 P 345.

Effect of Withdrawal of Original Notice and Substitution of Another

Where a written motion for a new trial has been made, its withdrawal and the substitution of another after the time for filing a notice had expired does not constitute, in effect, a withdrawal of the notice of intention to move so as to operate as an abandonment of the proceeding. *Wastl v. Montana Union Ry. Co.*, 13 M 500, 501, 34 P 844.

Extension of Time Unauthorized

Since the enactment of this section, the time for filing of notice of motion for a new trial cannot be extended either by order or stipulation, and therefore where such a notice was not filed until after the expiration of ten days it was too late and was properly stricken from the records, the contention that the defect was waived by the actions of opposing counsel being of no avail. *Dilts v. Brooks et al.*, 66 M 346, 351, 213 P 600.

Where notice of intention to move for a new trial was not filed until eleven

days after return of the verdict, the court was without jurisdiction to entertain it, and any orders made by it thereafter upon the assumption that the motion for new trial was still pending were void; hence an order made thereafter granting movant an extension of time within which to file his bill of exceptions was null, rendering the bill subject to a motion to strike from the record. *Stabler v. Adamson et al.*, 73 M 490, 495, 237 P 483.

Notice by Two Defendants—When Sufficient

A notice of appeal, though given by two defendants, against whom separate verdicts have been rendered, is sufficient, though both notices are embodied in one paper, if they give the plaintiff all the information which the statute requires. *Cummings v. Reins Copper Co.*, 40 M 599, 609, 107 P 904.

Where one of several defendants served his notice of intention to move for a new trial and his notice of appeal upon the only one of his codefendants who had any interest in opposing the relief sought by the motion and appeal, the service was sufficient as against the objection that all the adverse parties had not been served. *McIntyre v. MacGinnis*, 41 M 87, 92, 108 P 353.

"Notice of Entry of Judgment"

The notice of the entry of judgment contemplated by this section is a legal notice, that is, such a one as is described in section 9778, and served in the manner described in section 9779. *State ex rel. Cohn v. District Court*, 38 M 119, 124, 99 P 139.

Presumption That Notice Was Properly Filed and Served

The presumption is that the notice of intention was served and filed in time, unless the contrary affirmatively appears from the record. *State ex rel. Cohn v. District Court*, 38 M 119, 124, 99 P 139; *Best Mfg. Co. v. Hutton*, 49 M 78, 86, 141 P 653.

Purpose

The procedure to be followed in connection with a motion for new trial prescribed is exclusive, the notice of intention being the step initiating the proceeding, the chief function of which is to bring within the jurisdiction of the court those parties to the original action whose interests would be adversely affected by the granting of the motion. *Calvert et al. v. Anderson et al.*, 78 M 334, 340 et seq., 254 P 184.

Requisites of Notice in General

Upon a motion for a new trial, the notice of intention to move is the founda-

tion of the proceeding, and a formal written motion is not essential. *Wastl v. Montana Union Ry. Co.*, 13 M 500, 501, 34 P 844; *Lish v. Martin*, 55 M 582, 583, 179 P 826.

It is not necessary for a party to specify, in his notice of intention to move for a new trial, the particulars in which the evidence is claimed to be insufficient. *Ettien v. Drum*, 35 M 81, 89, 88 P 659.

The grounds of a motion for a new trial can be disclosed only by the notice of intention, required by this section to be filed within ten days after the receipt of notice of the entry of judgment. *Canning v. Fried*, 48 M 560, 564, 139 P 448.

A party desiring to move for a new trial must, under this section, serve his notice of motion upon the adverse party within ten days after verdict; if not served within that time it may be stricken from the files. *La Bonte v. Mutual Fire etc. Ins. Co.*, 75 M 1, 14, 241 P 631.

Service of Notice May be Waived

Service of notice of intention to move for a new trial may be waived. *Territory v. Rehberg*, 6 M 467, 469, 13 P 132; *Harigan v. Lynch*, 21 M 36, 42, 52 P 642; *Kenyon-Noble Co. v. School District*, 40 M 123, 126, 105 P 551; *McAllister v. McDonald*, 40 M 375, 387, 106 P 882; *Curn v. Perkins*, 40 M 588, 592, 107 P 901.

Though a party intending to move for a new trial may waive formal notice of the entry of judgment by instituting proceedings in support of his motion without it, such waiver may not be imputed to him where he inadvertently proceeds before he may properly do so. *McIntyre v. MacGinnis*, 41 M 87, 92, 108 P 353.

The statutory requirement that the party intending to move for a new trial must give notice of such intention within ten days after notice of the entry of judgment is intended for the benefit of the moving party; hence, the latter may waive notice of such entry and proceed without it; as where he serves the opposing party with notice of such intention, but notifies him that he will make such motion upon the minutes of the court and a bill of exceptions thereafter to be prepared and served. *State ex rel. Brown v. District Court*, 55 M 158, 161, 174 P 601.

What is Sufficient Notice of Entry of Judgment

A letter to the plaintiff's counsel, written by the clerk of the court, informing him that a judgment for the defendant has been signed, is not a sufficient notice of the entry of judgment. *Best Mfg. Co. v. Hutton*, 49 M 78, 87, 141 P 653.

When Notice Must be Served and Filed

A party intending to move for a new trial may do so by serving his notice within ten days after notice of the entry of judgment, but not before. *McIntyre v. MacGinnis*, 41 M 87, 92, 108 P 353.

To give the court jurisdiction over a motion for new trial, the notice of intention must be given within the time prescribed by the statute, but the court may grant extensions of time for the preparation of the documents to be made the basis of the motion. *Evans v. Oregon Short Line R. R. Co.*, 51 M 107, 111, 149 P 715.

Though the notice of intention to move for a new trial was served and filed on the same day that judgment was entered, with a fraction of a day intervening, such notice is not abortive because it was served and filed before the judgment was actually spread upon the judgment book; where no question of priority arises, it will be presumed that the clerk did his duty. *State ex rel. Brown v. District Court*, 55 M 158, 161, 174 P 601.

References

Cited or applied as section 1173, Code of Civil Procedure, before amendment, in *Strasburger v. Beecher*, 20 M 143, 144, 49 P 740; *Woodard v. Webster*, 20 M 279, 282, 50 P 791; *Murray v. Hauser*, 21 M 120, 125, 53 P 99; *Power v. Lenoir*, 22 M 169, 176, 56 P 106; *Application of Plume*, 23 M 41, 42, 57 P 408; *Farleigh v. Kelly*, 24 M 369, 372, 62 P 495, 685; *Rehberg v. Greiser*, 24 M 487, 492, 62 P 820, 63 P 41; *Ogle v. Potter*, 24 M 501, 504, 62 P 920; *Montana Ore Purchasing Co. v. Lindsay*, 25 M 24, 28, 63 P 715; *Yellowstone Nat. Bank v. Gagnon*, 25 M 268, 270, 64 P 664; *King v. Lincoln*, 26 M 157, 159, 66 P 836; *Whalen v. Harrison*, 26 M 316, 327, 67 P 934; *Kranich*

v. Helena Consolidated Water Co., 26 M 379, 381, 68 P 408, 71 P 672; *Cain v. Gold Mountain Min. Co.*, 27 M 529, 534, 71 P 1004; *Phillips v. Coburn*, 28 M 45, 50, 72 P 291; *King v. Pony Gold Min. Co.*, 28 M 74, 80, 72 P 309; *State ex rel. Stromberg-Mullins Co. v. District Court*, 28 M 123, 126, 74 P 412; *State ex rel. Heinze v. District Court*, 28 M 227, 235, 72 P 613; *State ex rel. Power v. Napton*, 28 M 336, 338, 72 P 676; *Wright v. Matthews*, 28 M 442, 443, 72 P 820; *Finlen v. Heinze*, 28 M 548, 561, 73 P 123; *Meisner v. City of Dillon*, 29 M 116, 124, 74 P 130; *State v. City of Walkerville v. District Court*, 29 M 176, 177, 74 P 414; *State v. Landry*, 29 M 218, 220, 74 P 418; *Ball v. Gussenhoven*, 29 M 321, 332, 74 P 871; *Hendrickson v. Wallace*, 29 M 504, 506, 75 P 355; *Smith v. Shook*, 30 M 30, 35, 75 P 513; *Nord v. B. & M. C. C. & S. M. Co.*, 30 M 48, 56, 75 P 681; *York v. Steward*, 30 M 367, 369, 76 P 756; *Schilling v. Curran*, 30 M 370, 376, 76 P 998; *Bond v. Hurd*, 31 M 314, 315, 78 P 579; *Gillies v. Clarke Fork Coal Min. Co.*, 32 M 320, 324, 80 P 370; *Pirrie v. Moule*, 33 M 1, 6, 81 P 390; *Hickey v. Anaconda Copper Min. Co.*, 33 M 46, 56, 81 P 806; *Friel v. Kimberly-Montana Gold Min. Co.*, 34 M 54, 59, 85 P 734; *Martin v. Corscadden*, 34 M 308, 316, 86 P 33; *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 36 M 478, 483, 93 P 640; as section 6796, Revised Codes, in *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 234, 99 P 837; *Girard v. McClernan*, 39 M 523, 528, 105 P 224; *State ex rel. Jones v. District Court*, 50 M 1, 4, 144 P 564; *State ex rel. Thelen v. District Court*, 51 M 337, 341, 152 P 475; *Ferrat v. Adamson*, 53 M 172, 177, 163 P 112; *State ex rel. Sinko v. District Court*, 64 M 181, 208 P 952; *Harrison v. Riddell et al.*, 64 M 466, 210 P 460; *Miles v. Miles*, 76 M 375, 383, 247 P 328; *Clifton-Applegate-Toole v. Drain Dist. No. 1*, 82 M 312, 319, 267 P 207.

9400. Hearing of motion—continuance—papers used. The hearing on the motion for new trial shall be had within ten days after the notice of motion is filed when the motion is made only on the minutes of the court and within ten days after the filing of affidavits and counter-affidavits when the motion is made on affidavits. The court may continue the hearing for not to exceed thirty days when engaged in the trial of cases at the time set for said hearing, or when for any other cause the court is unable, without serious inconvenience, to hear the matter upon the date fixed. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter, and the court shall decide the motion within fifteen days after the same is submitted. If the court shall fail to decide the motion within said time, the motion shall, at the expiration of said period, be deemed denied. The decision on motion for a new trial may be entered in the minutes of the court, or may be made in writing in chambers or in any county in the state where

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the judge may be, and be filed with the clerk of court in the county where the action is pending. Upon the hearing, reference may be had in all cases to the pleadings and the orders of the court on file, and, when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial and to the proceedings on the trial, and, when necessary, reference may be had to the notes of the court reporter.

History: Ap. p. Sec. 172, p. 77, Bannack Stat.; amd. Sec. 236, p. 76, Cod. Stat. 1871; en. Sec. 288, p. 114, L. 1877; re-en. Sec. 288, 1st Div. Rev. Stat. 1879; re-en. Sec. 299, 1st Div. Comp. Stat. 1887; amd. Sec. 1174, C. Civ. Proc. 1895; amd. Sec. 3, Ch. 41, L. 1907; Sec. 6797, Rev. C. 1907; amd. Sec. 8, Ch. 225, L. 1921; re-en. Sec. 9400, R. C. M. 1921, Cal. C. Civ. Proc. Sec. 660.

"Deemed" Defined

The word "deemed" as used in this section held to be equivalent to or synonymous with the words "considered," "determined," "adjudged," and therefore where something is by statute deemed to have been done, it is to be treated as having been done. State ex rel. Sinko v. District Court, 64 M 181, 187, 208 P 952.

Denial by Court by Failure to Pass on Motion Not Reviewable

Failure of the trial court to pass upon a motion for new trial within fifteen days declared by this section to be equivalent to a denial of the motion, is not reviewable on appeal. Outlook F. E. Co. v. American S. Co., 70 M 8, 15, 223 P 905.

Diligence Presumed

In the absence of an affirmative showing that the trial court abused its discretion in hearing a motion for new trial eleven months after notice of the motion, it will be presumed on appeal that it was heard at the earliest practicable period after notice, as required by this section where the motion was based upon the minutes of the court. Price v. Northern Pacific Ry. Co., 60 M 166, 170, 198 P 439.

Effect of Delay of Person in Bringing Motion to Hearing

Delay of a party in bringing his motion for new trial to a hearing is not ground for denying the motion. Wyman v. Jensen, 26 M 227, 238, 67 P 114.

Right of Appeal Not Denied by This Section

Held that the provision of this section that if the district court shall fail to decide a motion for new trial within fifteen days after its submission, the motion shall be deemed denied, is not open to the construction that thereby it is left optional with the moving party to consider the motion denied and appeal from the judgment, or permit it to remain under con-

sideration by the court for so long a time as the court might desire to consider it. State ex rel. Sinko v. District Court, 64 M 181, 187, 208 P 952.

Id. A party moving for a new trial is presumed to know that unless decided within fifteen days after its submission his motion is by operation of law denied, and if he fails to act upon that presumed knowledge and to take an appeal from the judgment within the statutory time he is in no position to complain that by the above construction of this section he is denied his right of appeal from the judgment.

What Court May Consider in Passing on a Motion

In passing upon a motion for a new trial made on the minutes of the court and affidavits filed in support thereof, the court is not bound to take the uncontroverted affidavits as true, but may take into consideration the pleadings, records and evidence, and have recourse to the notes of the court reporter. Davenport v. Davenport, 69 M 405, 412, 222 P 422; Parsons v. Rice, 81 M 509, 516, 264 P 396; Russell v. Sunburst Refining Co., 83 M 452, 462, 272 P 998.

When Court Must Pass on Motion

This section provides that the district court shall decide a motion for new trial within fifteen days after its submission, otherwise the motion shall be deemed denied; the decision may be made orally and entered in the minutes, or by written order filed with the clerk. At the close of argument of such a motion based on the ground of excessive damages the court announced that it believed the damages excessive and that if defendant would consent to a reduction, a new trial would be denied, otherwise it would be granted, defendant's counsel at once excepting to the court's ultimatum and ruling. Twenty days thereafter the court filed a written order granting a new trial. Held, as against the contention that the motion was not decided until the written order was filed and that therefore the court was then, twenty days after submission of the motion, without jurisdiction to make it, that the motion was decided at once when by excepting to the ultimatum of the court, counsel rejected the offer of a reduction, that the oral order then made

was self-executing, and the filing of the subsequent formal one without effect. *State Highway Commission v. Speidel*, 87 M 221, 223, 286 P 413.

When Hearing is Timely

While this section provides that the hearing of a motion for new trial must be had within ten days after notice of motion is filed, it also provides that the court may continue the hearing for certain reasons, not to exceed thirty days; therefore where such continuance was had to a date well within the thirty-day period and heard on that day, the hearing was within time. *Russell v. Sunburst Refining Co.*, 83 M 452, 462, 272 P 998.

The time limit of thirty days for which, under this section, hearing of a motion for a new trial may be continued, is not

controlling where the trial judge, disqualified by affidavit from hearing it, is unable within that time to secure a judge of another district to preside at the hearing. *Benema v. Union Ct. Life Ins. Co.*, 94 M 138, 142, 21 P 2d 69.

References

Cited or applied as section 1174, Code of Civil Procedure, before amendment, in *State ex rel. Beach v. District Court*, 29 M 265, 271, 74 P 498; as section 6797, Revised Codes, in *Sell v. Sell*, 58 M 329, 336, 193 P 561; *General F. E. Co. v. Northwestern A. S. Co.*, 70 M 1, 6, 223 P 504; *O'Donnell v. City of Butte*, 72 M 449, 453, 235 P 707; *Russell v. Sunburst Refining Co.*, 83 M 452, 272 P 998; *Schoenborn v. Williams et al.*, 83 M 477, 480, 272 P 992.

9401. Stay of proceedings, when. When notice of intention to move for a new trial is given, the judge may, upon such terms as in his opinion shall be just, make an order staying proceedings until the motion for new trial is disposed of.

History: Ap. p. Sec. 289, p. 115, L. 1877; re-en. Sec. 289, 1st Div. Rev. Stat. 1879; re-en. Sec. 300, 1st Div. Comp. Stat. 1887; en. Sec. 1175, C. Civ. Proc. 1895; re-en. Sec. 6798, Rev. C. 1907; re-en. Sec. 9401, R. C. M. 1921.

Operation and Effect

While the granting of a stay of proceedings after notice of motion for a new trial has been given rests in the discretion of the trial judge, such power should be exercised with caution and upon the exaction of some sort of security, except in cases where the ultimate satisfaction of the judgment is otherwise assured. *State ex rel. Robinson v. Clements*, 37 M 96, 98, 94 P 837.

Id. The fact that a district court had for many years pursued the erroneous practice of granting a stay of execution upon the ex parte application of a party moving for new trial, without exacting security,

contrary to the plain provisions of this section, did not endow the practice with the force of law, no matter how long continued.

Id. On application for a writ of mandate to compel a district judge to vacate an order granting a stay of execution pending the determination of a motion for new trial, a petition which failed to show what facts, if any, relative to the solvency of the movant were brought to the knowledge of the judge at the time the order was made, was insufficient to overcome the presumption that official duty had been regularly pursued, and that the order complained of was the result of the exercise of a sound legal discretion.

References

Cited or applied as section 6798, Revised Codes, in *State ex rel. Jones v. District Court*, 50 M 1, 4, 144 P 564; *Hoppin v. Long*, 74 M 558, 571, 241 P 636.

9402. Contents of record on appeal. The record on appeal from a final judgment shall consist of the judgment-roll, as defined in section 9409, together with all bills of exception settled and filed in the case, and a copy of the notice of appeal.

Whenever a motion for a new trial has been made and overruled, the party appealing from the judgment, and desiring to review also the order of the court denying the motion for a new trial, shall be permitted to use, in lieu of a bill of exceptions, a transcript of the minutes of the court, prepared and certified in the manner hereinafter provided, or he may prepare and have settled a bill of exceptions in the manner provided by section 9390. The record on appeal from an order granting a new trial shall consist of the pleadings and the affidavits used in the hearing, a copy

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of the motion for a new trial, a copy of the notice of appeal, and a transcript of the minutes of the court used on the hearing, containing all that part of the minutes of the court and all that part of the official stenographic report of the trial which was used on the hearing of the motion for a new trial or which related to questions raised on the hearing, or such parts thereof as may be agreed upon by the parties as sufficient; such transcript of the minutes shall be prepared, certified by the court as correct, and filed with the clerk of the court, who shall transmit the same to the supreme court as a part of the record on appeal.

History: Ap. p. Sec. 1176, C. Civ. Proc. 1895; en. Sec. 4, Ch. 41, L. 1907; Sec. 6799, Rev. C. 1907; amd. Sec. 9, Ch. 225, L. 1921; re-en. Sec. 9402, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 661.

Effect of an Erroneous Title Given to Part of the Record

The mere fact that the record on appeal from an order granting a new trial, required by this section, to contain a transcript of the minutes of the court made on the hearing, is erroneously entitled "bill of exceptions" does not destroy its efficacy. *Parsons v. Rice*, 81 M 509, 516, 264 P 396.

Judgment-Roll Need Not be Authenticated

Where the record on appeal contains properly authenticated copies of the papers of which the judgment-roll is composed, it is sufficient to meet the requirements of this section, even though it is not authenticated by the clerk as the judgment-roll. *Doornbos v. Thomas*, 50 M 370, 377, 147 P 277.

If the record on appeal from an order denying a new trial, made upon the minutes of the court, contains certified copies of all the papers which go to make up the judgment-roll, it need not embody a copy of the latter authenticated as such. *Stokes v. Long*, 52 M 470, 476, 159 P 28; *Eby v. City of Lewistown*, 55 M 113, 119, 173 P 1163.

Record on Appeal in General

Under this section, the record on appeal from an order overruling a motion for new trial must, among other things, contain the judgment-roll or such parts thereof as may be necessary to be considered on the appeal. *Minneapolis T. M. Co. v. Stanford M. Co.*, 59 M 359, 361, 197 P 993.

Where the transcript on appeal from a judgment does not contain a copy of the judgment, the supreme court is without jurisdiction to entertain the appeal. *Easton v. Western Life & Casualty Co.*, 59 M 434, 435, 197 P 252.

Id. The record on appeal from an order overruling motion for new trial must contain the judgment-roll, which of necessity must include the judgment.

Papers and documents incorporated in the transcript on appeal from a final judgment which are not properly a part of the judgment-roll and not included in a bill of exceptions duly settled are no part of the record and will be stricken therefrom. *Thompson v. Chicago etc. R. R. Co. et al.*, 78 M 170, 176, 253 P 313.

References

Cited or applied as section 1176, Code of Civil Procedure, before amendment, in *Wastl v. Montana Union Ry. Co.*, 24 M 159, 174, 61 P 9; *State v. Lucey*, 24 M 295, 305, 61 P 994; *Ryder & Adams Co. v. Closser*, 25 M 149, 150, 63 P 1043; *Conklin v. Cullen*, 25 M 214, 216, 64 P 502; *Beach v. Spokane Ranch & Water Co.*, 25 M 367, 371, 65 P 106; *In re Reilly's Estate*, 26 M 353, 359, 67 P 1121; *Kranich v. Helena Consolidated Water Co.*, 26 M 379, 381, 68 P 408, 71 P 672; *Carr, Ryder & Adams Co. v. Closser*, 27 M 94, 95, 69 P 560; *King v. Pony Gold Min. Co.*, 28 M 74, 82, 72 P 309; *Lisker v. O'Rourke*, 28 M 129, 132, 72 P 416, 755; *State ex rel. Heinze v. District Court*, 28 M 227, 235, 72 P 613; *Cornell v. Matthews*, 28 M 457, 459, 72 P 975; *Emerson v. McNair*, 28 M 578, 580, 73 P 121; *Powell v. May*, 29 M 71, 72, 74 P 80; *State ex rel. Bank v. Taylor*, 33 M 364, 365, 83 P 597; *In re Dougherty's Estate*, 34 M 336, 342, 86 P 38; *Sutton v. Lowry*, 39 M 462, 469, 104 P 545; as section 6799, Revised Codes, in *State ex rel. Coleman v. District Court*, 51 M 195, 198, 149 P 973; *Great Falls Nat. Bk. v. Young et al.*, 67 M 328, 334, 215 P 651; *Putnam v. Doney*, 78 M 190, 191, 253 P 270; *State v. Dixon*, 80 M 181, 213, 260 P 138; *Nagle v. City of Billings*, 80 M 278, 282, 260 P 717; *Clifton-Applegate-Toole v. Drain Dist. No. 1*, 82 M 312, 320, 267 P 207.

CHAPTER 58

THE MANNER OF GIVING AND ENTERING JUDGMENT

- Section 9403. Judgment to be entered in twenty-four hours, etc.
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9403. Judgment to be entered in twenty-four hours, etc. When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

History: En. Sec. 173, p. 77, Bannack Stat.; re-en. Sec. 197, p. 174, L. 1867; re-en. Sec. 237, p. 77, Cod. Stat. 1871; re-en. Sec. 290, p. 115, L. 1877; re-en. Sec. 290, 1st Div. Rev. Stat. 1879; re-en. Sec. 302, 1st Div. Comp. Stat. 1887; re-en. Sec. 1190, C. Civ. Proc. 1895; re-en. Sec. 6800, Rev. C. 1907; re-en. Sec. 9403, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 664.

Operation and Effect

Under this section, there cannot be a stay in aid of a new trial; such a stay is properly granted only after notice of intention has been given, as provided in section 9401, and notice of intention cannot be given, as shown by section 9399; until judgment has been entered. State ex rel. Jones v. District Court, 50 M 1, 4, 144 P 564.

Id. A case tried by a jury may be reserved for argument, under this section, only when the judgment does not necessarily follow the verdict, as, for instance, in equity suits, or where, after discharge of the jury, the verdict is claimed to be unresponsive to the issues, or so ambiguous or informal that no judgment, proper under the issues, could be entered in conformity with it.

Id. Neither the reservation nor the stay mentioned in this section can be

allowed ex gratia or without adequate reason.

The ministerial act of the clerk in recording a general verdict constitutes the rendition of judgment, to the entry of which the signature of the judge is not essential, but when the court directs the jury to return special findings, the announcement of his decision in open court and the entry of it in the minutes constitute the rendition of the judgment. McIntyre v. Northern Pacific, 58 M 256, 265, 191 P 1065.

The entry of the judgment is the act of the clerk, but, when entered, becomes the judgment of the court. Hynes v. Barnes, 30 M 25, 27, 75 P 523.

It is not the intention of the law that a judgment will follow so far behind the verdict as to be the cause of substantial damage, this being apparent from the code provision requiring the entry of judgment within twenty-four hours after verdict. Chestnut v. Sales, 49 M 318, 324, 141 P 986.

References

Cited or applied as section 6800, Revised Codes, in Consolidated Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 570, 111 P 152; Lasby v. Burgess, 93 M 349, 353, 18 P 2d 1104; Lynch v. City of Butte, 99 M 287, 43 P 2d 652.

9404. Case may be brought before the court for argument. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

History: En. Sec. 174, p. 77, Bannack Stat.; re-en. Sec. 198, p. 174, L. 1867; re-en. Sec. 238, p. 77, Cod. Stat. 1871; re-en. Sec. 290, p. 115, L. 1877; re-en. Sec. 290, 1st Div. Rev. Stat. 1879; re-en. Sec. 302, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1191, C. Civ. Proc. 1895; re-en. Sec. 6801, Rev. C. 1907; re-en. Sec. 9404, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 665.

9405. When counterclaim established exceeds plaintiff's demand. If a counterclaim, established at the trial, exceeds the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

History: En. Sec. 175, p. 77, Bannack Stat.; re-en. Sec. 199, p. 174, L. 1867; re-en. Sec. 239, p. 77, Cod. Stat. 1871; re-en. Sec. 291, p. 115, L. 1877; re-en. Sec. 291, 1st Div. Rev. Stat. 1879; re-en. Sec. 303, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1192, C. Civ. Proc. 1895; re-en. Sec. 6802, Rev. C. 1907; re-en. Sec. 9405, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 666.

9406. In replevin, judgment to be in the alternative, and with damages. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

9406
110 P.(2d) 975

History: En. Sec. 176, p. 77, Bannack Stat.; re-en. Sec. 200, p. 174, L. 1867; re-en. Sec. 240, p. 77, Cod. Stat. 1871; re-en. Sec. 291, p. 115, L. 1877; re-en. Sec. 291, 1st Div. Rev. Stat. 1879; re-en. Sec. 303, 1st Div. Comp. Stat. 1887; re-en. Sec. 1193, C. Civ. Proc. 1895; re-en. Sec. 6803, Rev. C. 1907; re-en. Sec. 9406, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 667.

Damages

Power of jury, in claim and delivery, to award damages. *Chestnut v. Sales*, 49 M 318, 323, 141 P 986.

This section and section 9363, recognize the right of the defendant in a claim and delivery action, who is awarded a return of the property, to recover damages for the wrongful taking and detention of it. *Hammond v. Thompson*, 54 M 609, 611, 173 P 229.

In an action in claim and delivery to recover a band of sheep or their value, an instruction fixing the measure of damages recoverable as the value of the property as of the date of the trial held erroneous, the measure being its value at the time of the wrongful taking, with interest to the time of trial. *First Nat. Bank v. Perrine et al.*, 97 M 262, 269, 33 P 2d 997.

Failure of Defendant to Demand Return of Property

Held, under section 9363 and this section, that where defendant in an action in claim and delivery fails in his answer

to demand the return of the property or its value, and the jury's verdict is in favor of plaintiff as to a portion thereof only, failure of the court to incorporate in the judgment a provision in favor of defendant as to the portion eliminated by the jury is not error. *Hayes v. Moffatt*, 83 M 185, 192, 271 P 452.

When Judgment Must be in the Alternative

The judgment in a claim and delivery action must be in the alternative. *Hynes v. Barnes*, 30 M 25, 26, 75 P 523; *Kelsey v. Yadish et al.*, 66 M 23, 24, 212 P 495.

Under this section there can be no judgment for the value if there can be a delivery of the property, but a judgment is not necessarily erroneous if the alternative is not expressed on its face. An absolute judgment for the money is equivalent to a special finding that a delivery cannot be made. *Boley v. Griswold*, 20 Wall. 486, 22 L. Ed. 375.

The requirement that in an action in claim and delivery the judgment must be in the alternative, viz., for the return of the property, or in case return cannot be made, for its value, held to apply only to a case tried upon the merits, and that therefore such a judgment in a case in which a verdict was directed for defendant because the complaint did not state facts sufficient to state a cause of action was error. *Barrett v. Shipley*, 63 M 152, 159, 206 P 430.

Where, prior to trial of a claim and delivery action, the property in controversy was turned back to plaintiff under appropriate proceedings, failure of the court to enter judgment in his favor in the alternative—for its return or its value in case return could not be had—does not constitute error of which defendant may complain, there being no necessity under

such circumstances for incorporation of the alternative clause. *Hayes v. Moffatt*, 83 M 185, 192, 271 P 452; *Fergus Motor Co. v. Schott et al.*, 95 M 249, 260, 26 P 2d 365.

References

Dalke v. Pancoast, 63 M 524, 527, 208 P 589.

9407. Judgment book to be kept by the clerk. The clerk must keep, with the records of the court, a book to be called the "judgment book," in which judgments must be entered.

History: En. Sec. 201, p. 174, L. 1867; re-en. Sec. 241, p. 77, Cod. Stat. 1871; re-en. Sec. 292, p. 115, L. 1877; re-en. Sec. 292, 1st Div. Rev. Stat. 1879; re-en. Sec. 304, 1st Div. Comp. Stat. 1887; amd. Sec. 1194, C. Civ. Proc. 1895; re-en. Sec. 6804, Rev. C. 1907; re-en. Sec. 9407, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 668.

Operation and Effect

Where judgments are required to be entered by the clerk in a record of the court

to be called the "judgment book," the entry of a judgment in a book designated as "journal of proceedings," though irregular, does not impair or invalidate the judgment as between the parties to the action. *Work v. Northern Pacific Ry. Co.*, 11 M 513, 520, 29 P 280.

The entry of a judgment is its recordation in the judgment book mentioned in this section. *Morehouse v. Bynum*, 51 M 289, 294, 152 P 477; *Lynch v. City of Butte*, 99 M 287, 43 P 2d 652.

9408. If a party die after verdict, judgment may be entered, but not to be a lien. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such a judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

History: En. Sec. 178, p. 78, Bannack Stat.; amd. Sec. 202, p. 174, L. 1867; re-en. Sec. 242, p. 77, Cod. Stat. 1871; re-en. Sec. 293, p. 116, L. 1877; re-en. Sec. 293, 1st Div. Rev. Stat. 1879; re-en. Sec. 305, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1195, C. Civ. Proc. 1895; re-en. Sec. 6805, Rev. C. 1907; re-en. Sec. 9408, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 669.

9409. Judgment-roll—contents and filing. Immediately after entering the judgment the clerk must attach together and file the following papers, which constitute the judgment-roll:

(1) In case no defendant has appeared, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment and in case the service so made is by publication the affidavit for publication of summons, and the order directing the publication of summons;

(2) In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court or referee, all bills of exceptions taken and filed, all orders, matters, proceedings deemed excepted to without bill of exceptions, and a copy of any order made on demurrer or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of service of it upon such defendant and if the service on such defaulting defendant be by publication, then the affidavit for publication and the order directing the publication of the summons, must also be added to the other papers mentioned in this subdivision.

9407
Rel. matter
S.L. '43 c. 83
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9409
100 Mont. 137
46 P (2d) 42

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89 P. (2d) 1021

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145 P. (2d) 827

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176 P. (2d) 268

9409 (2)
137 P. (2d)
1015

History: Ap. p. Sec. 203, p. 174, L. 1867; re-en. Sec. 243, p. 77, Cod. Stat. 1871; re-en. Sec. 294, p. 116, L. 1877; re-en. Sec. 294, 1st Div. Rev. Stat. 1879; re-en. Sec. 306, 1st Div. Comp. Stat. 1887; en. Sec. 1196, C. Civ. Proc. 1895; re-en. Sec. 6806, Rev. C. 1907; amd. Sec. 1, Ch. 36, L. 1921; re-en. Sec. 9409, R. C. M. 1921; amd. Sec. 1, Ch. 146, L. 1925. Cal. C. Civ. Proc. Sec. 670.

Agreed Statement of Facts is Part of Judgment-Roll

An agreed statement of facts has the force of a special verdict or finding of fact, and becomes a part of the judgment-roll under this section. *Conklin v. Cullen*, 25 M 214, 217, 64 P 502. See also *In re Klein's Estate*, 35 M 185, 203, 88 P 798.

An agreed statement of facts, which constitutes the trial court's finding of facts, comes properly before the supreme court for determination upon the judgment-roll. *Hale County v. Jefferson*, 39 M 137, 141, 101 P 973.

Bill of Exceptions is Part of Judgment-Roll

A bill of exceptions, prepared and settled under the provisions of this code, is a part of the judgment-roll. *Kranich v. Helena Consolidated Water Co.*, 26 M 379, 380, 68 P 408, 71 P 672.

Finding of Court or Referee

The "finding" of a referee, which this section provides shall be part of the judgment-roll, is the "finding" on the whole issue designated in section 9384. *Murphy v. Patterson*, 24 M 575, 584, 63 P 375.

How Default Should be Recorded

The fact that a default was duly entered against the defendant should appear either upon the minutes of the court or by an indorsement of the clerk upon the back of the complaint. *Palmer v. McMaster*, 8 M 186, 195, 19 P 585.

Importance of Judgment-Roll to the Appeal

On appeal from a final judgment, the presence of a copy of the judgment-roll in the record is jurisdictional, and without it the court cannot consider any question on the appeal. *Featherman v. Granite County*, 28 M 462, 465, 72 P 972. See also *Glavin v. Lane*, 29 M 228, 229, 74 P 406.

Informal Judgment-Roll

Where there is no formal judgment-roll consisting of the papers enumerated in this section, because there was no formal answer to the complaint, but the only papers which could be incorporated in the roll are contained in the record, properly certified as constituting the judgment-roll,

they will be considered as such on appeal. *Bickford v. Kirwin*, 30 M 1, 5, 75 P 518.

Instructions May be Part of Judgment-Roll

Instructions made a part of the judgment-roll can be reviewed on appeal, and need not be included in a bill of exceptions. *Wastl v. Montana Union Ry. Co.*, 24 M 159, 174, 61 P 9.

This section has, since the adoption of section 9349, become obsolete, so far as it includes the instructions as a part of the record for review, without a bill of exceptions, embodying the objections of the party to the action of the court thereon; and this applies, also, to instructions requested and refused. *Robinson v. Helena Light & Ry. Co.*, 38 M 222, 247, 99 P 837.

Instructions are a part of the judgment-roll. *Butte Mining & Milling Co. v. Kenyon*, 30 M 314, 318, 76 P 696, 77 P 319.

Motion to Strike is Part of the Judgment-Roll

A motion to strike out a portion of a pleading, being in effect a demurrer, constitutes part of the judgment-roll, and an order sustaining the same being deemed excepted to, is reviewable on appeal from the judgment without a bill of exceptions. *Bank of Commerce v. Fuqua*, 11 M 285, 293, 28 P 291.

An order sustaining a motion to strike out a portion of an answer is deemed excepted to, and is a part of the judgment-roll. *Bordeaux v. Bordeaux*, 43 M 102, 106, 115 P 25.

Order Allowing Amendment and Continuance is Part of Judgment-Roll

An order permitting an amendment to the complaint and refusing a continuance, after the jury had been sworn, is a part of the judgment-roll. *Borden v. Lynch*, 34 M 503, 507, 87 P 609.

Order Dismissing an Action is Part of the Judgment-Roll

An order of the district court, sustaining a motion to dismiss an action, on appeal to it from a justice's court, is properly a part of the judgment-roll; it is deemed to have been excepted to. *Metzler v. Adamson*, 38 M 198, 200, 99 P 441.

Id. The record on appeal from an order of the district court, sustaining a motion to dismiss an action, on appeal to it from a justice's court, must be made up as provided in this section, or there can be no record on appeal in such a case. This section makes no distinction between records in cases originating in the district court and those in cases brought into that court by appeal.

Probate Proceedings—Judgment-Roll

While, technically speaking, there is no judgment-roll in probate proceedings, the successive determinations of the court in the course of them, whenever directly or by implication declared by the statute to be final, must be regarded as final judgments, and the portions of the record upon which they are based must, on appeal, be regarded as the record for the particular determination. In *re Dougherty's Estate*, 34 M 336, 341, 86 P 38.

Id. On appeal from an order of the district court settling the account of an administratrix, the account, the written objections thereto, and the findings, and order of the court, together with a certified copy of the notice of appeal, constitute the judgment-roll for the purpose of the appeal, and a sufficient record to entitle the appeal to consideration on its merits.

Requisites of Judgment-Roll

Where the transcript on appeal contains no copy of any complaint, summons, proof of service, or of any other pleadings in the cause, there is no judgment-roll, within the meaning of this section, without which the supreme court has no jurisdiction to consider an appeal from a final judgment. *Stanton v. Lewis*, 28 M 267, 268, 72 P 658.

Where a number of changes of parties had been made by the court since the commencement of the action, but the record failed to contain copies of orders relating thereto, the judgment-roll was not complete, and the supreme court had no jurisdiction to consider the appeal on its merits. *Beck v. Holland*, 28 M 460, 461, 72 P 972.

The judgment-roll consists of such papers as constitute the record of the case in the court below; it should contain only such papers as the statute makes a part of the record. *Featherman v. Granite County*, 28 M 462, 466, 72 P 972.

What is Not a Part of Judgment-Roll

A motion for a nonsuit is no part of the judgment-roll. *Kleinschmidt v. McAndrews*, 4 M 223, 224, 2 P 286.

A motion and affidavit for a continuance are not a part of the judgment-roll. *Barber v. Briscoe*, 8 M 214, 223, 19 P 589.

Evidence at the trial is no part of the judgment-roll unless incorporated in a bill of exceptions or statement settled by the judge or referee before whom the trial takes place. *Conklin v. Cullen*, 25 M 214, 215, 64 P 502.

Proposed amendments of a bill of exceptions, which were allowed, but not incorporated in the bill, cannot be considered on appeal, although they appeared

in the transcript. *Yellowstone Nat. Bank v. Gagnon*, 25 M 268, 269, 64 P 664.

Where plaintiff's bill of exceptions was made up entirely of matters occurring after the entry of final judgment, it was no part of the judgment-roll, and hence would not be considered on defendant's appeal from an order denying a new trial. *Beach v. Spokane Ranch & Water Co.*, 25 M 367, 377, 65 P 106.

The register of actions is not a part of the judgment-roll. *Haupt v. Simington*, 27 M 480, 485, 71 P 672.

A statement on motion for a new trial is no part of the judgment-roll. *Powell v. May*, 29 M 71, 72, 74 P 80.

A statement on motion for a new trial is not a part of the judgment-roll under this section. *Harrington v. Butte & Boston Min. Co.*, 35 M 530, 531, 90 P 748.

In a divorce suit, where an insane husband was not personally served with summons, but a guardian ad litem was appointed, upon whom summons was served, and he appeared for the defendant by filing a demurrer, the summons with the return thereon is not part of the judgment-roll; the decree is on its face valid; and there is nothing upon the face of the record to reveal any infirmity. *State ex rel. Happel v. District Court*, 38 M 166, 170, 99 P 291.

Bills and documents incorporated in the transcript on appeal from a final judgment which are not properly a part of the judgment-roll and not included in a bill of exceptions duly settled are not part of the record and will be stricken therefrom. *Thompson v. Chicago etc. R. R. Co. et al.*, 78 M 170, 176, 253 P 313.

References

Cited or applied as section 294, First Division Revised Statutes 1879, in *Rooney v. Tong*, 4 M 596, 2 P 312; *Blessing v. Sias*, 7 M 103, 14 P 663; as section 306, First Division Compiled Statutes 1887, in *Sawyer v. Robertson*, 11 M 416, 28 P 456; as section 1196, Code of Civil Procedure, in *State v. Lucey*, 24 M 295, 305, 61 P 994; *Carr v. Ryder & Adams Co. v. Closser*, 25 M 149, 150, 63 P 1043; *Carr, Ryder & Adams Co. v. Closser*, 27 M 94, 95, 69 P 560; *Kinman v. Scheuer*, 30 M 73, 74, 75 P 690; *Burton v. Kipp*, 30 M 275, 285, 76 P 563; as section 6806, Revised Codes, in *Conrow v. Huffine*, 48 M 437, 447, 138 P 1094; *De Sandro v. Missoula Light & Water Co.*, 52 M 333, 336, 157 P 641; as section 1196, Code of Civil Procedure, in *Ferrat v. Adamson*, 53 M 172, 176, 163 P 112; as section 6806, Revised Codes, in *State ex rel. Brown v. District Court*, 55 M 158, 159, 174 P 601; *Batchoff*

v. Butte Pacific Copper Co., 60 M 179, 190, 198 P 132; Griffith v. Montana W. G. Assn., 75 M 466, 473, 244 P 277; Putnam

v. Doney, 78 M 190, 191, 253 P 270; Clifton-Applegate-Toole v. Drain Dist. No. 1, 82 M 312, 320, 267 P 207.

9410. Judgment lien—when it begins and when it expires. Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied.

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74 P (2d) 456,
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.....Mont.
§ 410
27 F. Supp. 503

History: Ap. p. Sec. 180, p. 78, Bannack Stat.; en. Sec. 204, p. 174, L. 1867; re-en. Sec. 244, p. 77, Cod. Stat. 1871; amd. Sec. 1, p. 40, L. 1876; re-en. Sec. 295, p. 116, L. 1877; re-en. Sec. 295, 1st Div. Rev. Stat. 1879; re-en. Sec. 307, 1st Div. Comp. Stat. 1887; re-en. Sec. 1197, C. Civ. Proc. 1895; re-en. Sec. 6807, Rev. C. 1907; re-en. Sec. 9410, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 671.

Applies to Judgments of Federal Court

This section, by force of the federal statute, applies to the judgments of federal courts within the state. Great Falls Nat. Bank v. McClure, 176 Fed. 208, 211, 99 C. C. A. 562.

Attaches to an Unpatented Mining Claim

An unpatented mining claim being real estate, a judgment lien attaches to it under this section. Butte Hardware Co. v. Frank, 25 M 344, 348, 65 P 1.

Clerk Presumed to Have Done His Official Duties

In the absence of anything to the contrary, it will be presumed that the clerk of the district court performed his official duty as prescribed in this section. Britannia Min. Co. v. United States F. & G. Co., 43 M 93, 100, 115 P 46.

Effect of Mistake of Name on Judgment Lien

The record of a money judgment against Mrs. C. J. E. cannot be held to have imparted constructive notice to a purchaser of real property from Anna E., the record title holder, that the property was impressed with a lien of judgment, unless the purchaser had actual knowledge that Mrs. C. J. E. and Anna E. were the same person. Poulos v. Lyman Brothers Co., 63 M 561, 208 P 598.

Interest Not Disclosed by Record Not Subject to Lien

Construing the provisions of this section with those of section 9424, held, that an

interest in real estate not disclosed of record is not subject to the lien of a docketed judgment. Piccolo et al. v. Tanaka et al., 78 M 445, 451, 253 P 890.

Nature of Lien

A judgment lien is not a specific lien upon the real estate of the judgment debtor, so as to constitute a property in the land itself to the exclusion of a prior equitable title in a third person, but is a general lien, securing a right to levy, or a preference over interests subsequently acquired, and is subject to all prior liens, whether legal or equitable. Vaughn v. Schmalsle, 10 M 186, 193, 25 P 102.

The lien given by this section is not a specific lien, or a lien in rem. It affects or charges only the actual interest of the debtor in the land—the subject of the ownership—and does not create a preference over, but is subject to, all prior legal or equitable titles in other persons. Rockefeller v. Dellinger, 22 M 418, 422, 56 P 822, 74 Am. St. Rep. 613. See also Stockmen's Nat. Bank v. Hofelot, 54 M 205, 209, 169 P 48.

Operation of Lien

Under this section and sections 1571 to 1574, where real estate is sold under execution and bid in by the judgment creditor for less than the amount of his judgment, the judgment debtor may transfer the interest remaining in him, during the period of redemption, to a third person, who, upon redemption within the statutory time, acquires the legal title free from the lien of a deficiency judgment theretofore entered. McQueeney v. Toomey, 36 M 282, 295, 92 P 561.

Id. An execution sale transfers the legal title to the purchaser leaving in the judgment debtor simply the right to redeem.

The lien of an attachment is merged in that of the judgment recovered in the main action; and the judgment continues and may be enforced by execution and levy against any of the real property of the defendant, whether covered by the

attachment or not, at any time within six years, but not afterward. *Great Falls Nat. Bank v. McClure*, 176 Fed. 208, 211, 99 C. C. A. 562.

Vendee Takes Subject to Lien

Where at the time real property was conveyed it was burdened with a judgment lien, the vendee took it subject to such lien, and when thereafter the property was sold on execution to satisfy the lien, the purchaser acquired all the rights the judgment debtor had in the property at the time the judgment became a lien upon it; hence the deed made by the debtor to his vendee did not give a title superior to that of the execution purchaser. *Commercial Bank & Trust Co. v. Jordan*, 85 M 375, 385, 278 P 832.

When Judgment Lien Expires

In order to preserve the priority obtained by a judgment lien on real property, a sale under execution must be made during the life of such lien, six years from the date of judgment (this section), or execution must have been issued and proceedings on judicial sale begun before the lien becomes barred, and to avoid operation of such bar the sale must be proceeded with without any delay greater than is permitted by section 9419, the mere issuance of execution being of no avail. *Marlowe v. Missoula Gas Co. et al.*, 68 M 372, 377, 219 P 1111.

When Lien Attaches

A judgment is not a lien upon the real estate of the judgment debtor until it is entered on the judgment docket. *Sklower v. Abbott*, 19 M 228, 229, 47 P 901.

A complaint by a judgment creditor to set aside his debtor's conveyance of realty as fraudulent, which does not allege the docketing of the creditor's judgment, is insufficient. *Wyman v. Jensen*, 26 M 227, 238, 67 P 114.

Id. The mere rendition of a judgment creates no lien.

A judgment becomes a lien upon the real property of the judgment debtor only when it is docketed. *McMillan v. Davenport*, 44 M 23, 30, 118 P 756.

While the judgment lien provided for by this section attaches to property held by a tenant in common, it does not attach while the debtor's title is undisclosed of record. *Isom v. Larson*, 78 M 395, 400, 255 P 1049.

Id. A grantee of property under a deed absolute on its face but in fact a mortgage reconveyed the property by deed to the grantors (husband and wife) upon payment of the debt secured thereby, and presented it for record five minutes before a second grantee of the same grantors presented his, also given as security for a loan. Held, that immediately upon the filing for record of the first deed, the grantors were reinvested with the legal title and the judgment lien of the creditor at once attached to the interest of the wife therein, and was therefore prior and superior to the claim of the second grantee under decree of foreclosure of his mortgage deed.

References

Cited or applied as section 307, First Division Compiled Statutes 1887, in *Peters v. Vawter*, 10 M 201, 208, 25 P 438; as section 1197, Code of Civil Procedure, in *Yerrick v. Higgins*, 22 M 502, 505, 57 P 95; *Vincent v. Vineyard*, 24 M 207, 212, 61 P 131; *Leonard v. Western et al.*, 74 M 513, 522, 241 P 523; *Swift & Co. v. Weston*, 88 M 40, 46, 289 P 1035; *Standard Oil Co. v. Idaho Community Oil Co.*, 95 M 412, 419, 27 P 2d 173.

9411. Docket—how kept, and what to contain. The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into eight columns, and headed as follows: Judgment debtors; judgment creditors; judgment, time of entry; where entered in judgment book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the defendants must be entered in alphabetical order.

History: En. Sec. 205, p. 174, L. 1867; re-en. Sec. 245, p. 78, Cod. Stat. 1871; re-en. Sec. 296, p. 116, L. 1877; re-en. Sec. 296, 1st Div. Rev. Stat. 1879; re-en. Sec. 308,

1st Div. Comp. Stat. 1887; re-en. Sec. 1198, C. Civ. Proc. 1895; re-en. Sec. 6808, Rev. C. 1907; re-en. Sec. 9411, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 672.

9412. Docket to be opened for inspection without charge. The docket kept by the clerk is open at all times, during office hours, for the inspection of the public, without charge. The clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection.

History: En. Sec. 206, p. 174, L. 1867; 309, 1st Div. Comp. Stat. 1887; re-en. Sec. re-en. Sec. 246, p. 78, Cod. Stat. 1871; 1199, C. Civ. Proc. 1895; re-en. Sec. 6809, re-en. Sec. 297, p. 116, L. 1877; re-en. Sec. Rev. C. 1907; re-en. Sec. 9412, R. C. M. 297, 1st Div. Rev. Stat. 1879; re-en. Sec. 1921. Cal. C. Civ. Proc. Sec. 673.

9413. Transcript to be filed in any county, and judgment to become a lien there. A transcript of the original docket, certified by the clerk, may be filed with the district court clerk of any other county, and from the time of the filing the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for six years, unless the judgment be previously satisfied.

History: Ap. p. Sec. 181, p. 78, Bannack Stat.; re-en. Sec. 207, p. 175, L. 1867; re-en. Sec. 247, p. 78, L. 1871; en. Sec. 1, p. 40, L. 1876; re-en. Sec. 298, p. 117, L. 1877; re-en. Sec. 298, 1st Div. Rev. Stat. 1879; re-en. Sec. 310, 1st Div. Comp. Stat. 1887; amd. Sec. 1200, C. Civ. Proc. 1895; re-en. Sec. 6810, Rev. C. 1907; re-en. Sec. 9413, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 674.

Operation and Effect

Where an attachment issued by the court in one county was levied on real estate in another, it was not essential to the establishment of a lien to file a transcript of the judgment in the other county, as provided by this section. *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 M 184, 193, 61 P 3.

The effect of filing in a county other than that in which a money judgment was rendered a certified transcript of the

docket is to impress a lien upon all real property owned by the judgment debtor in the county of its filing, not exempt from execution, or acquired by him thereafter and prior to the expiration of the lien or the satisfaction of the judgment, the lien, however, not attaching to any specific piece of property. *Poulos v. Lyman Brothers Co.*, 63 M 561, 566, 208 P 598.

Treating a royalty interest in an oil and gas lease as an interest in land, a judgment lien will, under this section, attach though title thereto was not acquired until thereafter, provided the debtor's title was then disclosed of record. *Johannes v. Dwire et al.*, 94 M 590, 593, 23 P 2d 971.

References

Cook v. Galen, 83 M 334, 339, 272 P 250; *Standard Oil Co. v. Idaho Community Oil Co.*, 95 M 412, 419, 27 P 2d 173.

9414. Satisfaction of a judgment—how made. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by his indorsement on the face, or on the margin of the record of the judgment, or by his attorney, unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it.

History: Ap. p. Sec. 182, p. 79, Bannack Stat.; amd. Sec. 208, p. 175, L. 1867; re-en. Sec. 248, p. 78, L. 1871; en. Sec. 299, p. 117, L. 1877; re-en. Sec. 299, 1st Div. Rev. Stat. 1879; re-en. Sec. 311, 1st Div. Comp. Stat. 1887; re-en. Sec. 1201, C. Civ. Proc. 1895; re-en. Sec. 6811, Rev. C. 1907;

re-en. Sec. 9414, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 675.

Operation and Effect

Where a judgment once entered upon a verdict is again entered *nunc pro tunc* and is affirmed on appeal, the appellant can-

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136 P. (2d) 534

9414
193 P. (2d) 632

not complain that two judgments stand against him upon the same cause of action and verdict, as under this section, upon satisfaction of said judgment, entry of satisfaction must be made, showing a cancellation of all judgments entered upon said verdict. *Work v. Northern Pacific Ry. Co.*, 11 M 513, 522, 29 P 280.

A judgment debtor whose property was about to be sold under execution, after

the judgment had been otherwise satisfied, had a plain, speedy, and adequate remedy at law, and therefore injunction did not lie to restrain the sale. *Donovan v. McDevitt*, 36 M 61, 64, 92 P 49.

References

Cited or applied as section 1201, Code of Civil Procedure, in *Stanford v. Coram*, 28 M 288, 290, 72 P 655.

9415. Lien of judgment of federal court. A transcript of the original docket of any judgment rendered in the circuit or district court of the United States, ninth circuit, district of Montana, certified by the clerk of said court, may be filed with the district court clerk of any county, and from the time of the filing the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien shall continue for six years, unless the judgment be previously satisfied.

History: En. Sec. 1, Ch. 14, L. 1907; re-en. Sec. 6812, Rev. C. 1907; re-en. Sec. 9415, R. C. M. 1921.

CHAPTER 59

THE EXECUTION

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9416. Within what time execution may issue. The party in whose favor judgment is given, may, at any time within six years after the entry thereof, have a writ of execution issued for its enforcement.

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92 P.(2d) 768

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129 P.(2d) 228

History: En. Sec. 183, p. 79, Bannack Stat.; re-en. Sec. 209, p. 176, L. 1867; re-en. Sec. 250, p. 80, Cod. Stat. 1871; amd. Sec. 301, p. 118, L. 1877; re-en. Sec. 301, 1st Div. Rev. Stat. 1879; re-en. Sec. 312, 1st Div. Comp. Stat. 1887; amd. Sec. 1210, C. Civ. Proc. 1895; re-en. Sec. 6813, Rev. C. 1907; re-en. Sec. 9416, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 681.

Operation and Effect

The proper way to issue an execution is in the name of the party in whose favor the judgment has been given. Johnson v. Puritan Min. Co., 19 M 30, 47, 47 P 337.

A writ of mandate to compel the clerk to issue an execution with the seal, bearing the former name of a county, is the proper remedy where the legislature, by

a void act, has attempted to change the name of a county. State ex rel. Sackett v. Thomas, 25 M 226, 235, 64 P 503.

The making up of the judgment-roll, as required by section 9409, is not a prerequisite to the issuance of execution. Burton v. Kipp, 30 M 275, 285, 76 P 563.

References

Cited or applied as section 312, First Division Compiled Statutes 1887, in Peters v. Vawter, 10 M 201, 208, 25 P 438; as section 1210, Code of Civil Procedure, in State ex rel. Robinson v. Clements, 37 M 96, 102, 94 P 837; as section 6813, Revised Codes, in Banking Corp. of Montana v. Hein, 52 M 238, 240, 156 P 1085; Sunburst Oil & Refining Co. v. Callender, 84 M 178, 187, 274 P 834.

9417. Execution—requirements of writ. The writ of execution must be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk, and must be directed to the sheriff, and must intelligibly refer to the judgment, stating the court, the county where the judgment-roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and shall require the sheriff substantially as follows:

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114 P.(2d) 1075

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129 P.(2d) 228

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182 P.(2d) 164

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1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the clerk of the district court of such county, stating such day, or any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged, according to law.

4. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at any time require the sheriff to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, the value of the property for which the judgment was rendered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 312, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 682.

Operation and Effect

The failure of the clerk to affix the seal of the court to an execution is a clerical misprision, rendering the execution voidable only. *Kipp v. Burton*, 29 M 96, 99, 74 P 85. See also *Burton v. Kipp*, 30 M 275, 284, 76 P 563; *In re Farrell*, 36 M 254, 263, 92 P 785.

There is nothing in this section requiring a writ of execution to carry a decree of foreclosure into effect. *Thomas v. Thomas*, 44 M 102, 110, 119 P 283.

Id. Before an officer is authorized to sell, under an ordinary judgment, he must have specific directions so to do; but, in a decree of foreclosure, the property to be subjected to the payment of the debt is already indicated by, and described in, the decree, coupled with a mandate that it be sold by the sheriff to satisfy the demands of the plaintiff.

References

Cited or applied as section 1211, Code of Civil Procedure, in *State ex rel. Sackett v. Thomas*, 25 M 226, 235, 64 P 503; as section 6814, Revised Codes, in *Banking Corp. of Montana v. Hein*, 52 M 238, 241, 156 P 1085; *Stone-Ordean-Wells Co. v. Strong et al.*, 94 M 20, 31, 20 P 2d 639; *Beyerlein v. Whitecomb et al.*, 95 M 293, 297, 26 P 2d 349.

9418. Execution when all defendants not served. When a writ of execution is issued on a judgment recovered against two or more persons in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it must direct the sheriff to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action.

History: En. Sec. 185, p. 80, Bannack Stat.; amd. Sec. 211, p. 177, L. 1867; re-en. Sec. 252, p. 81, Cod. Stat. 1871; re-en. Sec. 303, p. 119, L. 1877; re-en. Sec. 303, 1st

Div. Rev. Stat. 1879; re-en. Sec. 314, 1st Div. Comp. Stat. 1887; re-en. Sec. 1212, C. Civ. Proc. 1895; re-en. Sec. 6815, Rev. C. 1907; re-en. Sec. 9418, R. C. M. 1921.

9419. When made returnable. The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment-roll is filed. When the execution is returned, the clerk must attach it to the judgment-roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution-book," which must be indexed, with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they, or any part thereof, may be destroyed or mutilated.

History: En. Sec. 212, p. 177, L. 1867; re-en. Sec. 253, p. 81, Cod. Stat. 1871; amd. Sec. 20, p. 57, L. 1874; re-en. Sec. 304, p. 119, L. 1877; re-en. Sec. 304, 1st Div. Rev. Stat. 1879; re-en. Sec. 315, 1st Div. Comp. Stat. 1887; re-en. Sec. 1213, C. Civ. Proc. 1895; re-en. Sec. 6816, Rev. C. 1907; re-en. Sec. 9419, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 683.

References

State ex rel. Duggan v. District Court, 65 M 197, 202, 210 P 1062; Marlowe v. Missoula Gas Co. et al., 68 M 372, 378, 219 P 1111.

9420. Money judgments and others—how enforced. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or in part. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith. When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

9420
129 P.(2d) 228

History: Ap. p. Sec. 213, p. 177, L. 1867; re-en. Sec. 254, p. 81, Cod. Stat. 1871; en. Sec. 305, p. 120, L. 1877; re-en. Sec. 305, 1st Div. Rev. Stat. 1879; re-en. Sec. 316, 1st Div. Comp. Stat. 1887; re-en. Sec. 1214, C. Civ. Proc. 1895; re-en. Sec. 6817, Rev. C. 1907; re-en. Sec. 9420, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 684.

Operation and Effect

When properly docketed, a decree in equity directing the payment of money becomes a lien upon the real estate of the debtor, and may be enforced by execution in the same manner as a judgment in an action at law. *Raymond v. Blancgrass*, 36 M 449, 458, 93 P 648.

The word "process," employed in the constitution, does not include the order of sale found in the decree of a court of equity in foreclosure proceedings. *Thomas v. Thomas*, 44 M 102, 110, 119 P 283.

Id. If the property of a defendant, against whom an ordinary money judgment is entered, is subjected to the payment of the judgment by operation of law, the sheriff cannot proceed without a warrant for so doing.

Id. This section has no application to sales in foreclosure, the court having inherent power to order such sales without a formal execution, the sheriff deriving his power to sell from the decree, and not from a so-called order of sale.

Where one of two defendants had impounded a sum of money pending appeal from a judgment prosecuted by its co-defendant and the judgment was reversed, and judgment was thereupon entered directing that the money be paid over to the prevailing party, such judgment was not enforceable by levy of a general execution upon the property of the party holding the fund, but, under the last provision of this section, by service of a certified copy of the judgment; hence an order refusing to issue a writ of execution was proper. *Nepstad v. East Chicago Oil Assn., Inc.*, 96 M 183, 186, 29 P 2d 643.

References

Cited or applied as section 6817, Revised Codes, in *Hamilton v. Hamilton*, 51 M 509, 524, 154 P 717.

9421. Execution after six years. In all cases, the judgment may be enforced or carried into execution after the lapse of six years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings.

9421
92 P.(2d) 768

9421
129 P.(2d) 228

History: Ap. p. Sec. 7, p. 51, L. 1874; re-en. Sec. 813, 1st Div. Rev. Stat. 1879; re-en. Sec. 349, 1st Div. Comp. Stat. 1887; en. Sec. 1215, C. Civ. Proc. 1895; re-en. Sec. 6818, Rev. C. 1907; re-en. Sec. 9421, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 685.

References

Lindsay Great Falls Co. v. McKinney
M. Co., 79 M 136, 143, 255 P 25.

9422
136 P.(2d) 534,
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9422. Execution after death. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest.

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon, execution may be issued with the same effect as if he were still living.

History: En. Sec. 215, p. 178, L. 1867; re-en. Sec. 256, p. 82, Cod. Stat. 1871; re-en. Sec. 306, p. 120, L. 1877; re-en. Sec. 306, 1st Div. Rev. Stat. 1879; re-en. Sec. 317, 1st Div. Comp. Stat. 1887; re-en. Sec. 1216, C. Civ. Proc. 1895; re-en. Sec. 6819, Rev. C. 1907; re-en. Sec. 9422, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 686.

Operation and Effect

Under section 10186, execution may not issue after the death of a party on a judg-

ment rendered against him in his lifetime, except, as provided by this section, where the judgment is inter alia for the enforcement of a lien on the property of the decedent. In re Stevenson, 87 M 486, 496, 289 P 566.

References

Davis et al. v. Claxton et al., 82 M 574, 584, 268 P 787.

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114 P.(2d) 1075

9423
132 P.(2d) 170

9423. Execution—how and to whom issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

History: En. Sec. 216, p. 178, L. 1867; re-en. Sec. 257, p. 82, Cod. Stat. 1871; re-en. Sec. 307, p. 120, L. 1877; re-en. Sec. 307, 1st Div. Rev. Stat. 1879; re-en. Sec.

318, 1st Div. Comp. Stat. 1887; re-en. Sec. 1217, C. Civ. Proc. 1895; re-en. Sec. 6820, Rev. C. 1907; re-en. Sec. 9423, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 687.

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9424. What shall be liable on execution—not affected until levy. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold-dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

History: En. Sec. 192, p. 81, Bannack Stat.; amd. Sec. 217, p. 178, L. 1867; re-en. Sec. 258, p. 82, Cod. Stat. 1871; re-en. Sec. 308, p. 121, L. 1877; re-en. Sec. 308, 1st Div. Rev. Stat. 1879; re-en. Sec. 319, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1218, C. Civ. Proc. 1895; re-en. Sec. 6821, Rev. C. 1907; re-en. Sec. 9424, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 688.

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27 F. Supp. 503

Cause of Action—Execution How Made

A cause of action being personal property not capable of manual delivery, levy of execution upon it must, under this section, be made in like manner as upon a writ of attachment, which is, under subdivision 5 of section 9262, by leaving a copy of the writ, and a notice that the cause of action is levied upon, with the owner; hence where the copy and notice were delivered to the clerk of the district court and not to the owner, the levy was ineffective. *State ex rel. Coffey v. District Court*, 74 M 355, 358 et seq., 240 P 667.

Cause of Action Subject to Execution

A cause of action is the right which a party has to institute a judicial proceeding, and if the relief sought is the recovery of money, the cause of action is designated a "thing" or "chase in action," which is personal property and therefore subject to seizure and sale in satisfaction of a judgment. *State ex rel. Coffey v. District Court*, 74 M 355, 358 et seq., 240 P 667.

Interest Not Disclosed by Record is Not Subject to Lien

This section, construed with section 9410, leads to the conclusion that an interest undisclosed by the records is not subject to the lien of a docketed judgment. *McMillan v. Davenport*, 44 M 23, 32, 118 P 756; *Piccolo et al. v. Tanaka et al.*, 78 M 445, 451, 253 P 890.

Lien May be Acquired by Execution

The lien which a creditor who seeks to have a conveyance of realty set aside as fraudulent must have acquired as a condition precedent to his right to maintain the action, may be acquired, under this section, by levy of execution, and, having once been acquired, it is not lost by failure of the sheriff to hold a sale but, instead, making return nulla bona. *Stone-Ordean-Wells Co. v. Strong et al.*, 94 M 20, 29, 20 P 2d 639.

Manner of Levying on Shares of Stock

Under this section, shares of stock (in a building and loan association) are levied upon by the writ of execution in the same manner as upon a writ of attachment. *Fousek v. De Forest et al.*, 90 M 448, 459, 4 P 2d 472.

Purpose

The purpose of the legislature in enacting this section was to furnish an expeditious method of satisfying a judgment, and not to extend the operation of the lien. In other words, the purpose was to put upon the same footing, so far as the levy of execution is concerned, personal property and interests in real estate which are not affected by the lien of the judgment. *McMillan v. Davenport*, 44 M 23, 33, 118 P 756.

Right to Redeem Not Subject to Execution

The right to redeem is a personal privilege, and not a property right, and hence it does not come within the category of any of the interests enumerated in this section as subject to execution. *Hamilton v. Hamilton*, 51 M 509, 526, 154 P 717.

References

Cited or applied as section 319, First Division Compiled Statutes 1887, in *Spering v. Calfee*, 7 M 514, 529, 19 P 204; as section 1218, Code of Civil Procedure, in *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 M 184, 193, 61 P 3; *Cowell v. May*, 26 M 163, 168, 66 P 843; as section 6821, Revised Codes, in *Wheeler & Motter Merc. Co. v. Moon*, 49 M 307, 316, 141 P 665; *Knapp v. Andrus*, 56 M 37, 41, 180 P 908; *State ex rel. Hopkins v. Stephens*, 63 M 318, 322, 206 P 1094; *Northern Montana State Bk. v. Collins*, 67 M 575, 584, 216 P 330; *Brown et al. v. Timmons et al.*, 79 M 246, 250, 256 P 176; *Hockman v. Sunhew Petroleum Corp.*, 92 M 174, 182, 11 P 2d 778.

9425. Execution against one of a partnership—mortgaged property. If execution is levied upon the interest of one or more parties in the goods and property of a partnership, the same proceedings shall be had as in attachments, provided in sections 9289 and 9290 of this code. Personal property mortgaged or pledged may be taken on execution as provided in section 8283 of the Civil Code.

History: En. Sec. 1219, C. Civ. Proc. 1895; re-en. Sec. 6822, Rev. C. 1907; re-en. Sec. 9425, R. C. M. 1921.

9426. Claims by third persons. If personal property levied upon be claimed by a third person, the same proceedings shall be had as provided in attachment in section 9273 of this code.

History: En. Sec. 1220, C. Civ. Proc. 1895; re-en. Sec. 6823, Rev. C. 1907; re-en. Sec. 9426, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 689.

Operation and Effect

The officer is not bound to deliver possession to the claimant if the execution plaintiff furnishes an indemnity bond. *Gallick v. Bordeaux*, 31 M 328, 339, 78 P 583.

9427. Property exempt from execution. The following property is exempt from execution, except as herein otherwise provided:

In all cases, all wearing apparel of the judgment debtor and family; also all chairs, tables, desks, and books to the value of two hundred dollars; and also all necessary household, table, and kitchen furniture of the judgment debtor, including one sewing-machine, stoves, stove-pipes, and stove furniture, heating apparatus, beds, bedding, and bedsteads, and provisions and fuel provided for individual or family use sufficient for three months; and also one horse, saddle, and bridle, two cows and their calves, four hogs and fifty domestic fowls, and feed for such animals for three months, one clock, and all family pictures. An unmarried person who is not the head of a family is not entitled to any of the exemptions herein mentioned, except that of the wearing apparel of the judgment debtor.

None of the property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

History: Earlier exemption acts were Sec. 194, p. 81, Bannack Stat.; amd. Sec. 219, p. 178, L. 1867; amd. Sec. 260, p. 82, Cod. Stat. 1871; amd. Sec. 310, p. 121, L. 1877; re-en. Sec. 310, 1st Div. Rev. Stat. 1879; re-en. Sec. 321, 1st Div. Comp. Stat. 1887; amd. Sec. 1221, C. Civ. Proc. 1895.

This section en. Sec. 1, Ch. 8, L. 1905; re-en. Sec. 6824, Rev. C. 1907; amd. Sec. 1, Ch. 232, L. 1921; re-en. Sec. 9427, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 690.

Operation and Effect

Under the rule that exemption laws must be liberally construed, courts do not regard them as conferring a personal right upon the debtor, but as declaring a family right which may be asserted not only by a husband as the head of the family, but by the wife or any other person upon whom, for the time being, the care of the family has been cast. *Mennell v. Wells*, 51 M 141, 146, 149 P 954.

Where a debtor owns more property of a given class than the law exempts, he must, in order to secure the benefit of the exemption, identify the property he claims as exempted and segregate it from the portion liable to seizure. *Tetrault v. Ingraham*, 54 M 524, 527, 171 P 1148.

While exemption statutes must be liberally construed, yet where an exemption is extended to a certain class of persons, as by this section and the following section, the claimant must bring himself within the spirit of its provisions, i. e., he must show that he belongs to one of the classes mentioned. *Swanz v. Clark*, 71 M 385, 387, 229 P 1108.

References

McMullen v. Shields, 96 M 191, 197 et seq., 29 P 2d 652.

9428. Specific exemptions. In addition to the property mentioned in the preceding section, there shall be exempt to all judgment debtors who are married, or who are heads of families, the following property:

1. To a farmer: Farming utensils or implements of husbandry, not exceeding in value six hundred dollars; also, two oxen, or two horses or mules, and their harness, one cart or wagon, set of sleds, and food for such oxen, horses, cows, or mules for three months; also, all seed, grain, or vegetables actually provided, or on hand, for the purpose of planting or sowing the following spring, not exceeding in value the sum of two hundred dollars.

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2. To a mechanic or artisan: Tools or implements necessary to carry on his trade.

3. To a surgeon, physician, or dentist: The instruments and chest necessary to the exercise of his profession, with his scientific and professional libraries and necessary office furniture.

4. To attorneys-at-law and ministers of the gospel, etc.: The professional libraries of attorneys, counselors, and judges, and ministers of the gospel, editors, school teachers, and music teachers, and their necessary office furniture; also the musical instruments of music teachers; also the notarial seal, records, and office furniture of a notary public.

5. To a miner: His cabin or dwelling, sluices, and pipes, hose, windlass, derricks, cars, pumps, tools, implements, and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of one thousand dollars, and one horse or mule with harness, and food for such horse or mule for three months, when such horse or mule is used in working his mine or mining claim.

To a civil, mining, or mechanical engineer: Instruments, tools, books, and records necessary to carry on his profession.

To a chemist or assayer: The tools, instruments, and supplies necessary to carry on his profession.

6. To a cartman, hackman, huckster, peddler, teamster, or laborer: One horse, or mule, and harness for two animals, or two oxen and harness, and one cart or wagon, one dray or truck, one hack or carriage, by the use of which such person habitually earns his living; and one vehicle and harness or other equipments used by a physician or surgeon or minister of the gospel in making his professional visits, with food for such horse, mule, or oxen for three months.

7. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed five hundred dollars.

8. All fire-engines, hooks, and ladders, with the cart, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this state.

9. All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor.

10. All courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state, and all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such city or town to health, ornament, or public use, or for the use of any fire or military company organized under the laws of the state. No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state

shall have the benefit of these exemptions. No person can claim more than one of the exemptions mentioned in the first six subdivisions of this section.

History: Earlier exemption acts were Sec. 194, p. 81, Bannack Stat.; amd. Sec. 219, p. 178, L. 1867; amd. Sec. 260, p. 82, Cod. Stat. 1871; amd. Sec. 310, p. 121, L. 1877; re-en. Sec. 310, 1st Div. Rev. Stat. 1879; re-en. Sec. 321, 1st Div. Comp. Stat. 1887; amd. Sec. 1221, C. Civ. Proc. 1895. **Limitation to married men or heads of families,** see Sec. 269, p. 85, Cod. Stat. 1871; re-en. Sec. 319, p. 125, L. 1877; re-en. Sec. 319, 1st Div. Rev. Stat. 1879; re-en. Sec. 330, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1222, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 8, L. 1905; re-en. Sec. 6825, Rev. C. 1907; re-en. Sec. 9428, R. C. M. 1921.

Burden of Proof

While exemption statutes must be liberally construed, yet where an exemption is extended to a certain class of persons, as by section 9427, and this section, the claimant must bring himself within the spirit of its provisions, i. e., he must show that he belongs to one of the classes mentioned. *Swanz v. Clark*, 71 M 385, 387, 229 P 1108.

Ford Automobile Used on Farm Exempt From Execution as "Wagon"

In application of the rule of liberal construction, held, under this section (prior to amendment by Chapter 120, Laws of 1933), exempting to a farmer, as the head of a family, among other things, a cart or wagon, a Ford automobile, constituting the only means of conveyance of supplies to and products from the farm to market, and having taken the place of and serving the purposes of a wagon, is exempt from execution as a "wagon." (Mr. Chief Justice Callaway and Mr. Justice Stewart dissenting.) *McMullen v. Shields*, 96 M 191, 193 et seq., 29 P 2d 652.

"Head of the Family"

A wife who has been abandoned and who continues thereafter to farm a home-

stead theretofore occupied by her husband, to maintain herself and infant children, making use of farming implements, etc., for that purpose, could rightfully claim for herself exemption of such property from execution under a judgment against the husband, the term "head of a family," as used in the exemption statutes, including an abandoned wife. *Mennell v. Wells*, 51 M 141, 145, 149 P 954.

Instruments of Optometrist: Not Exempt

Optometrist held not within state statute exempting from execution the instruments and office furniture of "physician" or "surgeon." In *re Frazier*, 5 F. Supp. 903.

Liberal Construction of

Exemption statutes should be liberally construed for the benefit of the exemption claimant. *McMullen v. Shields*, 96 M 191, 193 et seq., 29 P 2d 652.

Exemption law must be liberally construed, provided claimant is within class exempted. In *re Frazier*, 5 F. Supp. 903.

Purpose

Exemption statutes, such as this section and 10145, are primarily intended for the protection of the home as well as for the protection of the state, which is interested in the welfare of the homes within its confines and the throwing of safeguards about them. In *re Metcalf's Estate*, 93 M 542, 545 et seq., 19 P 2d 905.

Schoolhouses Exempt

A mechanics' lien cannot be enforced against a schoolhouse and lots held by school trustees for uses of a public school. *Whiteside v. School District*, 20 M 44, 49 P 445.

References

Cited or applied as section 6825, Revised Codes, in *Tetrault v. Ingraham*, 54 M 524, 527, 171 P 1148.

9428.1
new sec.
L. 37 c. 127
sec. 1 p. 382

9429
75 P (2d) 786,
788
.....Mont.....

9429
amended
L. 39 c. 77
sec. 1 p. 158

9429
27 F. Supp. 503

9429
113 F. (2d) 657

9429. Exemption of earnings—debts incurred for necessities. The earnings of the judgment debtor for his personal services rendered at any time within forty-five days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family, supported in whole or in part by his labor, are exempt; but where debts are incurred by any such person or his wife or family for the common necessities of life, then the one-half of such earnings above mentioned are nevertheless subject to execution, garnishment, and attachment, to satisfy debts so incurred. The words "his family," as used herein, are to be construed with the words "head of family," as used in section 6969.

History: See history of preceding section for earlier acts. This section en. Sec. 1222, C. Civ. Proc. 1895; re-en. Sec. 6825, Rev. C. 1907; amd. Sec. 1, Ch. 48, L. 1913; re-en. Sec. 9429, R. C. M. 1921; amd. Sec. 1, Ch. 3, L. 1933.

Operation and Effect

Where the wages of a judgment debtor were levied upon and by him claimed as exempt from execution, as his personal earnings, within thirty days preceding the levy, and necessary for the use of his family residing in this state, supported wholly or in part by his labor, evidence on behalf of the officer making the levy, in an action against him to recover such wages, as to the quantity and value of the property held in the name of plaintiff's wife, and used by the family in common, and during such period, is admissible upon the issue

as to whether or not the family was in fact supported by the earnings of the plaintiff, or from some other source. *Cushing v. Quigley*, 11 M 577, 580, 29 P 337.

The words "personal services rendered" do not necessarily contemplate that the services be rendered another; they may, in proper cases, mean the services which one renders to himself. *Dayton v. Ewart*, 28 M 153, 156, 72 P 420.

Id. This section, prior to its amendment, was construed to exempt to a placer miner the gold-dust taken from his claim by his own labor within the statutory period next preceding a levy of execution or attachment, when he was shown to be a poor man who resided in the state and depended for support upon his personal labor in working his mine, and the debt was not for the common necessities of life.

9429.1. Earnings exempt in actions for less than ten dollars, when. In any action where the amount sued for is the sum of ten dollars (\$10.00) or less, no writ of attachment shall be issued and levied upon or against the wages or earnings of the debtor or defendant for his personal services rendered at any time within thirty days next preceding the commencement of the action, and in any such case or action such wages and earnings are exempt from attachment.

History: En. Sec. 1, Ch. 49, Ex. L. 1933.

9430. Homestead. The homestead of a judgment debtor exempt from execution is provided for in the Civil Code, sections 6945 to 6971 inclusive.

History: En. Sec. 1223, C. Civ. Proc. 1895; re-en. Sec. 6826, Rev. C. 1907; re-en. Sec. 9430, R. C. M. 1921.

References

Cited or applied as section 1223, Code of Civil Procedure, in *Yerrick v. Higgins*, 22 M 502, 505, 57 P 95.

9430
113 F. (2d) 657

9430.1. Exemptions of aged persons. An unmarried man or woman, over the age of sixty years, shall be allowed the same exemptions as are granted to the head of a family, under the laws of the state of Montana.

History: En. Sec. 1, Ch. 120, L. 1933.

9430.2. Truck or automobile—when exempt from execution. In addition to all other exemptions, the following property is exempt from execution, where the debtor is the head of a family, or over sixty years of age: one truck or automobile of the value of not more than three hundred dollars (\$300.00).

History: En. Sec. 2, Ch. 120, L. 1933.

9430.2
amended
L. 41 c. 48
sec. 1 p. 74

9430.3. Construction of act. Nothing herein contained shall be interpreted or construed as repealing any provisions of sections 9427 or 9428.

History: En. Sec. 3, Ch. 120, L. 1933.

9431. Writ—how executed. The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the

9430
27 F. Supp. 503

9731
91 P. (2d) 402,
91 P. (2d) 405

9731
sub sec. 2
91 P. (2d) 405
S.L. '33, Ch. 120
102 Mont. 91
56 P. (2d) 176
102 Mont. 367
58 P. (2d) 269
101 Mont. 5
52 P. (2d) 158

9430.2
S.L. '33, Ch. 120
102 Mont. 91
56 P. (2d) 176
102 Mont. 367
58 P. (2d) 269
101 Mont. 5
52 P. (2d) 158

9430.3
S.L. '33, Ch. 120
102 Mont. 91
56 P. (2d) 176
102 Mont. 367
58 P. (2d) 269
101 Mont. 5
52 P. (2d) 158

9431
77 P. (2d) 103;
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proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.

History: En. Sec. 198, p. 83, Bannack Stat.; re-en. Sec. 220, p. 180, L. 1867; re-en. Sec. 270, p. 85, Cod. Stat. 1871; amd. Sec. 320, p. 125, L. 1877; re-en. Sec. 320, 1st Div. Rev. Stat. 1879; re-en. Sec. 331, 1st Div. Comp. Stat. 1887; re-en. Sec. 1224, C. Civ. Proc. 1895; re-en. Sec. 6827, Rev. C. 1907; re-en. Sec. 9431, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 691.

Operation and Effect

The object of a levy is to bring property within the custody of the law, but where it, by operation of a judgment lien, is already in the custody of the law, no levy is necessary; nothing more is required than to give the necessary notice and sell. *Britannia Min. Co. v. United States F. & G. Co.*, 43 M 93, 100, 115 P 46.

A sheriff selling property on execution pursuant to a judgment, is a trustee for the debtor as well as the creditor, and he is bound, unless otherwise directed by the court, if the property sells for more than enough to pay the judgment and costs, to pay the overplus to the judgment debtor. *Sherlock v. Vinson*, 90 M 235, 242, 1 P 2d 71.

References

Cited or applied as section 1224, Code of Civil Procedure, in *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 M 184, 193, 61 P 3; as section 6827, Revised Codes, in *Banking Corp. of Montana v. Hein*, 52 M 238, 241, 156 P 1085; *State ex rel. Coffey v. District Court*, 74 M 355, 360, 240 P 667.

9432. Notice of sale—how given—copy of notice. Before the sale of the property on execution, notice thereof must be given as follows:

1. In case of perishable property: By posting written notice of the time and place of the sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property: By posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five days nor more than ten days.

In case of real property: By posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, which may be either at the courthouse or on the premises, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one; which notice shall be substantially as follows:

SHERIFF'S SALE.

....., Plaintiff,

vs.

....., Defendant,

To be sold at sheriff's sale on the.....day of....., 19....., at..... (Here insert brief description of property.)

Signed.

....., Sheriff.

Any sheriff publishing a notice not in accordance with this form, and which shall cost more than such a notice, shall not be entitled to any costs for publication of the same, but shall be personally liable for the payment of such publication.

History: En. Sec. 199, p. 83, Bannack Stat.; amd. Sec. 221, p. 180, L. 1867; re-en. Sec. 271, p. 86, Cod. Stat. 1871; amd. Sec. 20, p. 57, L. 1874; re-en. Sec. 321, p. 126, L. 1877; re-en. Sec. 321, 1st Div. Rev. Stat. 1879; re-en. Sec. 332, 1st Div. Comp. Stat. 1887; amd. Sec. 1225, C. Civ. Proc. 1895; re-en. Sec. 6828, Rev. C. 1907; re-en. Sec. 9432, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 692.

Operation and Effect

Failure to give the notice does not invalidate the sale; the remedy provided in the succeeding section being exclusive. *Burton v. Kipp*, 30 M 275, 286, 76 P 563.

9433. Selling without notice—penalty. An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

History: En. Sec. 200, p. 84, Bannack Stat.; re-en. Sec. 222, p. 180, L. 1867; re-en. Sec. 272, p. 86, Cod. Stat. 1871; re-en. Sec. 322, p. 127, L. 1877; re-en. Sec. 322, 1st Div. Rev. Stat. 1879; re-en. Sec. 333, 1st Div. Comp. Stat. 1887; re-en. Sec. 1226, C. Civ. Proc. 1895; re-en. Sec. 6829, Rev. C. 1907; re-en. Sec. 9433, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 693.

Operation and Effect

The penalty prescribed by this section is affixed to a wrongful sale, not a wrong-

ful levy; and the officer and his surety are liable for a wrongful sale, though the levy was made in a former term of the officer, when he had other sureties. *Britannia Min. Co. v. United States F. & G. Co.*, 43 M 93, 99, 115 P 46.

References

Cited or applied as section 6828, Revised Codes, in *Welch v. Nichols*, 41 M 435, 441, 110 P 89; *Banking Corp. of Montana v. Hein*, 52 M 238, 241, 156 P 1085; *Perham v. Putnam et al.*, 82 M 349, 359, 267 P 305; *Fox v. Curry*, 96 M 212, 221, 29 P 2d 663.

ful levy; and the officer and his surety are liable for a wrongful sale, though the levy was made in a former term of the officer, when he had other sureties. *Britannia Min. Co. v. United States F. & G. Co.*, 43 M 93, 99, 115 P 46.

References

Cited or applied as section 1226, Code of Civil Procedure, in *Burton v. Kipp*, 30 M 275, 286, 76 P 563; *Perham v. Putnam et al.*, 82 M 349, 361, 267 P 305.

9434. Sales—how conducted. All sales of property under execution must be made at auction, to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser, or be interested in any purchase, at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately, or, when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

History: En. Sec. 201, p. 84, Bannack Stat.; amd. Sec. 223, p. 180, L. 1867; re-en. Sec. 273, p. 86, Cod. Stat. 1871; re-en. Sec. 323, p. 127, L. 1877; re-en. Sec. 323, 1st Div. Rev. Stat. 1879; re-en. Sec. 334, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1227, C. Civ. Proc. 1895; re-en. Sec. 6830, Rev. C. 1907; re-en. Sec. 9434, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 694.

Holding of Sale at Hour Different From That in Published Notice Mere Irregularity, Not Affecting Validity of Sale

In the absence of a provision in this section fixing the hour when an execution sale of oil and gas rights in certain described lands was required to be held, the fact that the posted notice designated a certain hour while the published one failed to give the hour, was a mere irregularity not affecting the validity of the sale. (Propriety of amendment of statute so as to require statement of hour of sale suggested.) *Fox v. Curry*, 96 M 212, 220, 29 P 2d 663.

Operation and Effect

Mere inadequacy of the price, not attended by fraud, mistake, or surprise tending to influence the result, does not invalidate a sale under execution. *Burton v. Kipp*, 30 M 275, 285, 76 P 563.

9435. Postponement of execution sale. Good cause therefor appearing, the officer holding the execution may postpone any sale noticed thereunder, for a period not exceeding fifteen days, by public proclamation at the time and place fixed in the notice of sale, and by posting a notice in three public places in the township where the property has previously been noticed to be sold.

History: En. Sec. 1, Ch. 120, L. 1915; re-en. Sec. 9435, R. C. M. 1921.

9436. Proceedings when purchaser refuses to pay. If a purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction, and the person refusing to pay the costs which have accrued by reason of his bid shall be deemed guilty of contempt of court, and punished accordingly.

History: Ap. p. Sec. 202, p. 85, Bannack Stat.; amd. Sec. 224, p. 181, L. 1867; re-en. Sec. 274, p. 86, Cod. Stat. 1871; amd. Sec. 324, p. 127, L. 1877; re-en. Sec. 324, 1st Div. Rev. Stat. 1879; re-en. Sec. 335, 1st Div. Comp. Stat. 1887; en. Sec. 1228, C. Civ. Proc. 1895; re-en. Sec. 6831, Rev. C. 1907; re-en. Sec. 9436, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 695.

Operation and Effect

Defendant, a defaulting purchaser of realty at execution sale, in an action by the sheriff brought under this section, to recover the difference in the amount of defendant's bid and the amount which the officer received on resale, was not in a position to rely on the sheriff's failure to tender him a certificate of sale where he had stated that he would not have paid the amount of his bid even if a certifi-

Id. It must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known, or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels.

This section is directory only, so that a sale in gross is voidable only, and not void nor open to collateral attack. *Thomas v. Thomas*, 44 M 102, 113, 119 P 283.

References

Cited or applied as section 1227, Code of Civil Procedure, in *Wyman v. Jensen*, 26 M 227, 237, 67 P 114; as section 6830, Revised Codes, in *Hamilton v. Hamilton*, 51 M 509, 521, 154 P 717; *Banking Corp. of Montana v. Hein*, 52 M 238, 241, 156 P 1085; *Elston v. Hix et al.*, 67 M 294, 298, 299, 215 P 657.

cate had been tendered, thus showing that tender would have been an idle ceremony, not required by law. *Sherlock v. Vinson*, 90 M 235, 239, 1 P 2d 71.

Id. Where the sheriff regularly re-advertised real property for sale after the highest bidder at the first sale had repudiated his bid, thus giving notice to all the world including such bidder, the latter was not entitled to special notice of resale to hold him liable for loss sustained by his default under this section.

Id. In an action by the sheriff, under this section, to recover loss on resale of property made necessary by the purchaser's repudiation of his bid at the prior execution sale, the measure of his recovery is not the value of the property, but the amount of his previous bid.

9437. Officer may reject subsequent bids thereafter. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such purchaser.

History: En. Sec. 325, p. 128, L. 1877; re-en. Sec. 1229, C. Civ. Proc. 1895; re-en. Sec. 325, 1st Div. Rev. Stat. 1879; Sec. 6832, Rev. C. 1907; re-en. Sec. 9437, re-en. Sec. 336, 1st Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 696.

9438. Officer not liable beyond a certain amount. The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

History: En. Sec. 326, p. 128, L. 1877; re-en. Sec. 1230, C. Civ. Proc. 1895; re-en. Sec. 326, 1st Div. Rev. Stat. 1879; Sec. 6833, Rev. C. 1907; re-en. Sec. 9438, re-en. Sec. 337, 1st Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 697.

9439. Personal property, capable of manual delivery—how delivered. When the purchaser of any personal property, capable of manual delivery, pays the purchase money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

History: En. Sec. 205, p. 85, Bannack Stat.; re-en. Sec. 227, p. 181, L. 1867; re-en. Sec. 277, p. 87, Cod. Stat. 1871; re-en. Sec. 327, p. 128, L. 1877; re-en. Sec. 327, 1st Div. Rev. Stat. 1879; re-en. Sec. 338, 1st Div. Comp. Stat. 1887; amd. Sec. 1231, C. Civ. Proc. 1895; re-en. Sec. 6834, Rev. C. 1907; re-en. Sec. 9439, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 698.

9440. Personal property, not capable of manual delivery—how delivered. When the purchaser of any personal property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

History: En. Sec. 228, p. 181, L. 1867; re-en. Sec. 278, p. 87, Cod. Stat. 1871; re-en. Sec. 328, p. 128, L. 1877; re-en. Sec. 328, 1st Div. Rev. Stat. 1879; re-en. Sec. 339, 1st Div. Comp. Stat. 1887; amd. Sec. 1232, C. Civ. Proc. 1895; re-en. Sec. 6835, Rev. C. 1907; re-en. Sec. 9440, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 699.

References

Cited or applied as section 1232, Code of Civil Procedure, in *Raymond v. Blancgrass*, 36 M 449, 465, 93 P 648, 15 L. R. A. (N. S.) 976; *State ex rel. Coffey v. District Court*, 74 M 355, 367, 240 P 667.

9441. Real property—when sale absolute, and what certificate to contain. Upon a sale of real property, the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. When subject to redemption, it must be so stated.

A duplicate of such certificate must be filed by the officer in the office of the county clerk.

9441
63 P (2d) 135

History: En. Sec. 229, p. 181, L. 1867; re-en. Sec. 279, p. 87, Cod. Stat. 1871; re-en. Sec. 329, p. 128, L. 1877; re-en. Sec. 329, 1st Div. Rev. Stat. 1879; re-en. Sec. 340, 1st Div. Comp. Stat. 1887; re-en. Sec. 1233, C. Civ. Proc. 1895; re-en. Sec. 6836, Rev. C. 1907; re-en. Sec. 9441, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 700.

Covers Sales Under Foreclosure Decrees of Mortgages

This section, though apparently appertaining exclusively to sales under levies by execution upon judgments as such, includes sales made under foreclosure decrees. *Hamilton v. Hamilton*, 51 M 509, 521, 154 P 717; *Banking Corp. of Montana v. Hein*, 52 M 238, 240, 156 P 1085.

The provisions of the code governing the right of redemption apply not only to redemption from sales on execution, but also to those had under a power of sale contained in a mortgage or deed of trust. *Banking Corp. of Montana v. Hein*, 52 M 238, 240, 156 P 1085.

Foreclosure Sale Certificate is a Conveyance

The certificate of sale issued to purchaser under a foreclosure sale by the sheriff is a "conveyance" within the Recording Act. *Citizens' Nat. Bk. v. Western L. & B. Co.*, 64 M 40, 46, 268 P 893.

Nature of Rights of Judgment Debtor

After foreclosure sale and before redemption, the judgment debtor has neither legal nor equitable title to the property sold. *State ex rel. Hopkins v. Stephens*, 63 M 318, 321, 206 P 1094.

Nature of Rights of Purchaser

An execution sale transfers the legal title to the purchaser, leaving in the judgment debtor simply the right to redeem. *McQueeney v. Toomey*, 36 M 282, 295, 92 P 561.

Although this section provides that on execution sale the purchaser is substituted to and acquires the right, title, and interest of the judgment debtor, yet, if the purchaser is a close friend and business associate of the debtor and agrees to buy four properties without severance at sale for a grossly inadequate consideration, and to hold whatever little he gets only as a mortgage, and after sale before expiration of the redemption period again agrees so to hold the property, and the debtor within two years offers to redeem, the purchaser acquires no title of the debtor, who may redeem at any time, the transaction being a trust, and, once a mortgage, remaining always a mortgage. *Leggat v. McLure*, 234 F. 620, 622, 148 C. C. A. 386.

Under this section, the purchaser at a foreclosure sale is substituted to and acquires all the interest of the judgment debtor in the property sold, leaving in the judgment debtor only the bare right to redeem. *Citizens' Nat. Bk. v. Western L. & B. Co.*, 64 M 40, 46, 268 P 893.

The purchaser on execution sale becomes the actual owner of the property, subject only to the right of redemption, and as such is entitled to protect his interest and contest the right of the assignee of a subsequent judgment to redeem. *Leonard v. Western et al.*, 74 M 513, 517, 241 P 523; *Reynolds v. Davis et al.*, 78 M 56, 59, 252 P 386; *Libby Lbr. Co. v. Pacific States Fire Ins. Co.*, 79 M 166, 176, 255 P 340; *Brown et al. v. Timmons et al.*, 79 M 246, 251, 256 P 176; *Lepper v. Home Ranch Co. et al.*, 90 M 558, 565, 4 P 2d 722.

A sale of real property pursuant to decree of foreclosure divests the mortgagor of his title and vests it in the purchaser, the only right left the mortgagor being that of redemption. *Williard et al. v. Campbell et al.*, 91 M 493, 500, 11 P 2d 782; *Hillsdale College v. Thompson et al.*, 99 M 406, 44 P 2d 753.

Right to Redeem Not Subject to Levy and Sale Under Execution

On sale of real property under execution or decree of foreclosure the purchaser is substituted for and acquires all the right, title and interest of the judgment debtor in the property sold, leaving in the latter only the bare statutory right to redeem, which right is a personal privilege and not a property right and is not subject to levy and sale under execution. *Hillsdale College v. Thompson et al.*, 99 M 400, 409, 44 P 2d 753.

Rule of Caveat Emptor Applies to Sales Under Execution

The rule of caveat emptor applies to sales under execution, and the purchaser acquires no title where the judgment debtor was holding the legal title as trustee for another. *Chumasero v. Vial*, 3 M 376, 379; *Story v. Black*, 5 M 26, 52, 1 P 1; *McAdow v. Black*, 6 M 601, 607, 13 P 377; *Vaughn v. Schmalsle*, 10 M 186, 198, 25 P 102; *Stauffacher v. Great Falls P. S. Co. et al.*, 99 M 324, 43 P 2d 647.

References

Cited or applied as section 1233, Code of Civil Procedure, in *Raymond v. Blancgrass*, 36 M 449, 465, 93 P 648; as section 6836, Revised Codes, in *Hamilton v. Hamilton*, 51 M 509, 521, 154 P 717; *Wheeler v. McIntyre*, 55 M 295, 301, 175 P 892; *State ex rel. Continental S. Co. v. Tullock*, 68 M 268, 276, 217 P 348; *Beck v. Felen-*

zer et al., 69 M 592, 598, 223 P 499; Dipple v. Neville et al., 82 M 280, 286, 267 P 214; Short et al. v. Karnop et al., 84 M 276, 282, 275 P 278; Swanberg v. Schaefer et

al., 88 M 16, 19, 289 P 561; Williard et al. v. Federal Surety Co., 91 M 465, 471, 8 P 2d 633; Clack v. Clack et al., 98 M 552, 41 P 2d 32.

9442. Real property sold—how redeemed—who are redemptioners. Property sold subject to redemption, as provided by the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, his wife, or his successor in interest, in the whole or any part of the property, and if the judgment debtor or successor be a corporation, then by a stockholder thereof;

2. A creditor having a lien by judgment, mortgage, or attachment on the property sold, or on some share or part thereof, subsequent to that on which the property is sold. If a corporation be such creditor, then any stockholder thereof may redeem. The persons mentioned in the second division of this section are, in this chapter, termed "redemptioners."

History: En. Sec. 230, p. 181, L. 1867; re-en. Sec. 280, p. 87, Cod. Stat. 1871; re-en. Sec. 330, p. 129, L. 1877; re-en. Sec. 330, 1st Div. Rev. Stat. 1879; re-en. Sec. 341, 1st Div. Comp. Stat. 1887; amd. Sec. 1234, C. Civ. Proc. 1895; re-en. Sec. 6837, Rev. C. 1907; amd. Sec. 1, Ch. 107, L. 1913; re-en. Sec. 9442, R. C. M. 1921; amd. Sec. 1, Ch. 16, L. 1927. Cal. C. Civ. Proc. Sec. 701.

"Debtor"

The term "debtor," as used in the first subdivision of this section, refers exclusively to the debtor whose land was subjected to forced sale. Marcellus v. Wright, 51 M 559, 563, 154 P 714.

"Redemptioner"

The wife of a mortgagor of real property is not, by virtue of her relationship to him, a "redemptioner," as that term is defined by this section. Marcellus v. Wright, 51 M 559, 563, 154 P 714. See State ex rel. Harnden v. Crawford, 58 M 72, 189 P 1119.

Where real property had been sold on mortgage foreclosure and a creditor of the judgment debtor levied a writ of attachment on it before the period of redemption had expired, he acquired no lien by virtue of it, and therefore did not become a redemptioner within the meaning of subdivision 2 of this section, so as to entitle him to a sheriff's deed. State ex rel. Hopkins v. Stephens, 63 M 318, 320, 206 P 1094.

A sheriff's certificate of sale on foreclosure issued to the purchaser is a conveyance within the meaning of the Re-

deeming Act; by virtue of the sale the legal and equitable title of the mortgagor passes to the purchaser and there remains in the former the mere personal privilege of redeeming within the statutory period, such right to redeem being also accorded, under this section, to a redemptioner, i. e., a creditor having a lien by judgment, mortgage or attachment subsequent to that on which the property was sold. Dipple v. Neville et al., 82 M 280, 287, 267 P 214.

"Successors in Interest"

The use of the expression, "successors in interest" means nothing more than that one who has succeeded to the title to the property, or has been substituted to the rights of the debtor or redemptioner, has the same right. Hamilton v. Hamilton, 51 M 509, 527, 154 P 717; Williard et al. v. Campbell et al., 91 M 493, 500, 11 P 2d 782.

The right of redemption is not one of property, but a mere personal privilege, which cannot be levied upon or sold on execution at the instance of a judgment debtor but may be transferred to another by the debtor, the transferee being a "successor in interest" within the meaning of this section, and as such entitled to redeem. Brown et al. v. Timmons et al., 79 M 246, 250, 256 P 176.

References

State ex rel. Continental S. Co. v. Tullock, 68 M 268, 276, 217 P 348; Leonard v. Western et al., 74 M 513, 519, 522, 241 P 523.

9443. Redemption money—computation of amount to be paid. The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within one year after the sale, on paying the purchaser

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(temporary)

9443
amended
L. 37 c. 103
sec. 1 p. 285

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the amount of his purchase, with one per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.

History: En. Sec. 231, p. 181, L. 1867; re-en. Sec. 281, p. 88, Cod. Stat. 1871; amd. Sec. 331, p. 129, L. 1877; re-en. Sec. 331, 1st Div. Rev. Stat. 1879; re-en. Sec. 342, 1st Div. Comp. Stat. 1887; amd. Sec. 1235, C. Civ. Proc. 1895; re-en. Sec. 6838, Rev. C. 1907; re-en. Sec. 9443, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 702.

Effect on Decretal Sale of Mortgaged Premises

This section, allowing judgment debtors one year in which to redeem, was held applicable to a decretal sale of mortgaged premises thereafter made, although at the time the mortgage was given the period for redemption was six months. On rehearing, however, this decision was reversed, and the sheriff was compelled by mandamus to issue a deed to the purchaser at the expiration of six months from the sale. *State ex rel. Cruse Sav. Bank v. Gilliam*, 18 M 94, 44 P 394, 45 P 661.

Judgment Debtor May Redeem by Paying Purchase Price Plus Interest

While a "redemptioner" must, when redeeming property sold under forced sale, pay to the purchaser the amount of his purchase and any prior lien he may hold on the property, the judgment debtor may redeem by paying simply the amount of the purchase price, with interest, etc. *Hamilton v. Hamilton*, 51 M 509, 533, 154 P 717.

Redemptioner Under This Section Compared to That Allowed Under Section 9448

Since the right to redeem is purely statutory, a redemptioner availing himself of

the provisions of section 9448, under which the amount he has to pay to the purchaser may be much less than he would have to pay if proceeding under this section, and under which the time within which redemption may be made is extended, must assume its burdens in order to enjoy its benefits. *Leonard v. Western et al.*, 74 M 513, 519, 241 P 523.

Id. Where a redemptioner, proceeding under this section, deposited with the sheriff the amount paid by the purchaser at execution sale with interest, and at the same time demanded an accounting of the rents and profits received by the latter, which could only be done under section 9448, the attempt to redeem under the former section was nullified and therefore the redemption not completed by the deposit.

See also *Reynolds v. Davis et al.*, 78 M 56, 59, 252 P 386.

References

Cited or applied as section 1235, Code of Civil Procedure, in *McQueeney v. Toomey*, 36 M 282, 293, 92 P 561; *State ex rel. Hopkins v. Stephens*, 63 M 318, 320, 206 P 1094; *State ex rel. Continental S. Co. v. Tullock*, 68 M 268, 276, 217 P 348; *Libby Lbr. Co. v. Pacific States Fire Ins. Co.*, 79 M 166, 176, 255 P 340; *Brown et al. v. Timmons et al.*, 79 M 246, 251 et seq., 256 P 176; *Dipple v. Neville et al.*, 82 M 280, 287, 294, 267 P 214; *Grasswick v. Miller*, 82 M 364, 375, 267 P 299.

9444. Redemptioners' rights—manner of redeeming—when purchaser entitled to deed—certificate of redemption—redemption by stockholders—redeeming from wife. If property be so redeemed by a redemptioner, another redemptioner may, within sixty (60) days after the last redemption, again redeem it from the last redemptioner on paying the sum on such last redemption, with interest thereon at the rate of one per cent. (1%) per month in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount, and, in addition, the amount of any liens held by the said last redemptioner prior to his own, with interest; but the judgment under which the property was so sold need not be so paid as a lien. The property may be again, and as often as any redemptioner is so disposed, redeemed from any previous redemptioner, within sixty (60) days after the last redemption, on paying the sum paid on the

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9444
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last previous redemption, with interest thereon at the rate of one per cent. (1%) per month, and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him, with like interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with like interest. Written notice of redemption must be given to the sheriff, and a duplicate filed with the county clerk, and if any taxes or assessments are paid by the redemptioner, or if he has or acquired any liens other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the county clerk; and if such notice be not filed, the property may be redeemed without paying such tax, assessments, or lien. If no redemption be made within one year after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases, the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property. If the judgment debtor or his wife redeem, he or she must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. If the wife redeem, she shall become the owner of her husband's interest, subject to any liens thereon at the time of the execution sale. Upon a redemption by a debtor, or his wife, the person to whom the payment was made must execute and deliver to him or her a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the county clerk of the county in which the property is situated, and the county clerk must note the record thereof in the margin of the record of the certificate of sale.

If a stockholder of a corporation redeems, the corporation, within one (1) year after the date of sale, may redeem by paying to the redemptioner, or the sheriff for his benefit, the amount paid to effect the redemption, with interest thereon at the rate of one per cent. (1%) per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the redemptioner, with like interest thereon. When a stockholder redeems, any other stockholder or stockholders may, at any time after such redemption, and within sixty (60) days after the expiration of one (1) year from the date of sale, contribute to the redemption by paying to the redeeming stockholder, or depositing with the sheriff for his benefit, a sum which bears the same proportion to the amount necessary to redeem which the number of shares owned by such contributing stockholder or stockholders bears to the number of shares of such corporation outstanding, with interest on such sum from the date of redemption until the date of contribution at the rate of one per cent. (1%) per month, together with a like proportion of the taxes or assessments paid by such redeeming stockholder, with like interest thereon, and if the corporation does not redeem the property within the time and in the manner and form as aforesaid, the said redeeming and contributing stockholders shall be entitled to receive a sheriff's deed for

such property so redeemed, and shall succeed to the said property as tenants in common in such proportions, respectively, as they shall respectively pay or contribute to such redemption as aforesaid. The redeeming or contributing stockholder shall, in all cases when applying to redeem or contribute as aforesaid, present an affidavit, setting forth the number of shares of stock owned by him, and to the best of his knowledge, the number of shares of stock of the corporation outstanding.

If the wife of a judgment debtor redeem, the husband, within one year after the date of sale, may redeem by paying the wife or her successors in interest or the sheriff for her or their benefit, the amount paid to effect the redemption, with interest thereon at the rate of one per cent. (1%) per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the wife or her successors in interest, with like interest thereon.

History: Ap. p. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R. C. M. 1921; amd. Sec. 2, Ch. 16, L. 1927. Cal. C. Civ. Proc. Sec. 703.

Effect of Redemption by Debtor

If the debtor redeems, the effect of this section is to terminate the sale and restore the estate to him, whereupon any deficiency would attach as a lien. *McQueeney v. Toomey*, 36 M 282, 296, 92 P 561.

A redemption from foreclosure of mortgaged real property by the judgment debtor (mortgagor) or his successor in interest terminates the effect of the sale, restores one or the other to his estate and restores junior liens, wiped out by the sale; but a redemption by a redemptioner (a creditor) transfers to him the rights of the purchaser under the sale, and at the expiration of all periods of redemption he is entitled to a sheriff's deed on the original certificate of sale. *Dipple v. Neville et al.*, 82 M 280, 287, 267 P 214.

Time for Redemption by Debtor Not Affected by Acts of Redemptioner

The right of redemption may be invoked only by compliance with the statutory provisions; under them the judgment debtor may redeem from foreclosure at any

time within one year from the date of sale, and this period of limitation cannot be shortened by any action of a redemptioner; on the other hand, on the expiration of the one-year period his right of redemption ceases and he is in no position thereafter to question the title of a redemptioner who acted within the time given him by the statute. *Dipple v. Neville et al.*, 82 M 280, 287, 267 P 214.

What Judgment Debtor Must Pay in Redeeming From Redemptioner

In providing that a judgment debtor, in redeeming, must make the same payments as are required to effect a redemption by a redemptioner, the legislature intended to declare merely that if a judgment debtor redeems from a redemptioner, he must make the payments which have been made by the redemptioner. *Hamilton v. Hamilton*, 51 M 509, 534, 154 P 717.

When Sheriff May Execute His Deed

The sheriff is authorized to execute his deed to real estate, sold under execution, only at the expiration of a year from the day of the sale. *Hamilton v. Hamilton*, 51 M 509, 526, 154 P 717.

References

Cited or applied as section 6839, Revised Codes, as amended, in *Marcellus v. Wright*, 51 M 559, 563, 154 P 714; *Banking Corp. of Montana v. Hein*, 52 M 238, 241, 156 P 1085; *State ex rel. Hopkins v. Stephens*, 63 M 318, 320, 206 P 1094.

9445. To whom payment may be made. The payment mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him to the officer who made the sale, or, in case his term of office has expired, then to his successor in office; and in all cases when, under the provisions of this chapter, a purchaser of property at execution sale shall be entitled to a conveyance of the same, such conveyance shall be executed to him by the officer who made the sale, if he

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still be in office, but, in the case the officer who made such sale is not in office at the time the purchaser may be entitled to such conveyance, then the conveyance shall be executed by his successor in office.

History: Ap. p. Sec. 233, p. 182, L. 1867; en. Sec. 283, p. 88, Cod. Stat. 1871; re-en. Sec. 333, p. 129, L. 1877; re-en. Sec. 333, 1st Div. Rev. Stat. 1879; re-en. Sec. 344, 1st Div. Comp. Stat. 1887; re-en. Sec. 1237, C. Civ. Proc. 1895; re-en. Sec. 6840, Rev. C. 1907; re-en. Sec. 9445, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 704.

Effect of Misrepresentation by Sheriff

For the purposes of redemption, this section makes the sheriff the agent of the purchaser at the sale. It is his duty to know when the time for redemption expires; therefore, a false representation, made by him upon the subject is in legal effect a misrepresentation made by the purchaser or creditor, and, though it be innocently made, the latter cannot profit by it. *Hamilton v. Hamilton*, 51 M 509, 531, 154 P 717.

"Successor"

Any sheriff succeeding his predecessor, whether immediately or not, is the latter's "successor," within the meaning of that

term as used in this section. *McCauley v. Jones*, 34 M 375, 377, 86 P 422.

When Deed is Considered to Have Been Applied for Within a Reasonable Time

Where a purchaser at foreclosure sale went into possession after the expiration of the year within which the mortgagor was entitled to redeem, and nearly four years afterward the then sheriff, as successor of the sheriff making the sale, at the request of the purchaser executed to him a deed, the mortgagor having made no offer to redeem, it was held that the deed was applied for within a reasonable time, and was valid under this section. *McCauley v. Jones*, 34 M 375, 377, 86 P 422.

References

Cited or applied as section 1237, Code of Civil Procedure, in *McCauley v. Jones*, 34 M 375, 377, 86 P 422; *Wells Dickey Co. v. Benjamin*, 74 M 170, 173, 239 P 771; *Leonard v. Western et al.*, 74 M 513, 519, 241 P 523.

9446. What papers necessary in redemption. A redemptioner must produce to the officer or person, from whom he seeks to redeem, and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or by the clerk of the district court in the county where the judgment is docketed; or, if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the county clerk. If upon an attachment, a copy of the affidavit of attachment, certified by the clerk of the district court.

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then actually due upon the lien.

History: Ap. p. Sec. 234, p. 182, L. 1867; re-en. Sec. 284, p. 88, Cod. Stat. 1871; re-en. Sec. 334, p. 131, L. 1877; re-en. Sec. 334, 1st Div. Rev. Stat. 1879; re-en. Sec. 345, 1st Div. Comp. Stat. 1887; amd. Sec. 1238, C. Civ. Proc. 1895; re-en. Sec. 6841, Rev. C. 1907; re-en. Sec. 9446, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 705.

References

Cited or applied as section 6841, Revised Codes, in *Hamilton v. Hamilton*, 51 M 509, 532, 154 P 717; *Leonard v. Western et al.*, 74 M 513, 516, 519, 241 P 523.

9447. Court may restrain waste. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to con-

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tinue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences, or for fuel for his family while he occupies the property.

History: En. Sec. 235, p. 182, L. 1867; re-en. Sec. 285, p. 89, Cod. Stat. 1871; re-en. Sec. 335, p. 131, L. 1877; re-en. Sec. 335, 1st Div. Rev. Stat. 1879; re-en. Sec. 346, 1st Div. Comp. Stat. 1887; re-en. Sec. 1239, C. Civ. Proc. 1895; re-en. Sec. 6842, Rev. C. 1907; re-en. Sec. 9447, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 706.

References

Cited or applied as section 6842, Revised Codes, in *Power Mercantile Co. v. Moore Mercantile Co.*, 55 M 401, 406, 177 P 406; *Leonard v. Western et al.*, 74 M 513, 519, 241 P 523; *Blodgett Loan Co. v. Hansen*, 86 M 406, 410, 284 P 140.

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63 P (2d) 135
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9448. Who entitled to rents and profits. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amount of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amount of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action, in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

History: Ap. p. Sec. 236, p. 183, L. 1867; rep. Sec. 751, p. 187, Cod. Stat. 1871; en. Sec. 1240, C. Civ. Proc. 1895; re-en. Sec. 6843, Rev. C. 1907; re-en. Sec. 9448, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 707.

Accounting of Rents and Profits

Where a loan company had transferred its interest in real property bought by it at foreclosure sale to another with the understanding that the legal title and right of possession should remain in it until full payment had been made, the proper party defendant in an action for an accounting of rents and profits therefrom was the company and not the vendee. *Citizens' Nat. Bk. v. Western L. & B. Co.*, 64 M 40, 45, 208 P 893.

Purchaser Entitled to Rents and Profits During Period of Redemption

Where the vendee of mortgaged farm lands, then in possession of a tenant, held under a deed in which the vendor reserved

to himself the right to receive the rents therefrom, the vendor lost such right on foreclosure sale, the purchaser at such sale, under this section, then having become entitled to the rents until redemption. *Dolin v. Wachter*, 87 M 466, 473, 288 P 616.

Where the purchaser of mortgaged lands upon taking possession found thereon a tenant engaged in growing a crop who thereafter recognized the purchaser as his landlord and agreed to pay him as rent one-third of the crop, the former under this section, was entitled to receive from the latter the rent or the value of the use and occupation of the land. *Swanberg v. Schaefer et al.*, 88 M 16, 20, 289 P 561.

The purchaser of real property at foreclosure sale, from the time of the sale until redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive the rents from the property sold from the tenant in possession, or the value of the use and

occupation thereof (this section). *Lepper v. Home Ranch Co. et al.*, 90 M 558, 565, 568, 4 P 2d 722.

Purchaser to Account Only for Rents and Profits Actually Received

In the absence of any showing of wilful default or negligence on the part of the purchaser of realty at foreclosure sale, the redemptioner is entitled, under this section, to demand an accounting by notice or suit in equity, only to the rents and profits actually received by the former. *Citizens' Nat. Bk. v. Western L. & B. Co.*, 64 M 40, 45, 208 P 893.

Redemption Under This Section as Compared to Redemption Under 9443

Since the right to redeem is purely statutory, a redemptioner availing himself of the provisions of this section, under which the amount he has to pay to the purchaser may be much less than he would have to pay if proceeding under section 9443, and under which the time within which redemption may be made is extended, must assume its burdens in order to enjoy its benefits. *Leonard v. Western et al.*, 74 M 513, 519, 241 P 523.

Rents and Profits Properly Apportionable Between Purchasers

Held, in an action to recover rental on mortgaged lands, that under this section, rents payable in crops under a lease executed by the purchaser of mortgaged lands on foreclosure of a second mortgage and a tenant, and in force at the time the holder of the first mortgage foreclosed and became its purchaser, were properly apportionable between the two purchasers on the basis of the time the property was held by them respectively, and that the contention that the section has application only to cases where a redemption has been had cannot be sustained. *Blodgett Loan Co. v. Hansen*, 86 M 406, 409, 284 P 140.

"Tenant"

In an action for an accounting by a redemptioner against the purchaser at a foreclosure sale for rents and profits received by the latter, held, that the word "tenant" used in this section, in providing that a redemptioner is entitled to receive from the tenant in possession the rents of the property, etc., is not to be construed in its strict or technical sense, but as indicating one who holds possession of the land by any kind of title, either in fee, for life, for years, at will or at sufferance. *Citizens' Nat. Bk. v. Western L. & B. Co.*, 64 M 40, 45, 208 P 893.

A contract between the owner of land and one who desires to farm it, under which the latter agrees to pay as rental a portion

of the crops raised thereon is a lease and not a cropping agreement; the tenant becomes the owner of the crops as personal property, subject to his obligation to deliver the portion agreed upon to his landlord, and is a "tenant in possession" within the meaning of this section, providing that a purchaser at foreclosure sale shall be entitled to receive from such tenant the rents of the property until redemption. *Blodgett Loan Co. v. Hansen*, 86 M 406, 409, 284 P 140.

Tender Necessary

A redemptioner of real property from execution sale who, proceeding under this section, just prior to the expiration of the period of redemption demanded from the purchaser a verified statement of the rents and profits received by him from the property during his ownership, which was furnished after the expiration of such period, to then effect a redemption under that section was required to tender, within five days after receiving the statement, the amount found due after deduction of the rents and profits from the purchase price; and failure of plaintiff in an action to enjoin the sheriff from issuing a deed to the purchaser to allege in his complaint that he had made such tender rendered the pleading insufficient. *Reynolds v. Davis et al.*, 78 M 56, 59 et seq., 252 P 386.

Id. A redemptioner who deems the statement furnished him by the purchaser at execution sale of real property of the rents and profits thereof incorrect, must, to effect a redemption under this section, nevertheless tender the amount apparently due, but may do so under protest, thus advising the sheriff that the excess is not intended as a gift and making him a bailee of the redemptioner of the portion of the tender deemed excessive.

When Redemption is Completed

A redemptioner, proceeding under section 9443, must within one year from date of execution sale tender or pay the amount paid by the purchaser with interest up to the time of redemption, where, however, he proceeds under this section and asks for an accounting of the rents and profits received by the purchaser, a tender is not necessary until an account has been made, either voluntarily, in which event the period of redemption is extended five days after it is made, or compulsorily by means of a suit in equity, in which case the period is extended fifteen days after final determination of the suit, but the redemption is not completed until the accounting is had, and the amount due determined and paid or tendered within time. *Leonard v. Western et al.*, 74 M 513, 519, 241 P 523.

References

Cited or applied as section 6843, Revised Codes, in *Hamilton v. Hamilton*, 51 M

509, 527, 154 P 717; *Dyer v. Schmidt et al.*, 67 M 6, 7, 213 P 1117; *Patterson et al. v. Law et al.*, 78 M 221, 226, 254 P 412.

9449
S.L. '33, Ch. 150
101 Mont. 121
53 P (2d) 118

9449. Possession of lands prior to foreclosure and during period of redemption. The purchaser of lands at mortgage foreclosure or execution sales is not entitled to the possession thereof as against the execution debtor during the period of redemption allowed by law while said execution debtor personally occupies the land as a home for himself and his family. It shall be unlawful to insert in any mortgage of real estate any provision or language intended to constitute a waiver by the owner of real estate personally occupying land as a home for himself and family of the provision of this section or any provision or language intended to give the mortgagee possession of the land or premises prior to foreclosure upon default of tax, principal or interest payments. The intention hereof being to insure to such owner the possession of his land prior to foreclosure and during the year of redemption.

History: En. Sec. 1, Ch. 230, L. 1921; re-en. Sec. 9449, R. C. M. 1921; amd. Sec. 1, Ch. 150, L. 1933.

Operation in General

The purchaser at a sale of realty under foreclosure is, as against the judgment debtor, entitled to possession during the period of redemption if the premises are not occupied by the debtor as a home for himself and his family. *State v. District Court et al.*, 71 M 89, 93, 227 P 579; *Citizens' Nat. Bk. v. Western L. & B. Co.*, 64 M 40, 47, 208 P 893; *Fergus Co. v. First State Bk. of Hilger*, 67 M 1, 8, 213 P 1114; *Kester v. Amon et al.*, 81 M 1, 8, 261 P 288; *Lepper v. Home Ranch Co. et al.*, 90 M 558, 565, 4 P 2d 722.

Right Lost by a Change in Possession

The right granted by this section to a defaulting mortgagor who personally occupies the mortgaged premises as a home for himself and family, to remain in possession thereof during the period of redemption is exempt from forced sale; the right, however, is lost if there is a change of possession. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 13, 14, 17 P 2d 62.

Waiver of Right to Possession Allowed Prior to Amendment

Construing prior to amendment by Chapter 150, Laws of 1933, held, that the contention that the stipulation for waiver of any claim of homestead or right of possession of the mortgaged premises during the period of redemption is invalid on the ground that the right conferred by this section upon the mortgagor to remain in possession on foreclosure if he occupies the

premises personally as a home for himself and family, is in the nature of a homestead and that, therefore, the stipulation is void as contrary to the public policy of the exemption laws, may not be sustained. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 13, 14, 17 P 2d 62.

Construing prior to amendment by Chapter 150, Laws of 1933, under authority of section 8252, the parties to a real estate mortgage may incorporate therein a stipulation for immediate possession by the mortgagee in case of default by the mortgagor to make payment of interest, taxes, etc., promptly, notwithstanding this section provides that the purchaser at foreclosure sale is not entitled to possession during the period of redemption if the mortgagor personally occupies the premises as a home for himself and family. *Kelly v. Roberts et al.*, 93 M 106, 112 et seq., 17 P 2d 65.

Id. Construing prior to amendment by Chapter 150, Laws of 1933, where a mortgagor agrees to the incorporation of a clause in the mortgage to relinquish his right to remain in possession of the property on foreclosure sale, which right is reserved to him under this section, if he occupies the property with his family as a home, public policy does not prevent the enforcement of the agreement if it sufficiently identifies the right sought to be relinquished.

References

Union Cent. Life Ins. Co. v. Jensen, 74 M 70, 80, 237 P 518; *State ex rel. Kester v. District Court*, 74 M 100, 103, 238 P 875; *First National Corp. v. Perrine et al.*, 99 M 454, 43 P 2d 1073.

9450. Proceedings if title fails. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom, in conse-

quence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession, in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest, or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and, when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid; and any other or after-acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale under execution, in satisfaction of such debt, but no property of such debtor, sold bona fide before the filing of such petition, shall be subject to the lien of said judgment. The notice of the filing of such petition shall be made by filing a notice thereof in the office of the county clerk where such property may be situated, and said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest.

History: En. Sec. 237, p. 183, L. 1867; re-en. Sec. 286, p. 89, Cod. Stat. 1871; re-en. Sec. 336, p. 132, L. 1877; re-en. Sec. 336, 1st Div. Rev. Stat. 1879; re-en. Sec. 347, 1st Div. Comp. Stat. 1887; re-en. Sec. 1241, C. Civ. Proc. 1895; re-en. Sec. 6844, Rev. C. 1907; re-en. Sec. 9450, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 708.

Operation and Effect

When the purchaser of real estate sold on execution is evicted therefrom under the provisions of this section in proceedings instituted by the judgment creditor, by which the judgment and execution under which he purchased were declared void, he may recover the purchase money from the judgment creditor. Elling v. Harrington, 17 M 322, 42 P 851.

A purchaser of lands at a foreclosure sale under a decree which, unknown to him but known to the judgment creditor, was void because of non-service of summons on some of the defendants, may, un-

der this section, as well as in the absence of statute, by independent action recover reimbursement from the judgment creditor, subrogation not offering any remedy. McCarthy v. State Bank of Townsend, 54 M 319, 328, 170 P 15.

This section applies to sales under foreclosure. McCarthy v. State Bank of Townsend, 54 M 319, 329, 170 P 15.

Though a purchaser of real property at a judicial sale, title to which fails, has a double remedy under this section, in that he may bring an action in the nature of one for money had and received, or have the original judgment revived for his own use and benefit and proceed against the judgment debtor, a buyer of personalty is confined to the latter remedy. Tetrault v. Ingraham, 54 M 524, 526, 171 P 1148.

References

Cited or applied as section 286, p. 89, Codified Statutes 1871, in Roush v. Fort, 3 M 175, 184.

9451. Party who pays more than his share may compel contribution. When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment if, within ten days after his payment,

he file with the clerk of the court where judgment was rendered notice of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the docket.

History: En. Sec. 337, p. 132, L. 1877; re-en. Sec. 337, 1st Div. Rev. Stat. 1879; re-en. Sec. 348, 1st Div. Comp. Stat. 1887; re-en. Sec. 1242, C. Civ. Proc. 1895; re-en. Sec. 6845, Rev. C. 1907; re-en. Sec. 9451, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 709.

Operation and Effect

The right of a surety, who has paid a judgment against his principal, and himself and other sureties, to enforce contribution from a cosurety, is not barred by the lapse of the statutory period of limitation after the payment of the judgment, but exists so long as the judgment is alive. *Northwestern Nat. Bank v. Opera House Co.*, 23 M 1, 8, 57 P 440.

The purpose of this section is to relieve the paying surety from the necessity of bringing an action to enforce reimbursement or contribution. The surety paying

for the principal or his cosurety is given "the benefit of the judgment to enforce contribution or repayment," if he gives the notice required in the statute. It is the intention of the provision that the paying surety shall be substituted to all the rights of the plaintiff in the judgment, with the right and privilege of using it, just as the plaintiff could use it, to enforce by the process of execution thereon the payment of such claim as he has. *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 M 1, 8, 57 P 440.

The remedy afforded by this section not being exclusive, a surety who has paid a judgment against his principal and himself and others as sureties may take an assignment of the judgment to himself and enforce contribution from his cosureties. *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 M 33, 36, 57 P 445.

9452
120 P.(2d) 426

9452. Garnishment to apply to public officers. The provisions of section 9294 of this code, relating to the garnishment of public officers, apply to the levy of an execution.

History: En. Sec. 1243, C. Civ. Proc. 1895; re-en. Sec. 6846, Rev. C. 1907; re-en. Sec. 9452, R. C. M. 1921.

9453. Validation of judicial sales. All judicial sales of real property which previous to January 1, 1929, (provided no action is now pending to set such sale aside), where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale, and when no such deed has been executed, shall entitle such purchaser to such deed; and such deed if now or when executed shall be sufficient to convey all the title of judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, or the manner of making or conducting the sale, or in the recitals or references in such deed, shall be disregarded and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 2, p. 145, L. 1899; re-en. Sec. 6847, Rev. C. 1907; amd. Sec. 1, Ch. 5, L. 1915; re-en. Sec. 9453, R. C. M. 1921; amd. Sec. 1, Ch. 22, L. 1925; amd. Sec. 1, Ch. 125, L. 1929.

Operation and Effect

A sale made under an execution, defective by reason of its failure to contain the seal of the court, made prior to the enactment of a statute of this character, was validated thereby without any amendment of the process of the court. *Kipp v. Burton*, 29 M 96, 104, 74 P 85. See also

Burton v. Kipp, 30 M 275, 284, 289, 76 P 563.

A decree, void for want of jurisdiction in the court at the time of its rendition, was not made valid by a statute having the same object as this section. *Bullerdick v. Hermsmeyer*, 32 M 541, 552, 81 P 334.

References

Cited or applied as section 6847, Revised Codes, before amendment, in *Banking Corp. of Montana v. Hein*, 52 M 238, 240, 156 P 1085.

CHAPTER 60

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION

- Section 9454. Debtor required to answer concerning his property, when.
 9455. Proceedings to compel debtor to appear—in what cases he may be arrested—what bail may be given.
 9456. Any debtor of the judgment debtor may pay the latter's creditor.
 9457. Examination of debtors of judgment debtor, or of those having property belonging to him.
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 9465. When property vests in receiver.
 9466. Title by relation.

9454. Debtor required to answer concerning his property, when.

When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this state, to the sheriff of the county where the judgment-roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

History: En. Sec. 215, p. 88, *Bannack Stat.*; re-en. Sec. 238, p. 184, *L. 1867*; re-en. Sec. 287, p. 90, *Cod. Stat. 1871*; re-en. Sec. 338, p. 133, *L. 1877*; re-en. Sec. 338, 1st Div. Rev. Stat. 1879; re-en. Sec. 350, 1st Div. Comp. Stat. 1887; re-en. Sec. 1260, *C. Civ. Proc. 1895*; re-en. Sec. 6848, *Rev. C. 1907*; re-en. Sec. 9454, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 714*.

Operation and Effect

If there be property which cannot be reached directly by execution, and which the judgment debtor refuses to apply, he may be compelled, in proceedings supplementary to execution, to deliver it up in satisfaction of the judgment. *Sperling v. Calfee*, 7 M 514, 529, 19 P 204. See also *Bank of Minnesota v. Hayes*, 11 M 533, 540, 29 P 90.

A creditor's bill to enforce a judgment lien against property claim by defendants under a judicial sale need not be preceded by proceedings supplementary to execution, as such summary process is applicable to the discovery of property subject to execution, concealed or withheld by the debtor or others in collusion with him without pretense of substantial right, and not to cases where the attitude of the par-

ties to the property in controversy is fully understood. *Ryan v. Maxey*, 14 M 81, 83, 35 P 515. See also *Wilson v. Harris*, 21 M 374, 407, 54 P 46.

The general purpose of this chapter is to provide a substitute for a creditor's bill—a cheaper and easier method of reaching assets of the debtor which cannot be reached by the execution method. In *re Downey*, 31 M 441, 445, 78 P 772.

Held, that this section, providing for proceedings supplemental to execution, is applicable to cases wherein the judgment creditor has no knowledge of the existence of any property subject to levy under execution, and in such a case any order for examination of the judgment debtor may be obtained only after execution is returned; but that section 9455 applies where the judgment creditor has knowledge of property belonging to the debtor but which he has been unable to locate or have it levied upon under execution, and the order may be obtained after issuance of execution and before its return. *Brindjong v. Brindjong*, 96 M 481, 487, 31 P 2d 725.

References

Davis v. Spencer, 87 M 12, 14, 285 P 193.

9454
112 F. (2d) 247

9455. Proceedings to compel debtor to appear—in what cases he may be arrested—what bail may be given. After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.

History: Ap. p. Sec. 216, p. 88, Bannack Stat.; en. Sec. 239, p. 184, L. 1867; re-en. Sec. 288, p. 90, Cod. Stat. 1871; re-en. Sec. 339, p. 133, L. 1877; re-en. Sec. 339, 1st Div. Rev. Stat. 1879; re-en. Sec. 351, 1st Div. Comp. Stat. 1887; re-en. Sec. 1261, C. Civ. Proc. 1895; re-en. Sec. 6849, Rev. C. 1907; re-en. Sec. 9455, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 715.

Operation and Effect

Where no judgment had been entered or valid execution issued at the time of an order for the examination of a defendant on proceedings supplementary to execution, the proceedings are irregular, and cannot be cured by the subsequent entry of a judgment *nunc pro tunc*. *Barber v. Briscoe*, 9 M 341, 347, 23 P 726.

Held, that section 9454, providing for proceedings supplemental to execution, is applicable to cases wherein the judgment creditor has no knowledge of the existence of any property subject to levy under execution, and in such a case an order for examination of the judgment debtor may

be obtained only after execution is returned; but that this section applies where the judgment creditor has knowledge of property belonging to the debtor but which he has been unable to locate or have it levied under execution, and the order may be obtained after issuance of execution and before its return. *Brindjong v. Brindjong*, 96 M 481, 486, 31 P 2d 725.

Id. In proceedings supplemental to execution brought under this section, affidavit of judgment creditor that execution had been issued and still remained in the sheriff's hands; that the debtor had refused to pay the judgment, that he had money as a result of settlement of a personal injury claim, which could be applied to the settlement of the judgment, etc., held sufficiently definite and certain as to what money was referred to therein.

References

Cited or applied as section 1261, Code of Civil Procedure, in *In re Downey*, 31 M 441, 444, 78 P 772.

9456. Any debtor of the judgment debtor may pay the latter's creditor. After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is sufficient discharge for the amount so paid.

History: En. Sec. 217, p. 88, Bannack Stat.; re-en. Sec. 240, L. 1867; re-en. Sec. 289, Cod. Stat. 1871; re-en. Sec. 340, p. 134, L. 1877; re-en. Sec. 340, 1st Div. Rev.

Stat. 1879; re-en. Sec. 352, 1st Div. Comp. Stat. 1887; re-en. Sec. 1262, C. Civ. Proc. 1895; re-en. Sec. 6850, Rev. C. 1907; re-en. Sec. 9456, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 716.

References

Cited or applied as section 1262, Code of Civil Procedure, in *Cowell v. May*, 26 M 163, 168, 66 P 843; In re *Downey*, 31 M 441, 444, 78 P 772.

9457. Examination of debtors of judgment debtor, or of those having property belonging to him. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

9457
149 P. 2d 251

History: En. Sec. 218, p. 88, Bannack Stat.; re-en. Sec. 241, L. 1867; re-en. Sec. 290, Cod. Stat. 1871; re-en. Sec. 341, p. 134, L. 1877; re-en. Sec. 341, 1st Div. Rev. Stat. 1879; re-en. Sec. 353, 1st Div. Comp. Stat. 1887; re-en. Sec. 1263, C. Civ. Proc. 1895; re-en. Sec. 6851, Rev. C. 1907; re-en. Sec. 9457, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 717.

Operation and Effect

Where in proceedings supplemental it is made to appear that a third person, not made a party, holds funds belonging to the judgment debtor which could be applied to the judgment, it is the duty of the court under this section to bring in such person to be examined, and if he make no claim to the funds, the court may

order their application on the judgment; if, on the other hand, he dispute the claim of the judgment debtor to their possession, the court may empower the judgment creditor to bring suit to recover the amount and enjoin transfer or other disposition of it, or appoint a receiver to collect and apply the money. *Brindjong v. Brindjong*, 96 M 481, 488, 31 P 2d 725.

References

Cited or applied as section 1263, Code of Civil Procedure, in *In re Downey*, 31 M 441, 444, 78 P 772; *Johnson et al v. Lundeen et al.*, 61 M 145, 200 P 451; *Missoula etc. Bk. v. Insurance Co.*, 61 M 370, 371, 203 P 854; *Davis v. Spencer*, 87 M 12, 15, 285 P 193.

9458. Witnesses required to testify. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

9458
112 F. 2d) 247

History: En. Sec. 219, p. 88, Bannack Stat.; re-en. Sec. 242, L. 1867; re-en. Sec. 291, Cod. Stat. 1871; re-en. Sec. 342, p. 134, L. 1877; re-en. Sec. 342, 1st Div. Rev. Stat. 1879; re-en. Sec. 354, 1st Div. Comp. Stat. 1887; re-en. Sec. 1264, C. Civ. Proc. 1895; re-en. Sec. 6852, Rev. C. 1907; re-en. Sec. 9458, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 718.

References

Cited or applied as section 1264, Code of Civil Procedure, in *In re Downey*, 31 M 441, 444, 78 P 772; *Missoula etc. Bk. v. Insurance Co.*, 61 M 370, 371, 203 P 854.

9459. Judge may order property to be applied on execution. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

History: En. Sec. 220, p. 89, Bannack Stat.; re-en. Sec. 243, L. 1867; re-en. Sec. 292, Cod. Stat. 1871; re-en. Sec. 343, p. 135, L. 1877; re-en. Sec. 343, 1st Div. Rev. Stat. 1879; re-en. Sec. 355, 1st Div. Comp. Stat. 1887; re-en. Sec. 1265, C. Civ. Proc. 1895; re-en. Sec. 6853, Rev. C. 1907; re-en.

Sec. 9459, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 719.

Operation and Effect

Where an owner sold his land on the instalment plan, and put the land contract and his deed in escrow with a bank,

to be delivered to the purchaser upon completion of the payments, but in the meantime the land was attached as the property of the vendor, and judgment obtained upon which execution was returned unsatisfied, and there still remained in the bank, some of the moneys paid in on the land contract, the court has jurisdiction, in proceedings supplemental to execution, under this section, to order the judgment and execution to be satisfied and discharged out of the balance held by the bank; but the following section has no application to such a proceeding. *Knapp v. Andrus*, 56 M 37, 42, 180 P 908.

9460. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor. If it appear that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

History: En. Sec. 221, p. 89, *Bannack Stat.*; re-en. Sec. 244, L. 1867; re-en. Sec. 293, *Cod. Stat.* 1871; re-en. Sec. 344, p. 135, L. 1877; re-en. Sec. 344, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 356, 1st Div. *Comp. Stat.* 1887; re-en. Sec. 1266, *C. Civ. Proc.* 1895; re-en. Sec. 6854, *Rev. C.* 1907; re-en. Sec. 9460, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 720.

Operation and Effect

In an action under this section it is not necessary to allege that an order was made by the court permitting the action to be brought. *Sweeney v. Schlessinger*, 18 M 326, 45 P 213.

In proceedings supplemental to execution the only powers possessed by the

In proceedings supplemental to execution the only powers possessed by the court are those given it by this section and the next section. *Johnson et al. v. Lundeen et al.*, 61 M 145, 148, 200 P 451.

References

Cited or applied as section 1265, *Code of Civil Procedure*, in *In re Downey*, 31 M 441, 444, 78 P 772; *Missoula etc. Bk. v. Insurance Co.*, 61 M 370, 371, 372, 203 P 854; *Davis v. Spencer*, 87 M 12, 15, 16, 285 P 193; *Brindjong v. Brindjong*, 96 M 481, 489, 31 P 2d 725.

court are those given it by the preceding section and this section. *Johnson et al. v. Lundeen et al.*, 61 M 145, 200 P 451.

References

Cited or applied as section 356, *First Division Compiled Statutes* 1887, in *Wilson v. Harris*, 21 M 374, 406, 54 P 46; as section 1266, *Code of Civil Procedure*, in *Cowell v. May*, 26 M 163, 165, 66 P 843; as section 6854, *Revised Codes*, in *Knapp v. Andrus*, 56 M 37, 42, 180 P 908; *Missoula etc. Bk. v. Insurance Co.*, 61 M 370, 371, 372, 203 P 854; *Edenfield v. C. V. Seal Co., Inc.*, et al., 83 M 49, 64, 270 P 642; *Davis v. Spencer*, 87 M 12, 15, 16, 285 P 193; *Brindjong v. Brindjong*, 96 M 481, 489, 31 P 2d 725.

9461. Disobedience of orders—how punished. If any person, party, or witness disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference for a contempt.

History: En. Sec. 222, p. 89, *Bannack Stat.*; re-en. Sec. 245, L. 1867; re-en. Sec. 294, *Cod. Stat.* 1871; re-en. Sec. 345, p. 135, L. 1877; re-en. Sec. 345, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 357, 1st Div. *Comp.*

Stat. 1887; re-en. Sec. 1267, *C. Civ. Proc.* 1895; re-en. Sec. 6855, *Rev. C.* 1907; re-en. Sec. 9461, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 721.

9462. No person excused from answering on the ground of fraud. A party or witness examined in proceedings authorized by this chapter is not excused from answering a question on the ground that his examina-

tion will tend to convict him of the commission of a fraud, or to prove that he has been a party or privy to, or knowing of, a conveyance, assignment, transfer, or other disposition of property for any purpose; or that he or any other person claims to be entitled, as against the judgment creditor, or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor, or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding.

History: En. Sec. 1268, C. Civ. Proc. 1895; re-en. Sec. 6856, Rev. C. 1907; re-en. Sec. 9462, R. C. M. 1921.

9463. When and how a receiver may be appointed. At any time after making an order requiring the judgment debtor or any other person to attend and be examined, as prescribed in this chapter, the judge may make an order appointing a receiver of the property of the judgment-debtor. At least two days' notice of the application for the order appointing a receiver must be given personally to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the state; in which case, the order must recite that fact, and may dispense with notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him.

History: En. Sec. 1269, C. Civ. Proc. 1895; re-en. Sec. 6857, Rev. C. 1907; re-en. Sec. 9463, R. C. M. 1921.

References

Brindjong v. Brindjong, 96 M 481, 489, 31 P 2d 725.

9464. Oath and undertaking. An order appointing a receiver must be filed in the office of the clerk of the court where the judgment-roll is filed, or a transcript of the judgment, and the receiver must take and subscribe the official oath, and give an undertaking, if required by the judge.

History: En. Sec. 1270, C. Civ. Proc. 1895; re-en. Sec. 6858, Rev. C. 1907; re-en. Sec. 9464, R. C. M. 1921.

9465. When property vests in receiver. The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, subject to the following exceptions:

1. Real property is vested in the receiver, only from the time when the order is filed with the clerk of the court, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

2. Where the judgment debtor, at the time when the order is filed, resides in another county of the state, his personal property is vested in the receiver, only from the time when a copy of the order, certified by the clerk in whose office it is filed, is filed with the clerk of the district court of the county where he resides.

History: En. Sec. 1271, C. Civ. Proc. 1895; re-en. Sec. 6859, Rev. C. 1907; re-en. Sec. 9465, R. C. M. 1921.

9466. Title by relation. Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back, by relation, for the benefit of the judgment creditor in whose behalf the proceedings were instituted, as follows:

1. Where an order requiring the judgment debtor to attend and be examined has been served, before the appointment of a receiver, or the judgment debtor has been brought before the judge on arrest, the receiver's title extends back, so as to include the personal property of the judgment debtor, at the time of the service of the order or his arrest.

2. Where an order has not been served, or no arrest, as specified in the foregoing subdivision, but an order has been made, requiring a person to attend and be examined, concerning property belonging or a debt due to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands, or under the control, of the person or corporation thus required to attend, at the time of the service of the order; and to a debt then due him from that person or corporation.

3. In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor, at the time when the notice was served, either personally, or by complying with the requirements of an order, prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration; or the payment of a debt in good faith, and without notice.

History: En. Sec. 1272, C. Civ. Proc. 1895; re-en. Sec. 6860, Rev. C. 1907; re-en. Sec. 9466, R. C. M. 1921.

CHAPTER 61

ACTIONS FOR FORECLOSURE OF MORTGAGES

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| Section 9467. | Proceedings in foreclosure suits. |
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9467. Proceedings in foreclosure suits. There is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale, and the payment of the costs of the court and the expenses of the sale, and the

amount due the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

History: Ap. p. Sec. 223, p. 90, *Bannack Stat.*; en. Sec. 246, p. 185, L. 1867; re-en. Sec. 295, p. 92, *Cod. Stat.* 1871; re-en. Sec. 346, p. 135, L. 1877; re-en. Sec. 346, 1st Div. Rev. Stat. 1879; re-en. Sec. 358, 1st Div. Comp. Stat. 1887; amd. Sec. 1290, C. Civ. Proc. 1895; re-en. Sec. 6861, Rev. C. 1907; re-en. Sec. 9467, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 726.

Deficiency Judgment

A deficiency judgment may be properly entered against the grantor in a deed of trust given to secure the payment of a promissory note, though there may be nothing in the terms of the deed itself to warrant the entry of a judgment for a deficiency. *First National Bank v. Pardee*, 16 M 390, 392, 41 P 77.

Where a mortgage on real property is foreclosed and the property does not sell for sufficient to satisfy the debt, the fact that a deficiency judgment could not be entered up against the non-resident mortgagors, service of summons upon whom was had by publication, did not have the effect of discharging the debt, but in such case the unpaid portion affords ground for a separate action to recover it. *Craig v. Burns et al.*, 65 M 550, 556, 212 P 856.

Effect of a Transfer of Note and Mortgage

Where a note and a mortgage securing it were transferred by assignment, the payee indorsing the note without recourse, the transferee took it with full knowledge that it was a mortgage note, collectible under this section—a non-negotiable instrument subject to all the equities existing in favor of the maker. *Buhler v. Loftus*, 53 M 546, 565, 165 P 601.

Effect of Decree of Foreclosure

A decree of foreclosure operates directly upon the mortgaged property, and is itself sufficient authority for the officer to proceed; it is unnecessary that any order aside from the decree should issue. *Thomas v. Thomas*, 44 M 102, 111, 119 P 283.

Id. An officer's authority to sell land on foreclosure arises from the decree of sale, and not from any so-called "order of sale"; if an "order of sale," containing a copy of the decree, is issued to the sheriff, any errors in such order, either as to the style of process or otherwise, are immaterial, and should be disregarded.

A farm tenant holding under an unrecorded lease was, under this section, bound by the decree of foreclosure even though he was not a party to the action, and the writ of assistance lay to oust him from possession; unless he acquired a new and independent right after rendition of the decree. *State v. District Court et al.*, 96 M 600, 603, 31 P 2d 837.

Effect of Failure of Security

Where a note was secured by a second mortgage, which has become of no value because of foreclosure of the first mortgage and expiration of the time of redemption, the complaint in an action on such note need not refer to such mortgage or loss of security, the action not being to enforce such security under this section. *Brophy v. Downey*, 26 M 252, 256, 67 P 312.

Foreclosure is an Equity Proceeding

An action to foreclose a mortgage is one in equity which is not changed into one at law by pleadings which raise issues of law on questions incidental to the principal relief sought by plaintiff, and therefore defendant is not entitled to a jury trial. *Rochester v. Bennett*, 74 M 293, 304, 240 P 384.

"Judicial Sale"

A sale made pursuant to a decree of court in an action to foreclose a mortgage, instituted under this section, is a "judicial sale." *Interior Securities Co. v. Campbell*, 55 M 459, 466, 178 P 582.

Id. If a consent decree is entered in a suit to foreclose a mortgage, authorizing the receiver appointed therein to make a sale of the mortgaged property, a fully executed contract under such authority would

constitute a "judicial sale," not requiring confirmation to pass title.

Not in Conflict With Section 8233

While section 8233 appears in the Civil Code, and section 9467 (this section) in the Code of Civil Procedure, both referring to the right of creditors to enforce obligations secured by lien, they must be deemed to have been passed at the same moment of time, and it must be presumed that it was intended that both should be operative and each should govern as to the title in which it is found, and courts must construe them together and reconcile them, if possible. *Barth v. Ely*, 85 M 310, 317 et seq., 278 P 1002.

Parties

Where a second mortgage of church property did not purport to be the deed of the corporation, but was executed by the president and secretary of the trustees individually, and duly recorded, it was not necessary, in order to foreclose their equitable right to redeem, to make the second mortgagees parties to an action to foreclose a prior mortgage on the church property, since the second mortgage was not constructive notice that it was on such property. *Shackleton v. Allen C. A. M. E. Ch.*, 25 M 421, 424, 65 P 428.

Power of Court of Equity With Regard to Mortgaged Property

A court of equity has inherent power to order a sale of mortgaged property without issuing a formal writ of execution. *Thomas v. Thomas*, 44 M 102, 111, 119 P 283.

Power of Court to Direct the Manner of Sale

In an action to foreclose a mortgage on land the district court, under this section, authorizing it to direct the sale of the property but not prescribing the mode of its sale—whether in separate parcels or in one body—may in its discretion direct the manner of its sale. *Elston v. Hix et al.*, 67 M 294, 299, 215 P 657.

Purpose of Statute

The purpose of this section, providing that recovery of a debt secured by mortgage must be by suit in foreclosure, is to require mortgagees to exhaust their security before having recourse to the general assets of the debtor, and where the mortgagee has lost his security in any manner, other than a parting with it for the purpose of evading the provisions of the section, he may proceed against the mortgagor on the debt. *Leffek v. Luede-man*, 95 M 457, 473, 27 P 2d 511.

Rights of Second Mortgage

The holder of a note secured by a second mortgage is not required to foreclose during the period of redemption after the first mortgage has been foreclosed and the property sold thereunder, but he may wait until such period has expired and his lien is determined, and then sue on the note. *Brophy v. Downey*, 26 M 252, 258, 67 P 312.

Id. Where, in an action to foreclose a first mortgage, the mortgagee in a second mortgage is made a defendant and defaults, such action does not defeat the right of his assignee of the note to recover thereon after the time to redeem the premises from the foreclosure sale has expired.

Scope of Section

This section is a limitation upon the rights which usually pertain to property, and its restriction will not be construed to include personal or collateral security, or any other form of security not falling within the meaning of the term "mortgage." *State Savings Bank v. Albertson*, 39 M 414, 422, 102 P 692.

A contract of sale which, among other things, provided that time should be of the essence of it, that the vendors could, at their option, terminate it for failure on the part of the vendee to comply strictly with its terms, and that, upon such termination, the property involved and all payments made by the vendee should be the property of the vendors, and the vendee should not have any action to recover, was not a mortgage subject to foreclosure under this section. *Arnold v. Fraser*, 43 M 540, 547, 117 P 1064. See also *Cook-Reynolds Co. v. Chipman*, 47 M 289, 299, 133 P 694.

Held, that plaintiff by commencing an action to foreclose his mortgage upon land did not waive his claim upon wheat grown thereon, possession of which had been turned over to him by the mortgagors, but which was not covered by mortgage, the restriction found in this section not including personal or collateral security not falling fairly within the meaning of the term "mortgage." *Craig v. Burns et al.*, 65 M 550, 556, 212 P 856.

"Secured" Defined

The word "secured" as used in this section, in providing that if a debt is secured by mortgage the creditor must proceed in a foreclosure action, does not mean that the security shall be adequate; so long as the security has value he must so proceed, hence the fact that the lessee above referred to mortgaged his personal property upon which by the terms of the

lease the lessor had been given a lien, did not alone estop him from asserting that the lessor was barred by this section from maintaining the personal action against him to recover unpaid rentals. *Barth v. Ely*, 85 M 310, 317 et seq., 278 P 1002.

Security Must be Exhausted Before Resort Can be Had to General Assets

A surety on a promissory note whose liability has been secured by a chattel mortgage cannot, upon being obliged to pay the note, waive the mortgage security and proceed by attachment against his principals to recover the debt, but must foreclose the mortgage as required by this section. The decision in this case does not affect the question of enforcing the debt by exercising a power of sale contained in the mortgage. *Largey v. Chapman*, 18 M 563, 564, 46 P 808.

The obvious purpose of this section is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. *State Savings Bank v. Albertson*, 39 M 414, 422, 102 P 692.

Where suit is brought on a note, the defendant's answer that the plaintiff has taken "security" for the payment of the note does not bar the action and give a right of dismissal, where it does not appear from the answer that the security is in the form of a mortgage, or the equivalent of a mortgage; the fact that the obligation sued upon is secured by a mortgage or its equivalent is a matter of defense, and the burden rests upon the defendant to make that appear by his pleading. *State Savings Bank v. Albertson*, 39 M 414, 423, 102 P 692.

Without passing upon the propriety of plaintiff pleading in his complaint a mortgage given to secure the note upon which he sues, held, that where plaintiff did plead it, as well as the fact that defendant had disposed of the chattels upon which it was given, and defendant joined issue thereon, he was properly permitted to introduce testimony in his case in chief that the mortgage had become valueless without any fault on his part. *Vande Veegaete v. Vande Veegaete*, 75 M 52, 56 et seq., 243 P 1082.

Held, that this section, declaring that there is but one action for the recovery of a debt or the enforcement of any right secured by mortgage, prohibits any other action than that provided by statute for the foreclosure of the mortgage, that the creditor cannot waive the mortgage and sue on the debt, and that section 8233, providing that the existence of a lien as security for the performance of an obligation does not affect the right of the

creditor to enforce the obligation without regard to the lien, has reference to liens other than mortgage liens. *Barth v. Ely*, 85 M 310, 317 et seq., 278 P 1002.

Where there has been an improper sale of mortgaged property, the mortgagee still has security for the indebtedness and must resort to it in satisfaction of his claim. *Advance-Rumely Thresher Co. v. Kruger*, 93 M 66, 71, 16 P 2d 1102.

Suit on Note Alone Waives Mortgage Right

Where a note is secured by mortgage, an action on the note alone waives the mortgage security if plaintiff obtains a judgment which becomes final, and he may not thereafter go into a court of equity and secure relief by way of foreclosure. *Coburn v. Coburn et al.*, 89 M 386, 388, 298 P 349.

When Action Can be Had on Note Irrespective of Mortgage Security

Where the pleadings in an action on a promissory note do not disclose that plaintiff has security for the debt, a personal action may be maintained, in such a case the provision of this section, that there is but one action for the recovery of a debt secured by mortgage, to-wit, foreclosure thereof, not applying. *Richardson v. Lloyd et al.*, 90 M 127, 129, 300 P 254.

A mortgagee whose mortgage was rendered invalid for failure to file a renewal affidavit but whose debt has not become barred by the general statute of limitations may proceed against the mortgagor's administrator on the debt and is entitled to a judgment adjudicating the debt as a valid claim against the estate payable in due course of administration, as against the contention that the debt having been secured by mortgage the creditor's only remedy was by foreclosure of the mortgage. *Leffek v. Luedeman*, 95 M 457, 473, 27 P 2d 511.

References

Cited or applied as section 6861, Revised Codes, in *Dunne v. Yund*, 52 M 24, 30, 155 P 273; *Continental Oil Co. v. Jameson*, 53 M 466, 469, 164 P 727; *State ex rel. Continental S. Co. v. Tullock*, 68 M 268, 277, 217 P 348; *Kinyon Inv. Co. v. Belmont State Bank*, 69 M 282, 287, 288, 221 P 286; *Wood v. Ferguson et al.*, 71 M 540, 548, 230 P 592; *Oregon Mortgage Co., Ltd., v. Kunneke et al.*, 76 M 117, 125, 245 P 539; *Long v. W. P. Devereux Co. et al.*, 87 M 198, 208, 286 P 402; *Lepper v. Home Ranch Co. et al.*, 90 M 558, 567, 4 P 2d 722; *First National Corp. v. Perrine et al.*, 99 M 454, 43 P 2d 1073; *Humbird et al. v. Arnet et al.*, 99 M 499, 44 P 2d 756.

9468. Surplus money to be deposited in court. If there be surplus money remaining after the payment of the amount due on the mortgage, lien, or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

History: En. Sec. 247, p. 186, L. 1867; 359, 1st Div. Comp. Stat. 1887; re-en. Sec. re-en. Sec. 296, p. 92, Cod. Stat. 1871; 1291, C. Civ. Proc. 1895; re-en. Sec. 6862, re-en. Sec. 347, p. 136, L. 1877; re-en. Sec. Rev. C. 1907; re-en. Sec. 9468, R. C. M. 347, 1st Div. Rev. Stat. 1879; re-en. Sec. 1921. Cal. C. Civ. Proc. Sec. 727.

9469. Proceedings when debt secured falls due at different times. If the debt for which the mortgage, lien, or encumbrance is held is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterward, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

History: En. Sec. 248, p. 186, L. 1867; C. 1907; re-en. Sec. 9469, R. C. M. 1921. re-en. Sec. 297, p. 92, Cod. Stat. 1871; re-en. Cal. C. Civ. Proc. Sec. 728. Sec. 348, p. 136, L. 1877; re-en. Sec. 348, 1st Div. Rev. Stat. 1879; re-en. Sec. 360, 1st Div. Comp. Stat. 1887; re-en. Sec. 1292, C. Civ. Proc. 1895; re-en. Sec. 6863, Rev.

References

Wood v. Ferguson et al., 71 M 540, 548, 230 P 592.

9470. Power of sale. When a mortgage confers a power of sale, either upon the mortgagee or any other person, to be executed after a breach of the obligation for which the mortgage is a security, either an action may be maintained under this chapter to foreclose, or proceedings may be had under the provisions of the mortgage.

History: En. Sec. 1293, C. Civ. Proc. 1895; re-en. Sec. 6864, Rev. C. 1907; re-en. Sec. 9470, R. C. M. 1921.

Operation and Effect

An attorney in fact, under a general power of attorney to sell, convey, and mortgage the grantor's property, may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property, and authorizing the trustee or his successor in trust to sell the same in case of non-payment of the indebtedness. *Muth v. Goddard*, 28 M 237, 252, 72 P 621.

Held, under the rules prescribed by the codes for the interpretation of contracts, that where the parties to a real estate mortgage had contracted that, upon the mortgagor's default, the mortgagee could at his option declare the entire indebtedness due and payable without notice; that he could foreclose by judicial proceedings or sell the premises according to law, and should be entitled to immediate possession and receive the rents, issues and profits thereof, he was entitled to possession upon condition broken without foreclosure and

sale. *Union Cent. Life Ins. Co. v. Jensen*, 74 M 70, 75, 237 P 518.

Id. A mortgagee cannot become a purchaser at a summary sale of property conducted by himself under a power of sale contained in the mortgage.

Where a chattel mortgage contains a clause giving to the mortgagee the right to declare the debt due and payable before the due date, under certain circumstances, and the power to take possession of the property and sell it, concluding, that the power thus conferred shall be in addition to and not in substitution of the right of foreclosure, it is evidence of the intention of the parties that the mortgagee shall have the right of election granted by this section, to proceed either by foreclosure or under the above provision of the mortgage. *Bice v. Daffern*, 88 M 479, 485, 293 P 433.

Id. In determining whether there has been a breach of an obligation for which a mortgage was given as security, within the meaning of this section, prescribing how a power of sale conferred by the mortgage may be executed, the note and mortgage must be read together and the

stipulation in the mortgage must be construed as entering into and becoming a part of the note.

References

First National Corp. v. Perrine et al., 99 M 454, 43 P 2d 1073.

9471. Sale of real estate under power in mortgage—posting notices. Hereafter real estate sold under a power of sale given and contained in a mortgage of real estate shall be advertised for sale at least thirty days before the date fixed for such sale, in a newspaper in the county in which such real estate is situated, and in case there is no newspaper printed and published in said county, then by posting notices in at least five conspicuous places in said county, one of which notices must be posted on the land so advertised for sale. Two other of said notices must be posted in conspicuous places in the township in which said land is situated, one in such conspicuous place in said county as will be most likely to give notice to all persons interested in said sale, and one of said notices must be posted in a conspicuous place at the front door of the county courthouse of the county in which said land is located, and in addition to the said publication or posting, as hereinbefore provided, notices of such sale must be served personally at least thirty days before the date fixed for such sale upon the occupant of the property so advertised for sale, and upon the mortgagor if within the state of Montana, and upon every person or persons having or claiming an interest of record in the said real estate so advertised for sale who may be found within the said state of Montana.

History: En. Sec. 1, Ch. 165, L. 1917; re-en. Sec. 9471, R. C. M. 1921.

Notice of Sale

A sale of mortgaged real property under a power of sale granted in the mortgage on default of the mortgagor, had pursuant to publication of notice in a newspaper as provided in this section, was not rendered invalid by failure also to post such notice, publication in the one mode or the other being sufficient. First National Corp. v. Perrine et al., 99 M 454, 461, 43 P 2d 1073.

Id. The notice of sale of mortgaged realty under a power of sale in the mortgage on default of the mortgagor is jurisdictional; unless the requirements of this section were met, a sale made is void.

Id. This section provides that real property about to be sold under a power of sale granted the mortgagee by the mortgage on default of the mortgagor shall be advertised for sale "at least thirty days before the date fixed for such sale." Such a notice was published in a local weekly newspaper for four consecutive weeks,

beginning with March 11 and ending on April 1; the sale was had on April 15. Held, as against the contention that but fifteen days had elapsed between the last publication and the sale, that the first publication was as much notice as the last, and that therefore the sale had been advertised at least thirty days before the sale, rendering the notice sufficient.

Id. Erroneous inclusion of a tract of land owned by one other than the mortgagor, in a notice of sale under a power contained in the mortgage, did not vitiate the sale as to the mortgagor, whose property covered by the mortgage was properly described in the notice.

Id. Where the parties to two mortgages, executed at the same time, were the same, the fact that the property covered by both was included in one sale did not affect the validity of the notice of sale or the sale.

References

Union Cent. Life Ins. Co. v. Jensen, 74 M 75, 237 P 518.

9472. Rights of redemption applicable. All of the rights, powers, and privileges, concerning the redemption from sales of real estate applicable to the sales of real estate under foreclosure proceedings or sales under execution, shall be granted and allowed to sales of real estate under and by virtue of the power of sale contained in any mortgage or deed of trust in this state.

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new matter
L. 41 c. 16
secs. 1-13
pp. 22-25
(temporary)

History: En. Sec. 2, Ch. 165, L. 1917; re-en. Sec. 9472, R. C. M. 1921.

References

State ex rel. Continental S. Co. v. Tullock, 68 M 268, 217 P 348; Union Cent. Life Ins. Co. v. Jensen, 74 M 70, 75, 237 P 518.

9473. Allowance of attorneys' fees—petition and notice. If the mortgagee shall demand attorneys' fees in case of the sale of real estate under and by virtue of the power of sale contained in any mortgage or deed of trust in this state, he shall petition the district court of the county in which said real estate, or any part thereof, may be situated to fix the amount of such attorneys' fee, and a copy of such petition shall be served upon all parties having or claiming an interest of record in the property to be sold, or such of them as may be found within the state, which said copy of said petition must be served at least ten days before the day fixed for hearing, and notice of the time and place of such hearing shall be served at the same time as the copy of said petition is served; such petition shall be acted upon by the said district court before the notice of sale by publication or posting, as hereinbefore provided for, shall be given.

History: En. Sec. 3, Ch. 165, L. 1917; re-en. Sec. 9473, R. C. M. 1921.

9473.1. Deficiency judgment not allowed on foreclosure of purchase price mortgage. Upon the foreclosure of any mortgage, hereafter executed, to any vendor of real property or to his heirs, executors, administrators or assigns, for the balance of the purchase price of such real property, the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same.

History: En. Sec. 1, Ch. 2, L. 1935.

9473.2. Meaning of "foreclosure." The term "foreclosure" for the purpose of this act shall include sale or possession of real property made or taken whether by judicial proceedings or otherwise.

History: En. Sec. 2, Ch. 2, L. 1935.

CHAPTER 62

ACTIONS FOR NUISANCE, WASTE, AND WILFUL TRESPASS ON REAL PROPERTY

Section 9474. Nuisance defined and actions for.

9475. Waste, actions for.

9476. Trespass for cutting or carrying off trees, etc., action for.

9477. Measure of damages in certain cases under the last section.

9478. Damages in actions for forcible entry, etc., may be trebled.

9474. Nuisance defined and actions for. Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so far as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

History: En. Sec. 228, p. 91, Bannack Stat.; amd. Sec. 249, p. 187, L. 1867; re-en. Sec. 349, p. 137, L. 1877; re-en. Sec. 349, 1st Div. Rev. Stat. 1879; re-en. Sec. 361, 1st Sec. 298, p. 93, Cod. Stat. 1871; re-en. Sec. Div. Comp. Stat. 1887; re-en. Sec. 1300,

C. Civ. Proc. 1895; re-en. Sec. 6865, Rev. C. 1907; re-en. Sec. 9474, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 731.

Operation and Effect

It is well settled that defective water-pipes become a nuisance when carelessly maintained. *York v. Steward*, 21 M 515, 520, 55 P 29.

The use of water by an upper appropriator in such a way as to carry sand, gravel, and mining debris over the land of a lower proprietor, so as to render it valueless, constitutes a nuisance, both at common law and under this section. *Chessman v. Hale*, 31 M 577, 584, 79 P 254.

Id. Under this section, plaintiff in an action for damages for the maintenance of a nuisance is entitled to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of the acts complained of.

9475. Waste, actions for. If a guardian, tenant for life or years, joint-tenant, or tenant in common of real property commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

History: En. Sec. 229, p. 91, Bannack Stat.; re-en. Sec. 250, p. 187, L. 1867; re-en. Sec. 299, p. 93, Cod. Stat. 1871; re-en. Sec. 350, L. 1877; re-en. Sec. 350, 1st Div. Rev. Stat. 1879; re-en. Sec. 362, 1st Div. Comp. Stat. 1887; re-en. Sec. 1301, C. Civ. Proc. 1895; re-en. Sec. 6866, Rev. C. 1907; re-en.

Where a city gives a lease to land owned by it, but reserves the use thereof for the burial of dead animals, and for the dumping of garbage, and contracts with the lessee to superintend the proper disposition of garbage and the burying of dead animals, but the lessee fails to do so, and the city, having no other place to make proper disposition of its garbage and dead animals, brings an action for unlawful detainer, it is entitled to a temporary injunction, pendente lite, restraining the lessee from interfering with the city's use of the property, as the result of the lessee's course is the maintenance of a public nuisance. *City of Bozeman v. Bohart*, 42 M 290, 301, 112 P 388.

References

Cited or applied as section 361, First Division Compiled Statutes 1887, 22 M 312, 316, 56 P 358.

Sec. 9475, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 732.

References

Cited or applied as section 1301, Code of Civil Procedure, in *Erbes v. Smith*, 35 M 38, 43, 88 P 568.

9476. Trespass for cutting or carrying off trees, etc., action for. Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or on cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action in any court having jurisdiction.

History: En. Sec. 230, p. 91, Bannack Stat.; re-en. Sec. 251, p. 187, L. 1867; re-en. Sec. 300, p. 93, Cod. Stat. 1871; re-en. Sec. 351, L. 1877; re-en. Sec. 351, 1st Div. Rev. Stat. 1879; re-en. Sec. 363, 1st Div. Comp. Stat. 1887; re-en. Sec. 1302, C. Civ. Proc. 1895; re-en. Sec. 6867, Rev. C. 1907; re-en. Sec. 9476, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 733.

Operation and Effect

This section provides no new remedy for the trespasses it specifies. The proceedings to redress those trespasses are the same as the proceedings to redress any

other private trespass. Its only effect is the giving of additional pecuniary relief. *Morse v. Swan*, 2 M 306, 309.

Treble damages for the cutting of timber on plaintiff's land, and its conversion by defendant, are not recoverable under this section in an action for wilful and malicious trespass, in the absence of proof of malice, wantonness, or evil design. *McDonald v. Montana Wood Co.*, 14 M 88, 93, 35 P 668.

References

Tripp v. Silver Dyke Min. Co., 70 M 120, 128, 224 P 272.

9477. Measure of damages in certain cases under the last section. Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land, or adjoining it.

History: En. Sec. 231, p. 91, Bannack Stat. 1887; re-en. Sec. 1303, C. Civ. Proc. Stat.; re-en. Sec. 252, p. 187, L. 1867; re-en. 1895; re-en. Sec. 6868, Rev. C. 1907; re-en. Sec. 301, p. 93, Cod. Stat. 1871; re-en. Sec. Sec. 9477, R. C. M. 1921. Cal. C. Civ. 352, L. 1877; re-en. Sec. 352, 1st Div. Rev. Proc. Sec. 734.
Stat. 1879; re-en. Sec. 364, 1st Div. Comp.

9478. Damages in actions for forcible entry, etc., may be trebled. If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

History: En. Sec. 232, p. 91, Bannack Stat. 1887; re-en. Sec. 1304, C. Civ. Proc. Stat.; re-en. Sec. 253, p. 187, L. 1867; re-en. 1895; re-en. Sec. 6869, Rev. C. 1907; re-en. Sec. 302, p. 93, Cod. Stat. 1871; re-en. Sec. Sec. 9478, R. C. M. 1921. Cal. C. Civ. Proc. 353, L. 1877; re-en. Sec. 353, 1st Div. Rev. Sec. 735.
Stat. 1879; re-en. Sec. 365, 1st Div. Comp.

CHAPTER 63

QUIETING TITLE TO PERSONAL PROPERTY—QUIETING TITLE TO REAL PROPERTY AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE

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ref. to
L. 37 c. 198
sec. 1
pp. 605, 607

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- 9513. Subsequent action not to be brought until certain proof made.
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9478.1. Quieting title to personal property, action for. That any person claiming title to personal property, whether in actual possession thereof or not, may bring an action in the district court of any county wherein such personal property, or any part thereof is situated, against any person or persons claiming any interest therein by reason of alleged ownership, lien or otherwise; and by a decree of such court may have established and determined finally the rights of all claimants to such personal property.

History: En. Sec. 1, Ch. 51, L. 1935.

9478.1
76 P. (2d) 75
.....Mont.....
9478.1
113 P. (2d) 347
9478.1 et seq.
149 P. 2d 251
9478.1
182 P. (2) 476,
477

9478.2. Provisions applicable. The provisions of sections 9105 to 9124, inclusive, are hereby made applicable to the action for which provision is herein made.

History: En. Sec. 2, Ch. 51, L. 1935.

9478.2
120 P. (2d) 75
.....Mont.....

9479. Actions to quiet title to real property—parties—venue. An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, both known and unknown, who claim or may claim any right, title, estate, or interest therein, or lien or encumbrance thereon, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, for the purpose of determining such claim or possible claim, and quieting the title to said real estate. All actions brought under this section must be brought in the county in which the real estate, or a portion thereof, as to which the title is sought to be quieted, is situated, provided, that if the said real estate is situated in more than one county, said action may be brought and prosecuted in either of said counties, and a transcript of the original judgment certified by the clerk of court shall be filed in the office of the clerk of the court in the county other than which the said action was brought in which any of the real estate affected thereby is situated.

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120 P. (2d) 569-
574

9479
149 P. 2d 251

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9479
174 P. (2d) 810:
175 P. (2d) 190

9479
182 P. (2) 475-
477;
186 P. (2) 881;
186 P. (2) 888

9479
204 P. (2d) 804

History: En. Sec. 233, p. 92, Bannack Stat.; re-en. Sec. 254, p. 188, L. 1867; re-en. Sec. 303, p. 94, Cod. Stat. 1871; re-en. Sec. 354, p. 138, L. 1877; re-en. Sec. 354, 1st Div. Rev. Stat. 1879; re-en. Sec. 366, 1st Div. Comp. Stat. 1887; amd. Sec. 1310, C. Civ. Proc. 1895; re-en. Sec. 6870, Rev. C. 1907; amd. Sec. 1, Ch. 113, L. 1915; re-en. Sec. 9479, R. C. M. 1921; amd. Sec. 1, Ch. 70, L. 1931. Cal. C. Civ. Proc. Sec. 738.

Action Lies to Quiet Title to an Easement

Held, under this section, that an action lies to quiet title to an easement to a right-of-way for a ditch as against a county in exclusive use of the land for highway purposes. (Mr. Chief Justice Brantly dissenting.) *Mannix v. Powell County*, 60 M 510, 513, 199 P 914.

Action to Remove a Cloud on Title is One to Quiet Title

An action to remove a cloud on title is one in rem and one to quiet title, which must be tried in the county in which the realty is situated. *Heinecke v. Scott et al.*, 95 M 200, 208, 26 P 2d 167.

Burden of Proof

In suit under this section, to quiet title to certain mineral claims, burden was upon defendants to disprove plaintiff's title, where record fair upon its face showed chain of title running to plaintiff. *Maury et al. v. Jones*, 25 F. 2d 412.

Id. In suit to quiet title to mining claims, under this section, in which defendants claimed as purchasers under sale of property of estate, evidence of attempted transfer by plaintiff of mining property to father's estate was insufficient to sustain defendants' burden to disprove plaintiff's record title.

Nature of Action

An action to quiet title is not aimed at particular instruments but at the pretensions of individuals claiming adversely, while a suit to remove a cloud on title is directed at instruments rather than at adverse claims and preserves in statutory form one of the remedies afforded by courts of equity upon the principle of *quia timet*. *Slette v. Review Publishing Co.*, 71 M 518, 521, 522, 230 P 580.

Possession of Plaintiff Not Essential

Suit to quiet title to mining claims brought under this section, which permits such an action by plaintiff whether in or out of possession, is within equitable cognizance of federal courts. *Maury et al. v. Jones*, 25 F. 2d 412.

Probate Court May Not Determine Questions of Title Between Estate and Adverse Claimants

State court sitting in probate held without jurisdiction to determine questions of title between estate and persons claiming adversely, and order and judgment for sale of estate's property in probate court was therefore not res judicata of question of title in subsequent suit to quiet title under this section. *Maury v. Jones*, 25 F. 2d 412.

Proper Parties

A mere contract to convey land will not divest the vendor of his right to maintain an action to quiet title or remove a cloud therefrom when the legal title remains in him. *Kern et al. v. Robertson*, 92 M 283, 292, 12 P 2d 565.

Id. An executor, as holder of the naked legal title to real property sold by his testate on deferred payments, charged with the duty to make conveyance on compliance by the purchaser with the terms of

his contract, was a proper party to prosecute an action to quiet title to remove a cloud thereon in the shape of a sheriff's certificate on execution sale of the property levied upon as real property after its conversion into personalty as detailed above.

Sufficiency of Complaint

The complaint in an action to quiet title to land claimed as a private road or way of necessity is sufficient if it alleges ownership in plaintiff, obstruction of it by defendant and assertion and claim of right or interest therein by him adverse to plaintiff, that defendant's claim is without authority of law and invalid, and that the same constitutes a cloud upon plaintiff's title. *Violet et al. v. Martin*, 62 M 335, 339, 205 P 221.

In an action to quiet title under this section, as distinguished from one brought under section 8733, to remove a cloud on title, the complaint alleging that the defendant claims an adverse estate or interest is sufficient without further defining it, whereas under the latter section the pleader must state facts disclosing the apparent validity of the instrument attacked and its actual invalidity. *Slette v. Review Publishing Co.*, 71 M 518, 521, 230 P 580.

References

Cited or applied as section 1310, Code of Civil Procedure, before amendment, in *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 305, 70 P 1114; *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 536, 539, 71 P 1005; *Hahn v. James*, 29 M 1, 2, 73 P 965; *Hopkins v. Butte Copper Co.*, 29 M 390, 393, 74 P 1081; *Mares v. Dillon*, 30 M 117, 141, 75 P 963; *Woody v. Hinds*, 30 M 189, 191, 76 P 1; *Burton v. Kipp*, 30 M 275, 276, 76 P 563; *Merk v. Bowery Min. Co.*, 31 M 298, 309, 78 P 519; *Pollock Min. & Mill. Co. v. Davenport*, 31 M 452, 453, 78 P 768; *Thornton v. Kaufman*, 35 M 181, 183, 88 P 796; *Larson v. Peppard*, 38 M 128, 132, 99 P 136; *Cottonwood Ditch Co. v. Thom*, 39 M 115, 119, 101 P 825, 104 P 281; *O'Hanlon v. Ruby Gulch Min. Co.*, 48 M 65, 82, 135 P 913; *Northern Pacific Ry. Co. v. Hauswirth*, 49 M 135, 138, 140 P 516; *Hopkins v. Walker*, 244 U. S. 486, 490, 61 L. Ed. 1270, 37 Sup. Ct. 711; *O'Hanlon et al. v. Ruby Gulch Min. Co.*, 64 M 318, 325, 209 P 1062; *Solberg v. Sunburst Oil & Gas Co. et al.*, 70 M 177, 182, 225 P 612; *Hochsprung v. Stevenson*, 82 M 222, 232, 266 P 406; *Dipple v. Neville et al.*, 82 M 280, 285, 267 P 214; *School Dist. No. 42 v. Pribyl*, 82 M 295, 301, 267 P 289; *Teisinger v. Hardy*, 86 M 180, 190, 282 P 1050; *Moulton Mining Co. v. Anaconda Copper Mining Co.*, 23 F. 2d 811.

9480. Parties defendant—unknown claimants. In any action brought under the preceding section, the plaintiff may join as defendants any or all persons, known or unknown, claiming, or who might claim, any right, title, estate, or interest in, or lien or encumbrance upon, the real property described in the complaint, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, and including the person or persons in possession if the plaintiff is not in possession. If the plaintiff shall desire to obtain a complete adjudication of the title to the real estate described in the complaint, he may name as defendants all known persons who assert or who might assert any claim as in this section above specified, and may join as defendants all persons unknown who might make any such claim, by adding in the caption of the complaint in such action the words, "and all other persons, unknown, claiming or who might claim any right, title, estate, or interest in, or lien or encumbrance upon, the real property described in the complaint, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued."

History: En. Sec. 2, Ch. 113, L. 1915;
re-en. Sec. 9480, R. C. M. 1921.

References

Dipple v. Neville et al., 82 M 280, 285,
267 P 214.

9481. Notice of pendency of action. Before any order for the publication of summons is granted as hereinafter provided, the plaintiff shall file, in the office of the clerk and recorder of each county in which any of the property involved in such action is situated, a notice of the pendency of such action, signed by the plaintiff or his attorney, which notice shall contain the title of the court in which such action is filed, the full caption of the cause, a complete description of all the property involved in such action, and a statement of the relief sought by plaintiff.

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9481, R. C. M. 1921.

9482. Service of summons by publication, when. When any defendant specifically named in such complaint resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or when any defendant is a foreign corporation, having no agent for the service of process, nor managing or business agent, cashier, secretary, or other officer within the state, or when any defendant is a domestic corporation and none of the officers or agents of such corporation, upon whom valid service of said corporation can be made, can, after due diligence, be found within the state, the plaintiff, upon the return of the summons showing due personal service within the state upon all defendants specifically named in the complaint, other than such as come within the meaning of the foregoing provisions of this section, and upon filing with the clerk of said court an affidavit setting forth the facts with reference to any of such defendants upon whom personal service of summons within the state

cannot be made, within the meaning of the foregoing provisions of this section, may obtain an order for the service of summons upon such defendants last mentioned, to be made by publication.

History: En. Sec. 2, Ch. 113, L. 1915;
re-en. Sec. 9482, R. C. M. 1921.

References
Teisinger v. Hardy, 86 M 180, 190, 282
P 1050.

9483
98 P.(2d) 326

9483. Order for publication of summons—how obtained—affidavit.

9483
120 P.(2d) 574

9483
124 P.(2d) 577

9483
186 P. (2) 881;
186 P. (2) 888

The plaintiff may obtain an order for the service of summons upon all unknown claimants or possible claimants by publication, upon filing with the clerk of the court an affidavit showing that he has made diligent search and inquiry for all persons who claim, or might claim, any right, title, estate, or interest in, or lien, or encumbrance upon, such real property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and has specifically named as defendants in such action all such persons whose names can be ascertained. One affidavit and order for service by publication may be made to include all defendants, known and unknown, upon whom such service is sought, and in such event but one (1) summons shall be published, and the same shall be directed to all defendants upon whom such summons shall be served by publication; but no order for service by publication shall be made until proof of the filing of the notice of the pendency of such action, in accordance with the provisions of section 9481, has been made to the court. That the order above provided for may be issued by either the judge or the clerk of the court, and any order for the service of summons by publication in quiet title actions which may have been heretofore issued or made by the clerk of the court is hereby declared to be valid and of the same force and effect as if the same had been issued or made by the judge of the court.

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9483, R. C. M. 1921; amd. Sec. 2, Ch. 70, L. 1931.

9484
104 P. (2d) 3

9484
120 P.(2d) 574

9484
124 P.(2d) 577.
578

9484
Repealed
S.L. '45 c. 8
Sec. 1 p. 11

9485
120 P.(2d) 574

9485
Amended
S.L. '47, C. 15
Sec. 1, p. 14

9484
186 P. (2) 881;
186 P. (2) 888

9485
186 P. (2) 881;
186 P. (2) 888

9484. Affidavit to show due diligence. The affidavit provided for in the two preceding sections shall clearly show that the necessary facts exist, and that the plaintiff has used due diligence in all respects as to which due diligence is required in such case by the preceding sections. The facts constituting due diligence shall be set out in said affidavit.

History: En. Sec. 2, Ch. 113, L. 1915; amd. Sec. 1, Ch. 1, L. 1917; re-en. Sec. 9484, R. C. M. 1921.

9485. Form of summons—period of publication—when service complete. The summons to be published under the preceding sections shall be in substantially the following form:

"-----
Title of the court and cause
The State of Montana to the above named defendants
and to all other persons unknown,
GREETING:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the

plaintiff's attorney within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint. This action is brought for the purpose of quieting title to the land situated in.....county, Montana, and described as follows: (Here insert description of land.)

Witness my hand and the seal of said court this.....day of

.....
Clerk of the above entitled court."

Such summons shall be published at least once in each week for a period of three (3) weeks, making a total of four (4) successive publications, in some newspaper of general circulation printed and regularly published at least once a week in the county in which the action is brought, or, if there is no such newspaper printed in such county, then such summons shall be published in like manner, for a like period, in the nearest county in which such a newspaper is printed, preference to be given, first, to an adjoining county in which any portion of the property is situated, if situated in more than one (1) county; and second, to any adjoining county. Service shall be deemed complete on the twenty-second day after the day of first publication.

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9485, R. C. M. 1921; amd. Sec. 1, Ch. 55, L. 1923; amd. Sec. 3, Ch. 70, L. 1931.

9486
186 P. (2) 881;
186 P. (2) 888

9486. Provisions of code applicable. The provisions of sections 9105 to 9124, inclusive, so far as the same are not in conflict with these sections, are hereby made applicable to the action herein provided for.

9486
104 P. (2d) 3

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9486, R. C. M. 1921.

9486
120 P. (2d) 574

9487. Jurisdiction acquired by service—effect of decree—evidence to support—reduction of testimony to writing. Upon the service of summons on all defendants, known and unknown, in the manner provided in the preceding sections, the court in which such action is tried shall have jurisdiction to make a complete adjudication of the title to the lands named in the complaint, and the title to which is sought to be quieted, including jurisdiction to direct the cancellation of instruments constituting clouds upon such title, the execution of conveyances, where it appears that any party to such action should execute such conveyance or conveyances, the execution of satisfactions of mortgages and other apparent liens upon such land, or any part thereof, or the doing of any other act of a personal nature necessary to give effect to the rights of the respective parties to such action, as the same may be adjudicated by the court. When any judgment or decree shall be rendered in such action, for a conveyance, release, or acquittance, as above mentioned, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith, within the time specified in said judgment or decree for such compliance, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformably to such judgment or decree. Before plaintiff shall be entitled to a decree in such action against any defendant who

9487
106 P. (2d) 182,
183

9487
120 P. (2d) 571,
574

9487
186 P. (2) 881;
186 P. (2) 888

shall not appear therein, he must produce evidence sufficient to prima facie entitle him to relief, and relief shall be granted only to the extent to which such evidence shall prima facie prove him to be entitled to the same; but this provision shall not affect the procedure in or manner of trial of such actions as between the plaintiff and any defendant who shall appear in such action.

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9487, R. C. M. 1921; amd. Sec. 2, Ch. 55, L. 1923.

Operation and Effect

Under this section the district court has jurisdiction to make a complete adjudication of the title to lands involved in an action to quiet title, irrespective of whether the claim asserted by defendant under an instrument in writing constitutes a cloud on plaintiff's title; if the claim is adverse to plaintiff's interest the action may be maintained. *Hochsprung v. Stevenson*, 82 M 222, 232, 266 P 406.

In an action to quiet title in which defendants default, plaintiff must, under this section, to sustain his action, produce sufficient evidence to prima facie entitle him to relief, and where the evidence is insufficient the court may properly decree that plaintiff take nothing and order dismissal of the action. *Le Vasseur v. Roullman et al.*, 93 M 552, 559, 20 P 2d 250.

References

Teisinger v. Hardy, 91 M 9, 15, 5 P 2d 219.

9488. Who bound by judgment. Every person made a defendant to such action, by name, and every unknown claimant or possible claimant, upon whom service has been made by publication, in accordance with the preceding sections, and who has not appeared in such action, shall be bound by the judgment or decree entered in such action, subject to the right of any such defendants to apply for relief in any manner provided by the statutes applicable to the case of a defaulting defendant served only by publication.

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9488, R. C. M. 1921.

References

Teisinger v. Hardy, 86 M 180, 190, 282 P 1050.

9489. When plaintiff cannot recover costs. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs. But in actions which the plaintiff has brought under section 2326 of the Revised Statutes of the United States to determine an adverse claim, the plaintiff shall recover costs if the defendant does not relinquish in the proper United States land office or disclaim in writing any interest or estate in the property, within twenty days from the filing of said adverse claim in such land office.

History: Ap. p. Sec. 234, p. 92, *Bannack Stat.*; re-en. Sec. 255, p. 188, L. 1867; re-en. Sec. 304, p. 93, *Cod. Stat.* 1871; re-en. Sec. 355, p. 138, L. 1877; re-en. Sec. 355, 1st Div. Rev. Stat. 1879; amd. Sec. 367, 1st Div. Comp. Stat. 1887; re-en. Sec. 1311, C. Civ. Proc. 1895; re-en. Sec. 6871, Rev.

C. 1907; re-en. Sec. 9489, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 739.*

References

Cited or applied as section 1311, *Code of Civil Procedure*, in *Woody v. Hinds*, 30 M 189, 192, 76 P 1.

9490. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated

during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

History: En. Sec. 235, p. 92, Bannack Stat.; re-en. Sec. 256, p. 188, L. 1867; re-en. Sec. 305, p. 94, Cod. Stat. 1871; re-en. Sec. 356, p. 138, L. 1877; re-en. Sec. 356, 1st Div. Rev. Stat. 1879; re-en. Sec. 368, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1312, C. Civ. Proc. 1895; re-en. Sec. 6872, Rev. C. 1907; re-en. Sec. 9490, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 740.

9491. When value of improvements may be allowed as set-off. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damage.

History: En. Sec. 236, p. 92, Bannack Stat.; re-en. Sec. 257, p. 188, L. 1867; re-en. Sec. 306, p. 94, Cod. Stat. 1871; re-en. Sec. 357, L. 1877; re-en. Sec. 357, 1st Div. Rev. Stat. 1879; re-en. Sec. 369, 1st Div.

Comp. Stat. 1887; re-en. Sec. 1313, C. Civ. Proc. 1895; re-en. Sec. 6873, Rev. C. 1907; re-en. Sec. 9491, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 741.

9492. An order may be made to allow a party to survey and measure the land in dispute. The court in which an action is pending for the recovery of real property or mining claims, or for damages for an injury, or to quiet title, or to determine adverse claims thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter into or upon the property or mining claim, and make survey or measurement thereof, or of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands or mining claims belonging to parties to the action.

History: Ap. p. Sec. 237, p. 92, Bannack Stat.; re-en. Sec. 258, p. 188, L. 1867; re-en. Sec. 307, p. 95, Cod. Stat. 1871; en. Sec. 357, p. 138, L. 1877; re-en. Sec. 357, 1st Div. Rev. Stat. 1879; re-en. Sec. 369, 1st Div. Comp. Stat. 1887; amd. Sec. 1314, C. Civ. Proc. 1895; re-en. Sec. 6874, Rev. C. 1907; re-en. Sec. 9492, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 742.

to use its appliances to lower and raise plaintiff's agents in making such inspection, without providing for the payment by plaintiff of the expenses incident thereto, upon the presentation of a claim therefor by the defendant. State ex rel. Parrott S. & C. Co. v. District Court, 28 M 528, 542, 73 P 230.

Injunction Does Not Preclude the Granting of the Order

The granting of a temporary injunction does not preclude the issuance of an inspection order. State ex rel. Heinze v. District Court, 26 M 416, 423, 68 P 794, 946.

Nature of Section in General

This section and the following section are but declaratory of the inherent power of courts of equity and rest upon the principle that the parties should be enabled to put the court in possession of all the facts touching the controversy, to the end that their rights may be properly adjudicated. The power of the court under these sections is limited only by the necessities of the pending action. State ex rel. Anaconda C. M. Co. v. District Court, 26 M 396, 404, 68 P 570, 69 P 103.

Constitutionality

This section is neither in contravention of the "due process of law" clause of the federal constitution nor the provision of the state constitution prohibiting the taking or damaging of private property without just compensation to the owner. State ex rel. Parrott S. & C. Co. v. District Court, 28 M 528, 544, 73 P 230.

Discretionary Matter

The propriety of granting an order of inspection and survey under this section lies very largely in the discretion of the trial court. State ex rel. Heinze v. District Court, 26 M 416, 421, 68 P 794, 946.

Expenses of Inspection

It was error to allow an inspection of defendant's working, requiring defendant

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Inspection orders should always be limited by the necessities of the case. *State ex rel. Heinze v. District Court*, 26 M 416, 422, 68 P 794, 946.

Purpose

The purpose of this section is to enable the parties to present the facts of the case to the court, so that it may intelligently adjudicate the rights involved. *State ex rel. A. C. M. Co. v. District Court*, 25 M 504, 511, 65 P 1020; *State ex rel. Heinze v. District Court*, 26 M 416, 420, 68 P 794, 946.

Showing Necessary for Order

The evidence upon which an order of inspection and survey is made need go no further than would be necessary to support a search-warrant in a given case. *State ex rel. Geyman v. District Court*, 26 M 483, 486, 68 P 861.

Time When Order May be Granted

Under this section an inspection order may be granted before the issues are framed. *State ex rel. Heinze v. District Court*, 26 M 416, 420, 68 P 794, 946.

When Court May Grant Order

Where the respective parties assert title to certain ore bodies, each basing his claim on an asserted ownership of the apex of a vein, to determine which will necessitate a following of the vein from the surface, a court may properly grant an order requiring the owner of the surface openings to allow the other party to enter such openings for the purpose of surveying beneath the surface, though the latter party had complete maps up to the commencement of the suit, after which it was excluded, and work of removing the ores rapidly pushed. *State ex rel. Heinze v. District Court*, 26 M 416, 421, 68 P 794, 946.

Id. Where, in a suit to determine ownership of certain ore bodies, the parties base their respective claims on the asserted ownership of the apex of a vein, to determine which will necessitate a following of the vein from the surface, an order requiring the owner of the surface openings to allow the other party to enter such openings for the purpose of surveying beneath the surface should be limited to those openings alone an inspection of which is necessary to determine the issues, though examination should be allowed of all the workings made in pursuit of the vein in the direction of the strike, to determine the continuity of its direction, as well as the angle of the dip.

Where the evidence indicates conditions to justify a well-grounded belief that the adverse party is trespassing upon applicant's rights, the order of inspection and survey should be made. *State ex rel. Gey-*

man v. District Court, 26 M 483, 484, 68 P 861; *State ex rel. Parrott S. & C. Co. v. District Court*, 28 M 528, 543, 73 P 230.

Where it is made to appear from the allegations of the petition, either alone or by reference to the complaint, that there is good cause to believe that an examination of the property will aid the parties in the presentation of their case, and such allegations are supported by substantial evidence, it is sufficient to warrant the making of a proper order of inspection and survey under this section. The filing of a petition is not required; a motion sufficient to move the discretion of the court is all that is required. *State ex rel. Parrott S. & C. Co. v. District Court*, 28 M 528, 539, 73 P 230.

Id. If a stranger, under claim of title, encroaches upon the exterior portions of a lode by means of openings of which he has the exclusive control, this section grants the owner of such exterior portions entry through, and a proper inspection and survey of, such underground workings of his adversary as are necessary to the ascertainment of the facts necessary to enable the owner to protect his rights.

When Error to Grant Order

Where the evidence showed the prima facie right to a mining claim to be in relators, it was error for the district court to make an order granting defendant and his employees the right to enter and inspect all of relators' surrounding mines for the period of forty days to obtain evidence. *State ex rel. Anaconda C. M. Co. v. District Court*, 25 M 504, 511, 65 P 1020. See also *Anaconda Copper Min. Co. v. Pilot Butte Min. Co.*, 52 M 165, 179, 156 P 409.

Where the issues do not render necessary an examination of all of defendant's workings, an order authorizing the plaintiffs to survey all the underground workings in the entire group of defendant's claims is erroneous. *State ex rel. Parrott S. & C. Co. v. District Court*, 28 M 528, 541, 73 P 230.

Id. Where, in an action to determine the extralateral rights of the owner of lode mining property, it appeared that most of the workings in one of defendant's claims could be readily reached through plaintiff's shaft, it was error for the court, in granting an order of inspection and survey, to allow the plaintiff access to defendant's workings exclusively through defendant's shafts, and by means of the latter's appliances.

References

Cited or applied as section 1314, Code of Civil Procedure, in *May v. Northern Pacific Ry. Co.*, 32 M 522, 535, 81 P 328, 4 Ann. Cas. 605, 70 L. E. A. 111.

9493. Order—what to contain and how served—if unnecessary injury done, the party surveying to be liable therefor. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter the property, with necessary surveyors and assistants, and make such survey and measurement; but if unnecessary damage be done to the property, he is liable therefor.

History: En. Sec. 238, p. 92, Bannack Stat.; re-en. Sec. 259, p. 188, L. 1867; re-en. Sec. 308, p. 95, Cod. Stat. 1871; re-en. Sec. 358, p. 139, L. 1877; re-en. Sec. 358, 1st Div. Rev. Stat. 1879; re-en. Sec. 370, 1st Div. Comp. Stat. 1887; re-en. Sec. 1315, C. Civ. Proc. 1895; re-en. Sec. 6875, Rev. C. 1907; re-en. Sec. 9493, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 743.

References

Cited or applied as section 1315, Code of Civil Procedure, in *State ex rel. Anaconda C. M. Co. v. District Court*, 25 M 504, 511, 65 P 1020; *State ex rel. Anaconda C. M. Co. v. District Court*, 26 M 396, 404, 68 P 570, 69 P 103.

9494. Same—procedure. Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such lead, mine, lode, or mining claim should be had or made; or whenever any inspection, examination, or survey of any such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lode, or mining claim, and the person in possession of the same shall refuse, for a period of three days after demand therefor in writing, to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the district court, or a judge thereof, of the county wherein the mine, lead, lode, or mining claim is situated, a petition, under oath, setting out his interest in the premises, describing the same, that the premises are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection, or survey, and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing either party may read affidavits or produce oral testimony, and if the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination, or survey of the lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order. Such person shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such person while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner.

History: En. Sec. 8, p. 10, L. 1881; re-en. Sec. 376, 1st Div. Comp. Stat. 1887; re-en. Sec. 1317, C. Civ. Proc. 1895; re-en. Sec. 6876, Rev. C. 1907; re-en. Sec. 9494, R. C. M. 1921.

Constitutionality

The authority bestowed by this section does not empower the district court to grant an order that may be made unjust or oppressive, nor does it deprive the

adverse party of his property without due process of law, and is therefore not unconstitutional, though it does not require the interest of the petitioner to be defined, and permits such examination before the commencement of any action by the parties and without bond, as such proceeding is in the proper mode of securing the best evidence of which the case in its nature is susceptible, and though it does not provide for an appeal from such order, as the proceedings may be reviewed by the writ of certiorari. *St. Louis Min. & Milling Co. v. Montana Co.*, 9 M 288, 299, 23 P 510.

An order requiring defendant to use its appliances to lower and raise plaintiff's agents in making an inspection of mining property, and providing the amount to be paid therefor, was not objectionable as taking or damaging defendant's property without just compensation. *State ex rel. Boston & M. Co. v. District Court*, 30 M 206, 219, 76 P 206.

Costs to be Paid by Petitioner

It appears that the costs of obtaining the order under this section, as well as the costs of the survey and inspection, should be paid by the petitioner. *State ex rel. Anaconda C. M. Co. v. District Court*, 26 M 396, 410, 68 P 570, 69 P 103.

Id. In the order granted under this section, the court may provide that all appliances in use to facilitate ingress and egress be made available to the person making the inspection, the additional expense being paid by the petitioner.

Under this section and section 9802, fees paid a witness testifying on the hearing for an order of inspection and survey, fees paid a witness at the hearing of an order to show cause, fees for summoning such witness, and the expense of preparing a map, are *prima facie* proper items of costs. *King v. Allen*, 29 M 5, 9, 73 P 1107.

Id. A finding that an inspection and survey was necessary to enable a party to properly present his case was an adjudication of costs attendant on procuring the order for the survey.

An order granting an inspection is defective which fails to provide for the compensation contemplated by this section. *State ex rel. Heinze v. District Court*, 29 M 105, 110, 74 P 132.

An order granting an inspection of the underground workings of mining property in controversy, which arbitrarily fixed the amount to be paid by plaintiff to defendant for lowering and hoisting plaintiff's agents engaged in such inspection at a certain sum, without hearing any evidence as to the actual cost, was erroneous. *State ex rel. Boston & M. Co. v. District Court*, 30 M 206, 218, 76 P 206.

Equity Has no Jurisdiction

Equity has no jurisdiction, independent of statute, and in the absence of a suit to order inspection of property. *State ex rel. Anaconda C. M. Co. v. District Court*, 26 M 396, 408, 68 P 570, 69 P 103.

Extent of Right and Limitations

Inspection should not be granted of a mine not described in the petition, and the order for inspection and survey of a mine for protection of petitioner's interest therein or in another mine should be limited to the necessities of the case, and explicitly state how far it may go. *State ex rel. Anaconda C. M. Co. v. District Court*, 26 M 396, 410, 68 P 570, 69 P 103.

Interest in Property Necessary

This section is not applicable where the petitioner asserts no interest in the property of which inspection is sought, or through which entry is necessary to inspect adjoining property. *State ex rel. Anaconda C. M. Co. v. District Court*, 26 M 396, 405, 69 P 103; *State ex rel. Anaconda C. M. Co. v. District Court*, 26 M 412, 413, 68 P 570; *State ex rel. Geyman v. District Court*, 26 M 433, 434, 68 P 797.

To entitle one under this section to an inspection of a claim for the purpose of ascertaining or enforcing his right or interest in another claim, he must have an interest in the first claim, and the right of one owning a claim to follow a lode having its apex therein into another claim is not such an interest in the latter claim as to authorize his inspection and survey of it. *State ex rel. Anaconda C. M. Co. v. District Court*, 26 M 396, 405, 69 P 103.

References

Cited or applied as section 1317, Code of Civil Procedure, in *State ex rel. Anaconda C. M. Co. v. District Court*, 25 M 504, 511, 65 P 1020; *State ex rel. Parrott S. & C. Co. v. District Court*, 28 M 528, 542, 73 P 230; *May v. Northern Pacific Ry. Co.*, 32 M 522, 535, 81 P 328.

9495. Mortgage not deemed conveyance, whatever its terms—recovery of possession by mortgagee. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. When the mortgage confers a power of sale, as men-

tioned in section 8257 of the Civil Code, possession may be recovered according to the terms of the mortgage.

History: En. Sec. 239, p. 93, Bannack Stat.; re-en. Sec. 260, p. 188, L. 1867; re-en. Sec. 309, p. 95, Cod. Stat. 1871; re-en. Sec. 359, p. 139, L. 1877; re-en. Sec. 359, 1st Div. Rev. Stat. 1879; re-en. Sec. 371, 1st Div. Comp. Stat. 1887; amd. Sec. 1316, C. Civ. Proc. 1895; re-en. Sec. 6877, Rev. C. 1907; re-en. Sec. 9495, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 744.

Operation and Effect

For the construction of this section, in the form in which it existed prior to the adoption of the codes, see *Fee v. Swingly*, 6 M 596, 13 P 375; *First National Bank v. Bell S. & C. Min. Co.*, 8 M 32, 19 P 403; *Holland v. Board of Commissioners*, 15 M 460, 39 P 575, 27 L. R. A. 797; *Bell Silver etc. Mining Co. v. First Nat. Bank of Butte*, 156 U. S. 470, 39 L. Ed. 497, 15 Sup. Ct. 440.

This section, providing that a mortgage of real property is not to be deemed a conveyance so as to entitle the mortgagee to recover possession independent of foreclosure, has reference only to mortgages wherein no provision is made conferring upon the mortgagee the right of possession upon condition broken. *Union Cent. Life Ins. Co. v. Jensen*, 74 M 70, 78, 237 P 518.

References

Cited or applied as section 6877, Revised Codes, in *Harrington v. Butte & Superior Copper Co.*, 52 M 263, 278, 157 P 181; *Power Mercantile Co. v. Moore Mercantile Co.*, 55 M 401, 406, 177 P 406; *Stack v. Coyle*, 59 M 444, 450, 197 P 747; *Morton v. Union Central Life Ins. Co.*, 80 M 593, 607, 261 P 278; *First National Corp. v. Perrine et al.*, 99 M 454, 43 P 2d 1073.

9496. Court may grant injunction during foreclosure or after sale on execution, before conveyance. The court or judge may, by injunction, upon good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

History: En. Sec. 240, p. 93, Bannack Stat.; re-en. Sec. 261, p. 188, L. 1867; re-en. Sec. 310, p. 95, Cod. Stat. 1871; re-en. Sec. 360, p. 139, L. 1877; re-en. Sec. 360, 1st Div. Rev. Stat. 1879; re-en. Sec. 372, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1318, C. Civ. Proc. 1895; re-en. Sec. 6878, Rev. C. 1907; re-en. Sec. 9496, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 745.

9497. Damages may be recovered for injury to the property after sale and before delivery of possession. When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyance.

History: En. Sec. 262, p. 188, L. 1867; re-en. Sec. 311, p. 95, L. 1871; re-en. Sec. 361, p. 139, L. 1877; re-en. Sec. 361, 1st Div. Rev. Stat. 1879; re-en. Sec. 373, 1st Div. Comp. Stat. 1887; re-en. Sec. 1319, C. Civ. Proc. 1895; re-en. Sec. 6879, Rev. C. 1907; re-en. Sec. 9497, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 746.

References

Cited or applied as section 6879, Revised Codes, in *Power Mercantile Co. v. Moore Mercantile Co.*, 55 M 401, 466, 177 P 406.

9498. Action not to be prejudiced by alienation pending suit. An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

History: En. Sec. 241, p. 93, Bannack Stat.; re-en. Sec. 263, p. 188, L. 1867; re-en. Sec. 312, p. 95, L. 1871; re-en. Sec. 362, p. 139, L. 1877; re-en. Sec. 362, 1st Div. Rev. Stat. 1879; re-en. Sec. 374, 1st Div.

Comp. Stat. 1887; re-en. Sec. 1320, C. Civ. Proc. 1895; re-en. Sec. 6880, Rev. C. 1907; re-en. Sec. 9498, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 747.

9499. Mining claims—action concerning to be governed by local rules. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state or the United States, must govern the decision of the action.

History: En. Sec. 363, p. 139, L. 1877; re-en. Sec. 363, 1st Div. Rev. Stat. 1879; re-en. Sec. 375, 1st Div. Comp. Stat. 1887; amd. Sec. 1321, C. Civ. Proc. 1895; re-en. Sec. 6881, Rev. C. 1907; re-en. Sec. 9499, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 748.

Operation and Effect

A custom among miners in a certain district that twenty days' labor should constitute one hundred dollars' worth of work is in conflict with section 2324, Revised Statutes of the United States, and therefore void; the test being not the number of days' work performed, but the worth or reasonable value of the labor performed or improvements made. *Penn v. Oldhauber*, 24 M 287, 290, 61 P 649.

9500. Adverse claims under acts of congress. In an action brought to determine the respective rights of claimants to the possession of a mining claim or quartz lode, under the provisions of the acts of congress of the United States, it is immaterial which party is in possession, and it is sufficient to confer jurisdiction upon the court, if it appears from the pleadings that the application for a patent has been made and an adverse claim thereto filed and allowed in the proper land office; and the verdict or decision must find which party is entitled to the possession of the premises in dispute.

History: En. Sec. 1322, C. Civ. Proc. 1895; re-en. Sec. 6882, Rev. C. 1907; re-en. Sec. 9500, R. C. M. 1921.

Equitable Action Based on This Section

Where the complaint in an action to determine an adverse claim to a mining location set up the filing of plaintiff's adverse claim, as provided by this section, after defendant had applied for a patent, and prayed that defendant be required to set forth the nature of his claim to the ground, and that all adverse claims of defendant might be determined by the judgment of the court, and the answer denied plaintiff's ownership and possession, and prayed that defendant be adjudged to be the owner and entitled to possession of the premises sued for, the suit was one of equitable cognizance, and not an action at law. *Mares v. Dillon*, 30 M 117, 141, 75 P 963.

Nature of Action and Procedure

An action under this section proceeds to judgment as other actions, and the court may permit amendments to the complaint so as to make it state a cause of action, even after the thirty days prescribed in the federal statute have expired. *Woody v. Hinds*, 30 M 189, 192, 76 P 1.

This section applies especially to adverse claims in patent proceedings, and seems to contemplate a special action, equitable in its nature. It has not, how-

ever, changed the rule of pleading established by previous decisions, and the fact of the filing of the claim in the land office within the prescribed time and the bringing of the action within the prescribed limitation must be alleged, or the complaint will not support the judgment. *Thornton v. Kaufman*, 35 M 181, 183, 88 P 796.

Operation and Effect

This section clearly implies that in an action to determine an adverse claim to a mining location, it is useless for the court to proceed to judgment, unless it appears that an application for patent has been made, and that an adverse claim has been filed and allowed in the proper land office. *Hopkins v. Butte Copper Co.*, 29 M 390, 394, 74 P 1081.

By the adoption of this section, the legislature recognized the distinction between ordinary actions to determine adverse claims, authorized by the statute in relation to suits to quiet title, and adverse claims to determine the right of the contestant to a patent. *Thornton v. Kaufman*, 35 M 181, 183, 88 P 796.

Qualification of Parties

One who has not filed his adverse claim under the act of congress cannot intervene in an action to determine adverse claims to a location, though he claims an interest in the premises adverse to plaintiff and

defendant. *Murray v. Polglase*, 23 M 401, 416, 59 P 439. See also *Poore v. Kaufman*, 44 M 248, 259, 119 P 785.

References

See *Lozar v. Neill et al.*, 37 M 287, 96 P 343, on nonsuit and proceedings there-
after in adverse suits.

Cited or applied as section 6882, Revised Codes, in *O'Hanlon v. Ruby Gulch Min. Co.*, 48 M 65, 82, 135 P 913; *O'Hanlon et al. v. Ruby Gulch Min. Co.*, 64 M 318, 325, 209 P 1062.

9501. Action to establish title to property granted to heirs of deceased entryman. Whenever the government of the United States has heretofore, or shall hereafter, grant lands in the state of Montana to the heirs of a deceased entryman, any person who claims an estate of inheritance or interest in such lands may bring and maintain an action in rem against all the world, in the district court for the county in which such real property is situated, to establish his title to such property and to determine all adverse claims thereto. Any number of separate parcels of land claimed by the plaintiff may be included in the same action.

History: En. Sec. 1, Ch. 15, L. 1915; re-en. Sec. 9501, R. C. M. 1921.

Operation and Effect

In an action brought under this section, through Sec. 9515, to establish title to property granted by patent to heirs of deceased entrymen on public lands, being essentially equitable in character, the court, once having obtained jurisdiction

over the subject matter and the parties, will retain jurisdiction for the purpose of administering complete relief and doing entire justice. *Raistakka v. Fagerstrom et al.*, 64 M 173, 180, 208 P 949.

References

Welch v. All Persons, 78 M 370, 378, 254 P 179.

9502. Complaint in such action—parties defendant. The action shall be commenced by the filing of a verified complaint, in which the parties so commencing the same shall be named as plaintiff, and the defendants shall be described as "All persons claiming any interest in or lien upon the real property herein described, or any part thereof," and shall contain a statement of the facts enumerated in the preceding section, a particular description of such real property, and shall specify the estate, title, or interest of the plaintiff therein.

History: En. Sec. 2, Ch. 15, L. 1915; re-en. Sec. 9502, R. C. M. 1921.

9503. Affidavit to be filed by plaintiff. At the time of filing the complaint, the plaintiff shall file with the same his affidavit, fully and explicitly setting forth and showing:

1. The character of his estate, right, title, interest, or claim in the property.
2. Whether or not he has ever made any conveyance of his interest in said property, or any part thereof, and if so, when, and to whom. Also statement of any and all existing mortgages, deeds of trust, judgments, or other liens thereon.
3. When and where the deceased entryman of said property died, and what kin or relationship the claimant bore to the said entryman at the time of his death, and the names and residences of any other person who is next of kin or entitled to succeed to any portion of the lands, the subject of said action, and the names of and residences of all persons who have liens upon the property, or any part thereof, adversely to the plaintiff, if he knows or has been informed, or has been able to discover any such person. If the plaintiff is unable to state any one or more of the matters

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herein required, he shall set forth and show fully and explicitly the reasons for such inability. Such affidavit shall constitute a part of the judgment-roll. If the plaintiff be a person under guardianship, the affidavit shall be made by his guardian.

History: En. Sec. 3, Ch. 15, L. 1915; re-en. Sec. 9503, R. C. M. 1921.

9504. Summons—issuance and form. Upon the filing of the complaint and affidavit, a summons must be issued under the seal of the court, which shall contain the name of the court and county in which the action is brought, the name of the plaintiff, and the particular description of the real property involved, and shall be directed to "All persons claiming any interest in or lien upon the real property herein described, or any part thereof," as defendants, and shall be substantially in the following form:

In the district court of the judicial district of the state of Montana, in and for the county of, plaintiff, vs. all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof, defendants.

The state of Montana to all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof, defendants, Greeting:

You are hereby required to appear and answer the complaint of, plaintiff, filed with the clerk of the above-entitled court, within sixty days after the first publication of this summons, and set forth what interest or lien, if any, you have in or upon that certain real property, or any part thereof, situated in the county of, state of Montana, particularly described as follows: (Here insert description.)

And you are hereby notified that, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to-wit: (Here insert a statement of the relief so demanded.)

Witness my hand and the seal of said court this day of, A. D. 19.....

....., Clerk.

History: En. Sec. 4, Ch. 15, L. 1915; re-en. Sec. 9504, R. C. M. 1921.

9505. Publication of summons—posting. The summons shall be published in a newspaper of general circulation, published in the county in which the action is brought. The newspaper in which such publication is to be made shall be designated by an order of the court or judge thereof, to be signed and filed with the clerk. No other order for the publication of the summons shall be necessary, nor shall any affidavit therefor be required, nor need any copy of the complaint be served, except as herein-after required. The summons shall be published at least once a week for a period of five weeks, and to each publication thereof shall be appended a memorandum, signed by the plaintiff's attorney, in substance as follows: "The following persons are said to claim an interest in, or lien upon, said property, adverse to plaintiff." (Give names and addresses as above provided.) A copy of the summons, together with a copy of the foregoing memorandum, shall be posted in a conspicuous place on each separate parcel of the property described in the complaint, within ten days after the first publication of the summons.

History: En. Sec. 5, Ch. 15, L. 1915; re-en. Sec. 9505, R. C. M. 1921.

9506. Personal service of summons—service by mail on nonresidents.

If the said affidavit discloses the name of any person next of kin or relationship to the deceased entryman, or entitled to succeed to any part of said property, or the name of a person who claims, or may claim, an interest by mortgage, trust deed, judgment, or other lien, the said summons shall also be personally served upon such person, if he can be found within the state, together with a copy of the complaint and a copy of said affidavit, during the period of the publication of the summons, and to the copy of the summons delivered to any such person there shall be appended a copy of the memorandum provided in the preceding section. If such person resides out of the state, a copy of the summons, memorandum, complaint, and affidavit shall be, within ten days after the first publication of the summons, deposited in the United States postoffice, enclosed in a sealed envelope, postage prepaid, addressed to such person at the address given in the affidavit, or if no address be given therein, then at the county seat of the county in which the action was brought. If such person resides within the state, and could not, with due diligence, be found within the state within the period of the publication of the summons, then said notice aforesaid shall be mailed to him, as above provided, forthwith upon the expiration of said period of said publication.

History: En. Sec. 6, Ch. 15, L. 1915; re-en. Sec. 9506, R. C. M. 1921.

9507. Jurisdiction acquired by the court. Upon the completion of the publication and posting of the summons, and its service upon and mailing to the persons, if any, upon whom it is hereby directed to be so specially served, the court shall have full and complete jurisdiction over the plaintiff and the said property, and of the person of every one having or claiming any estate, right, title, or interest in or to, or lien upon, such property, or any part thereof, and shall be deemed to have obtained the possession and control of said property for the purposes of the action, and shall have full and complete jurisdiction to render the judgment therein, which is provided for in this act.

History: En. Sec. 7, Ch. 15, L. 1915; re-en. Sec. 9507, R. C. M. 1921.

9508. Time for appearance by defendant—answer. At any time within the first sixty days from the first publication of the summons, or within such further time, not exceeding thirty days, as the court may for good cause grant, any person having or claiming any estate, right, title, or interest, in or to, or lien upon, said property, or any part thereof, may appear and make himself a party to the action by pleading to the complaint. All answers must be verified and set forth specifically the kin or relationship of the deceased entryman, and the estate, right, title, interest, or lien so claimed.

History: En. Sec. 8, Ch. 15, L. 1915; re-en. Sec. 9508, R. C. M. 1921.

9509. Lis pendens. The plaintiff must, at the time of filing the complaint, and every defendant to claim or claiming any affirmative relief, must, at the time of filing his answer, record in the office of the county clerk and recorder of the county in which the property is situated, a notice of the pendency of the action, containing the object of the action or the

defense, and a particular description of the property affected thereby; and the recorder shall record the same in a book of the miscellaneous records of his office, and make a reference as to the date and time of the filing of such notice, and when recorded, to the book and page record thereof.

History: En. Sec. 9, Ch. 15, L. 1915; re-en. Sec. 9509, R. C. M. 1921.

9510. Default judgment prohibited—inquiry for next of kin. No judgment in any such action shall be given by default, but the court must require proof of the facts alleged in the complaint and other pleadings, and the court must further make diligent inquiry of the plaintiff and all defendants appearing, concerning the next of kin of said deceased entryman, and upon such examination should any heir be discovered who has not been served, or who has not appeared, the court may order such heir brought in if necessary for the determination herein provided for.

History: En. Sec. 10, Ch. 15, L. 1915; re-en. Sec. 9510, R. C. M. 1921.

9511. Judgment—conclusiveness—recording copy. The judgment shall ascertain and determine the heirship of said deceased entryman, and all estates, rights, titles, interests, and claims in and to said property, and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consists of mortgages or liens of any description, and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed to have any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action. A certified copy of the judgment in such action shall be recorded in the office of the recorder of the county in which said action was commenced, and any party, or the successor in interest of any party to said action, may at his option file for record in the office of the recorder of such county the entire judgment-roll in said action.

History: En. Sec. 11, Ch. 15, L. 1915; re-en. Sec. 9511, R. C. M. 1921.

9512. Rules of evidence, pleading and practice—depositions. Except as herein otherwise provided, all the provisions and rulings of law relating to evidence, pleading, practice, new trials, and appeals, applicable to other civil actions, shall apply to the actions hereby authorized.

At any time after the issuance of the summons, any party to the action may take depositions therein in conformity to law, upon notice to the adverse party sought to be bound by such depositions, and who have appeared in the action, if any, and upon notice filed with the clerk. The depositions may be used by any party against any other party giving or receiving the notice (except the clerk), subject to all just exceptions.

History: En. Sec. 12, Ch. 15, L. 1915; re-en. Sec. 9512, R. C. M. 1921.

9513. Subsequent action not to be brought until certain proof made. Whenever judgment in an action hereby authorized shall have been entered, as to any real property, no other action relative to the same property, or any part thereof, maintained under this act, shall be tried until proof shall first have been made to the court that all persons who appeared in

the first action, or their successors in interest, have been personally served with the papers mentioned in section 9506, either within or without this state, more than one month before the time to plead expired.

History: En. Sec. 13, Ch. 15, L. 1915; re-en. Sec. 9513, R. C. M. 1921.

9514. Actions by executors, administrators, or guardians. An executor, administrator, or guardian, or other person claiming an interest by deed of conveyance or otherwise, may maintain, as plaintiff, and may appear and defend in the action herein provided for.

History: En. Sec. 14, Ch. 15, L. 1915; re-en. Sec. 9514, R. C. M. 1921.

9515. Remedies cumulative. The remedies provided for by this act shall be deemed cumulative, and in addition to any other remedy now or hereafter provided by law for quieting or establishing title to real property.

History: En. Sec. 14, Ch. 15, L. 1915; re-en. Sec. 9515, R. C. M. 1921.

CHAPTER 64

ACTIONS FOR THE PARTITION OF REAL ESTATE

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9516. Who may bring actions for partition. When several cotenants hold and are in possession of real property as joint-tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition cannot be made without a great prejudice to the owners.

9516
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History: En. Sec. 492, p. 140, Bannack Stat.; re-en. Sec. 264, p. 190, L. 1867; re-en. Sec. 313, p. 97, Cod. Stat. 1871; re-en. Sec. 364, p. 139, L. 1877; re-en. Sec. 364, 1st Div. Rev. Stat. 1879; re-en. Sec. 377, 1st Div. Comp. Stat. 1887; re-en. Sec. 1340, C. Civ. Proc. 1895; re-en. Sec. 6883, Rev. C. 1907; re-en. Sec. 9516, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 752.

Operation and Effect

In actions for the partition of real property, the defendant is not required to plead facts sufficient to constitute a counterclaim in order to obtain affirmative relief. In such actions the plaintiffs must set out specifically and particularly, so far as may be known to them, the inter-

ests of all persons in the property; the defendants must set forth in their answers fully and particularly the origin, nature, and extent of their respective interests. The rights of all parties may be put in issue, tried, and determined. An answer stating the matters required to be pleaded by the statute will, when established, entitle the defendants to full relief. State ex rel. Cornue v. Lindsay, 24 M 352, 357, 61 P 883.

An action for partition is a special statutory proceeding. The statute must be looked to for the authority to bring the action, and for the procedure to be followed both in bringing the action and after it is instituted. Hurley v. O'Neill, 31 M 595, 600, 79 P 242.

9517. Actions by infant. An action for the partition of real property shall not be brought by an infant, except by the written authority of the district judge of the county in which the property, or a part thereof, is situated. The authority shall not be given unless the district judge is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action. A judgment for a partition shall not be rendered in such an action unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment. A guardian ad litem for an infant party, in an action for partition, can be appointed only by the court

or judge, and must give an undertaking in a sum fixed by the judge for the faithful discharge of his trust, which undertaking must be approved by the judge and filed with the clerk.

History: En. Sec. 1341, C. Civ. Proc. 1895; re-en. Sec. 6884, Rev. C. 1907; re-en. Sec. 9517, R. C. M. 1921.

9518. Who must be parties. Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, or for years; every person entitled to the reversion, remainder, or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency, contained in a devise, or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof; every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be a party to an action for partition. But no person, other than a joint-tenant or a tenant in common of the property, shall be a plaintiff in the action.

History: En. Sec. 1342, C. Civ. Proc. 1895; re-en. Sec. 6885, Rev. C. 1907; re-en. Sec. 9518, R. C. M. 1921.

Operation and Effect

The wife of a defendant tenant in common, having an inchoate right of dower in an undivided share of the property, is an indispensable party to a suit for partition. *Hurley v. O'Neill*, 31 M 595, 601, 79 P 242.

9519. Who may be parties. The plaintiff may, at his election, make a tenant in dower, for life or for years, of the entire property, or a creditor, or other person having a lien or interest which attaches to the entire property, a defendant in the action. In that case the final judgment may either award to such a party his or her entire right and interest, or the proceeds thereof, or may reserve and leave unaffected his or her right or interest, or any portion thereof. A person specified in this section who is not made a party is not affected by the judgment in the action.

History: En. Sec. 1343, C. Civ. Proc. 1895; re-en. Sec. 6886, Rev. C. 1907; re-en. Sec. 9519, R. C. M. 1921.

References

Cited or applied as section 1343, Code of Civil Procedure, in *Hurley v. O'Neill*, 31 M 395, 600, 79 P 242.

9520. What complaint to contain. The interests of all the persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon the executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

History: En. Sec. 493, p. 140, Bannack Stat.; re-en. Sec. 265, p. 190, L. 1867; re-en. Sec. 314, p. 97, Cod. Stat. 1871; re-en. Sec. 365, p. 139, L. 1877; re-en. Sec. 365, 1st Div. Rev. Stat. 1879; re-en. Sec. 378, 1st Div. Comp. Stat. 1887; re-en. Sec. 1344, C. Civ. Proc. 1895; re-en. Sec. 6887, Rev. C.

1907; re-en. Sec. 9520, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 753.

References

Cited or applied as section 1344, Code of Civil Procedure, in *Hurley v. O'Neill*, 31 M 395, 600, 79 P 242.

9521. Lienholders or grantees not of record need not be made parties. No person having a conveyance of or claiming a lien on the property, or some part of it, need be a party to the action, unless such conveyance or lien appear of record.

History: En. Sec. 266, p. 190, L. 1867; 1st Div. Comp. Stat. 1887; re-en. Sec. 1345, re-en. Sec. 315, p. 97, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6888, Rev. C. Sec. 366, p. 140, L. 1877; re-en. Sec. 366, 1907; re-en. Sec. 9521, R. C. M. 1921. Cal. 1st Div. Rev. Stat. 1879; re-en. Sec. 379, C. Civ. Proc. Sec. 754.

9522. Lis pendens to be filed. Immediately after filing the complaint in the district court, the plaintiff must file in the office of the county clerk of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice, all persons shall be deemed to have notice of the pendency of the action.

History: En. Sec. 495, p. 141, Bannack Stat.; re-en. Sec. 267, p. 190, L. 1867; re-en. Sec. 316, p. 97, Cod. Stat. 1871; re-en. Sec. 367, p. 140, L. 1877; re-en. Sec. 367, 1st Div. Rev. Stat. 1879; re-en. Sec. 380, 1st Div. Comp. Stat. 1887; amd. Sec. 1346, C. Civ. Proc. 1895; re-en. Sec. 6889, Rev. C. 1907; re-en. Sec. 9522, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 755.

9523. Summons—how directed. The summons must be directed to all the joint-tenants and tenants in common, and all persons having an interest in, or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof, and generally to all persons unknown who have or claim any interest in the property.

History: En. Sec. 496, p. 141, Bannack Stat.; re-en. Sec. 268, p. 190, L. 1867; re-en. Sec. 317, p. 97, Cod. Stat. 1871; re-en. Sec. 368, p. 140, L. 1877; re-en. Sec. 368, 1st Div. Rev. Stat. 1879; re-en. Sec. 381, 1st Div. Comp. Stat. 1887; re-en. Sec. 1347, C. Civ. Proc. 1895; re-en. Sec. 6890, Rev. C. 1907; re-en. Sec. 9523, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 756.

9524. Unknown parties—how served. If a party having a share or interest is unknown, or any one of the known parties resides out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a general statement of the nature of the action, and a brief description of the property which is the subject of the action.

History: En. Sec. 497, p. 141, Bannack Stat.; re-en. Sec. 269, p. 191, L. 1867; re-en. Sec. 318, p. 98, Cod. Stat. 1871; re-en. Sec. 369, p. 140, L. 1877; re-en. Sec. 369, 1st Div. Rev. Stat. 1879; re-en. Sec. 382, 1st Div. Comp. Stat. 1887; amd. Sec. 1348, C. Civ. Proc. 1895; re-en. Sec. 6891, Rev. C. 1907; re-en. Sec. 9524, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 757.

9525. Answer of defendants. The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also, whether the

same has been secured in any other way or not; and, if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

History: En. Sec. 498, p. 141, Bannack Stat.; amd. Sec. 270, p. 191, L. 1867; re-en. Sec. 319, p. 98, Cod. Stat. 1871; re-en. Sec. 370, p. 141, L. 1877; re-en. Sec. 370, 1st Div. Rev. Stat. 1879; re-en. Sec. 383, 1st Div. Comp. Stat. 1887; amd. Sec. 1349, C. Civ. Proc. 1895; re-en. Sec. 6892, Rev. C. 1907; re-en. Sec. 9525, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 758.

9526. Title of parties may be tried. The right of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action. The title or interest of the plaintiff in the property, as stated in the complaint, may be controverted by the answer. The title or interest of any defendant in the property, as stated in the complaint, may also be controverted by his answer, or the answer of any other defendant; and the title or interest of any defendant, as stated in his answer, may be controverted by the answer of any other defendant, and the issues joined as prescribed in sections 9125 to 9192 of this code, which may be tried before a jury if the court so direct.

History: Ap. p. Sec. 499, p. 141, Bannack Stat.; re-en. Sec. 271, p. 191, L. 1867; re-en. Sec. 320, p. 98, Cod. Stat. 1871; re-en. Sec. 371, p. 140, L. 1877; re-en. Sec. 371, 1st Div. Rev. Stat. 1879; re-en. Sec. 384, 1st Div. Comp. Stat. 1887; en. Sec. 1350, C. Civ. Proc. 1895; re-en. Sec. 6893, Rev. C. 1907; re-en. Sec. 9526, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 759.

9527. Determination of title required before sale—rights of unknown parties, proof of. When a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the summons has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except where there are several unknown parties having an interest in the property, their rights may be considered together in the action, and not as between themselves.

History: Ap. p. Sec. 499, p. 141, Bannack Stat.; re-en. Sec. 271, p. 191, L. 1867; re-en. Sec. 320, p. 98, Cod. Stat. 1871; re-en. Sec. 371, p. 140, L. 1877; re-en. Sec. 371, 1st Div. Rev. Stat. 1879; re-en. Sec. 384, 1st Div. Comp. Stat. 1887; en. Sec. 1351, C. Civ. Proc. 1895; re-en. Sec. 6894, Rev. C. 1907; re-en. Sec. 9527, R. C. M. 1921.

9528. Partial partition. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made, as if such original cotenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

History: En. Sec. 272, p. 191, L. 1867; re-en. Sec. 321, p. 98, Cod. Stat. 1871; re-en. Sec. 372, p. 141, L. 1877; re-en. Sec. 372, 1st Div. Rev. Stat. 1879; re-en. Sec. 385, 1st Div. Comp. Stat. 1887; re-en. Sec. 1352, C. Civ. Proc. 1895; re-en. Sec. 6895, Rev. C. 1907; re-en. Sec. 9528, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 760.

9529. Lienholders as parties. If it appears to the court, by the certificate of the clerk of the court and county clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or encumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or encumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and, if secured, the nature and extent of the security.

History: Ap. p. Sec. 501, p. 142, Bannack Stat.; en. Sec. 273, p. 191, L. 1867; re-en. Sec. 322, p. 98, Cod. Stat. 1871; re-en. Sec. 373, p. 142, L. 1877; re-en. Sec. 373, 1st Div. Rev. Stat. 1879; re-en. Sec. 386, 1st Div. Comp. Stat. 1887; re-en. Sec. 1353, C. Civ. Proc. 1895; re-en. Sec. 6896, Rev.

C. 1907; re-en. Sec. 9529, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 761.

References

Cited or applied as section 1353, Code of Civil Procedure, in *Hurley v. O'Neill*, 31 M 395, 600, 79 P 242.

9530. Lienholders must be notified. The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed, as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due, or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

History: En. Sec. 502, p. 142, Bannack Stat.; re-en. Sec. 274, p. 192, L. 1867; re-en. Sec. 323, p. 99, Cod. Stat. 1871; re-en. Sec. 374, p. 142, L. 1877; re-en. Sec. 374, 1st

Div. Rev. Stat. 1879; re-en. Sec. 1354, C. Civ. Proc. 1895; re-en. Sec. 6897, Rev. C. 1907; re-en. Sec. 9530, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 762.

9531. Court may order sale or partition—appointment of referees. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

History: En. Sec. 503, p. 142, Bannack Stat.; re-en. Sec. 275, p. 192, L. 1867; re-en. Sec. 324, p. 99, Cod. Stat. 1871; re-en. Sec. 375, p. 142, L. 1877; re-en. Sec.

375, 1st Div. Rev. Stat. 1879; re-en. Sec. 1355, C. Civ. Proc. 1895; re-en. Sec. 6898, Rev. C. 1907; re-en. Sec. 9531, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 763.

Operation and Effect

Where property is so situated that partition cannot be made without great preju-

dice to the owners, the court may order a sale thereof. Hurley v. O'Neill, 31 M 595, 599, 79 P 242.

9532. Lots and subdivisions. When the site of an incorporated city or town is included within the exterior boundaries of the property to be partitioned, on said fact being established by evidence, the following proceedings shall be had: The court shall thereupon direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads, and streets, as in section 9534 of this code provided, and to report such survey and separate appraisement on each lot and subdivision to the court. The court may confirm, change, modify, or set aside the report in whole or in part, and if necessary appoint new referees. When, after the final confirmation of the report of such survey and appraisement, it shall appear by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city, town, or any portion thereof, will be for the best interests of the owners of the whole property, it shall order a sale thereof; provided, that within sixty days thereafter any tenant in common, or tenants in common, having improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and pay into court the amount so appraised as the value thereof, and upon such payment the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by said referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers; such further proceedings shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided.

History: En. Sec. 1356, C. Civ. Proc. 1895; re-en. Sec. 6899, Rev. C. 1907; re-en. Sec. 9532, R. C. M. 1921.

9533. Death and insanity. If, during the pendency of the action, any of the parties die or become insane or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court shall appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed shall be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon, in the discretion of the court.

History: En. Sec. 1357, C. Civ. Proc. 1895; re-en. Sec. 6900, Rev. C. 1907; re-en. Sec. 9533, R. C. M. 1921.

9534. Partition according to rights of parties. In making partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, ac-

cording to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor, with the necessary assistants, to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient, in the judgment of said referees, to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways.

History: Ap. p. Sec. 504, p. 143, Bank Stat.; re-en. Sec. 276, p. 192, L. 1867; re-en. Sec. 325, p. 99, Cod. Stat. 1871; re-en. Sec. 376, p. 143, L. 1877; re-en. Sec. 376, 1st Div. Rev. Stat. 1879; re-en. Sec. 389,

1st Div. Comp. Stat. 1887; en. Sec. 1358, C. Civ. Proc. 1895; re-en. Sec. 6901, Rev. C. 1907; re-en. Sec. 9534, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 764.

9535. Grantee of tenant in common, allotment of land to—improvements, how located on partition. Whenever it shall appear, in an action for the partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury to the rights and interests of the other cotenants who may not have joined in such conveyance; provided, that in all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each cotenant so as to embrace as far as practicable the improvements made by such cotenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land.

History: En. Sec. 1359, C. Civ. Proc. 1895; re-en. Sec. 6902, Rev. C. 1907; re-en. Sec. 9535, R. C. M. 1921.

9536. Referees must make report. The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

History: En. Sec. 505, p. 143, Bannack Stat.; re-en. Sec. 277, p. 192, L. 1867; re-en. Sec. 326, p. 99, Cod. Stat. 1871; re-en. Sec. 377, p. 143, L. 1877; re-en. Sec. 377, 1st Div. Rev. Stat. 1879; re-en. Sec. 390, 1st Div. Comp. Stat. 1887; re-en. Sec. 1360, C. Civ. Proc. 1895; re-en. Sec. 6903, Rev. C. 1907; re-en. Sec. 9536, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 765.

9537. Judgment upon confirmation of report—upon whom to be conclusive. The court may confirm, change, modify, or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.
2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.
3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

History: Ap. p. Sec. 506, p. 143, Bannack Stat.; amd. Sec. 278, p. 192, L. 1867; re-en. Sec. 327, p. 100, Cod. Stat. 1871; amd. Sec. 378, p. 143, L. 1877; re-en. Sec. 378, 1st Div. Rev. Stat. 1879; re-en. Sec. 391, 1st Div. Comp. Stat. 1887; en. Sec. 1361, C. Civ. Proc. 1895; re-en. Sec. 6904, Rev. C. 1907; re-en. Sec. 9537, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 766.

9538. Judgment does not affect tenant for years. The judgment does not affect tenants for years, less than ten, to the whole of the property which is the subject of the partition.

History: En. Sec. 507, p. 143, Bannack Stat.; re-en. Sec. 279, p. 193, L. 1867; re-en. Sec. 328, p. 100, Cod. Stat. 1871; re-en. Sec. 379, p. 144, L. 1877; re-en. Sec. 379, 1st Div. Rev. Stat. 1879; re-en. Sec. 392, 1st Div. Comp. Stat. 1887; re-en. Sec. 1362, C. Civ. Proc. 1895; re-en. Sec. 6905, Rev. C. 1907; re-en. Sec. 9538, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 767.

9539. Expenses apportioned. The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

History: En. Sec. 508, p. 143, Bannack Stat.; re-en. Sec. 280, p. 193, L. 1867; re-en. Sec. 329, p. 100, Cod. Stat. 1871; re-en. Sec. 380, p. 144, L. 1877; re-en. Sec. 380, 1st Div. Rev. Stat. 1879; re-en. Sec. 393, 1st Div. Comp. Stat. 1887; re-en. Sec. 1363, C. Civ. Proc. 1895; re-en. Sec. 6906, Rev. C. 1907; re-en. Sec. 9539, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 768.

9540. Lien on undivided interest. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made,

shall thenceforth be a charge only on the share assigned to such party; but such share must be first charged with its just proportion of the costs of the partition, in preference to such lien.

History: En. Sec. 509, p. 143, Bannack Stat.; re-en. Sec. 281, p. 193, L. 1867; re-en. Sec. 330, p. 100, Cod. Stat. 1871; re-en. Sec. 381, p. 144, L. 1877; re-en. Sec. 381, 1st Div. Rev. Stat. 1879; re-en. Sec. 394, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1364, C. Civ. Proc. 1895; re-en. Sec. 6907, Rev. C. 1907; re-en. Sec. 9540, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 769.

9541. Estate for years or for life. When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

History: En. Sec. 510, p. 143, Bannack Stat.; re-en. Sec. 282, p. 193, L. 1867; re-en. Sec. 331, p. 100, Cod. Stat. 1871; re-en. Sec. 382, p. 144, L. 1877; re-en. Sec. 382, 1st Div. Rev. Stat. 1879; re-en. Sec. 395, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1365, C. Civ. Proc. 1895; re-en. Sec. 6908, Rev. C. 1907; re-en. Sec. 9541, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 770.

9542. Application of proceeds of encumbered property. The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares therein.

History: En. Sec. 511, p. 144, Bannack Stat.; re-en. Sec. 283, p. 193, L. 1867; re-en. Sec. 332, p. 100, Cod. Stat. 1871; re-en. Sec. 383, p. 145, L. 1877; re-en. Sec. 383, 1st Div. Rev. Stat. 1879; re-en. Sec. 396, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1366, C. Civ. Proc. 1895; re-en. Sec. 6909, Rev. C. 1907; re-en. Sec. 9542, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 771.

9543. Other securities. Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

History: En. Sec. 512, p. 144, Bannack Stat.; re-en. Sec. 284, p. 193, L. 1867; re-en. Sec. 333, p. 100, Cod. Stat. 1871; re-en. Sec. 384, p. 145, L. 1877; re-en. Sec. 384, 1st Div. Rev. Stat. 1879; re-en. Sec. 397,

1st Div. Comp. Stat. 1887; re-en. Sec. 1367, C. Civ. Proc. 1895; re-en. Sec. 6910, Rev. C. 1907; re-en. Sec. 9543, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 772.

9544. Proceeds of sale, disposition of. The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into the court, or deposited therein, or as directed by the court.

History: En. Sec. 513, p. 144, Bannack Stat.; re-en. Sec. 285, p. 194, L. 1867; re-en. Sec. 334, p. 101, Cod. Stat. 1871; re-en. Sec. 385, p. 145, L. 1877; re-en. Sec. 385, 1st Div. Rev. Stat. 1879; re-en. Sec. 398,

1st Div. Comp. Stat. 1887; re-en. Sec. 1368, C. Civ. Proc. 1895; re-en. Sec. 6911, Rev. C. 1907; re-en. Sec. 9544, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 773.

9545. When paid into court. When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into the court, the action may continue as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original action.

History: En. Sec. 514, p. 144, Bannack Stat.; re-en. Sec. 286, p. 194, L. 1867; re-en. Sec. 335, p. 101, Cod. Stat. 1871; re-en. Sec. 386, p. 145, L. 1877; re-en. Sec. 386, 1st Div. Rev. Stat. 1879; re-en. Sec. 399, 1st Div. Comp. Stat. 1887; re-en. Sec. 1369, C. Civ. Proc. 1895; re-en. Sec. 6912, Rev. C. 1907; re-en. Sec. 9545, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 774.

9546. Sales must be at public auction. All sales of real property, made by referees under this chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property, or any part of it, is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice.

History: En. Sec. 515, p. 145, Bannack Stat.; re-en. Sec. 287, p. 194, L. 1867; re-en. Sec. 336, p. 101, Cod. Stat. 1871; re-en. Sec. 387, p. 146, L. 1877; re-en. Sec. 387, 1st Div. Rev. Stat. 1879; re-en. Sec. 400, 1st Div. Comp. Stat. 1887; re-en. Sec. 1370, C. Civ. Proc. 1895; re-en. Sec. 6913, Rev. C. 1907; re-en. Sec. 9546, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 775.

9547. Court must direct terms of sale. The court must, in the order of sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase-money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of this state.

History: En. Sec. 516, p. 145, Bannack Stat.; re-en. Sec. 288, p. 194, L. 1867; re-en. Sec. 337, p. 101, Cod. Stat. 1871; re-en. Sec. 388, p. 146, L. 1877; re-en. Sec. 388, 1st Div. Rev. Stat. 1879; re-en. Sec. 401, 1st Div. Comp. Stat. 1887; re-en. Sec. 1371, C. Civ. Proc. 1895; re-en. Sec. 6914, Rev. C. 1907; re-en. Sec. 9547, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 776.

9548. Referees may take security for purchase-money. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase-money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for the other shares, in the name of the clerk of the court of the county and his successors in office.

History: En. Sec. 517, p. 145, Bannack Stat.; re-en. Sec. 289, p. 194, L. 1867; re-en. Sec. 338, p. 101, Cod. Stat. 1871; re-en. Sec. 389, p. 146, L. 1877; re-en. Sec. 389, 1st Div. Rev. Stat. 1879; re-en. Sec. 402, 1st Div. Comp. Stat. 1887; re-en. Sec. 1372, C. Civ. Proc. 1895; re-en. Sec. 6915, Rev. C. 1907; re-en. Sec. 9548, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 777.

9549. Tenants must receive compensation. The person entitled to a tenancy for life, or years, or who has a right or inchoate right of dower, whose estate has been sold, is entitled to receive such sum as may be

deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

History: En. Sec. 518, p. 145, Bannack Stat.; re-en. Sec. 290, p. 194, L. 1867; re-en. Sec. 339, p. 101, Cod. Stat. 1871; re-en. Sec. 390, p. 146, L. 1877; re-en. Sec. 390, 1st Div. Rev. Stat. 1879; re-en. Sec. 403, 1st Div. Comp. Stat. 1887; re-en. Sec. 1373, C. Civ. Proc. 1895; re-en. Sec. 6916, Rev. C.

1907; re-en. Sec. 9549, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 778.

Note.—The words “or who has a right or inchoate right of dower” were added by section 1373, Code of Civil Procedure 1895.

9550. Court may fix same. If such consent be not given, filed, and entered, as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him or her, as the case may require.

History: En. Sec. 519, p. 145, Bannack Stat.; re-en. Sec. 291, p. 195, L. 1867; re-en. Sec. 340, p. 102, Cod. Stat. 1871; re-en. Sec. 391, p. 146, L. 1877; re-en. Sec. 391, 1st Div. Rev. Stat. 1879; re-en. Sec. 404,

1st Div. Comp. Stat. 1887; re-en. Sec. 1374, C. Civ. Proc. 1895; re-en. Sec. 6917, Rev. C. 1907; re-en. Sec. 9550, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 779.

9551. Court must protect unknown tenants. If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

History: En. Sec. 520, p. 146, Bannack Stat.; re-en. Sec. 292, p. 195, L. 1867; re-en. Sec. 341, p. 102, Cod. Stat. 1871; re-en. Sec. 392, p. 147, L. 1877; re-en. Sec. 392, 1st Div. Rev. Stat. 1879; re-en. Sec. 405, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1375, C. Civ. Proc. 1895; re-en. Sec. 6918, Rev. C. 1907; re-en. Sec. 9551, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 780.

9552. Ascertainment of future contingent or vested interests. In all cases of sales, when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

History: En. Sec. 521, p. 146, Bannack Stat.; re-en. Sec. 293, p. 195, L. 1867; re-en. Sec. 342, p. 102, Cod. Stat. 1871; re-en. Sec. 393, p. 147, L. 1877; re-en. Sec. 393, 1st Div. Rev. Stat. 1879; re-en. Sec. 406,

1st Div. Comp. Stat. 1887; re-en. Sec. 1376, C. Civ. Proc. 1895; re-en. Sec. 6919, Rev. C. 1907; re-en. Sec. 9552, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 781.

9553. Terms of sale. In all cases of sales of property, the terms must be made known at the time; and if the premises consist of distinct farms and lots, they must be sold separately.

History: En. Sec. 522, p. 146, Bannack Stat.; re-en. Sec. 294, p. 195, L. 1867; re-en. Sec. 343, p. 102, Cod. Stat. 1871; re-en. Sec. 394, p. 147, L. 1877; re-en. Sec. 394, 1st Div. Rev. Stat. 1879; re-en. Sec. 407,

1st Div. Comp. Stat. 1887; re-en. Sec. 1377, C. Civ. Proc. 1895; re-en. Sec. 6920, Rev. C. 1907; re-en. Sec. 9553, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 782.

9554. Who may not be purchasers. Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

History: En. Sec. 523, p. 146, Bannack Stat.; re-en. Sec. 295, p. 195, L. 1867; re-en. Sec. 344, p. 102, Cod. Stat. 1871; re-en. Sec. 395, p. 147, L. 1877; re-en. Sec. 395, 1st Div. Rev. Stat. 1879; re-en. Sec. 408,

1st Div. Comp. Stat. 1887; re-en. Sec. 1378, C. Civ. Proc. 1895; re-en. Sec. 6921, Rev. C. 1907; re-en. Sec. 9554, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 783.

9555. Report of sale to court. After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the price paid or secured; the terms and conditions of the sale; and the securities, if any, taken. The report must be filed in the office of the clerk of the court, and a certified copy thereof in the office of the county clerk of the county where the property is situated.

History: En. Sec. 524, p. 146, Bannack Stat.; re-en. Sec. 296, p. 195, L. 1867; re-en. Sec. 345, p. 102, Cod. Stat. 1871; re-en. Sec. 396, p. 147, L. 1877; re-en. Sec. 396, 1st Div. Rev. Stat. 1879; re-en. Sec. 409,

1st Div. Comp. Stat. 1887; re-en. Sec. 1379, C. Civ. Proc. 1895; re-en. Sec. 6922, Rev. C. 1907; re-en. Sec. 9555, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 784.

9556. If confirmed, conveyances may be executed. If the sale be confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of sale.

History: En. in substance as Sec. 525, p. 146, Bannack Stat.; re-en. Sec. 297, p. 195, L. 1867; re-en. Sec. 346, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877.

This section en. Sec. 1380, C. Civ. Proc. 1895; re-en. Sec. 6923, Rev. C. 1907; re-en. Sec. 9556, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 785.

9557. If lienholder become purchaser. When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

History: En. in substance as Sec. 526, p. 146, Bannack Stat.; re-en. Sec. 298, p. 195, L. 1867; re-en. Sec. 347, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877.

This section en. Sec. 1381, C. Civ. Proc. 1895; re-en. Sec. 6924, Rev. C. 1907; re-en. Sec. 9557, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 786.

9558. Conveyances must be recorded, and will be a bar against parties. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

History: En. in substance as Sec. 527, p. 146, Bannack Stat.; re-en. Sec. 299, p. 195, L. 1867; re-en. Sec. 348, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877.

This section en. Sec. 1382, C. Civ. Proc. 1895; re-en. Sec. 6925, Rev. C. 1907; re-en. Sec. 9558, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 787.

9559. Proceeds of sale belonging to parties unknown—how invested.

Where there are proceeds of a sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same must be invested in bonds of this state or the United States, for the benefit of the persons entitled thereto.

History: En. in substance as Sec. 528, p. 146, Bannack Stat.; re-en. Sec. 300, p. 195, L. 1867; re-en. Sec. 349, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877. **This section en. Sec. 1383, C. Civ. Proc. 1895; re-en. Sec. 6926, Rev. C. 1907; re-en. Sec. 9559, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 788.**

9560. Investment made in name of clerk. When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the court where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the persons interested, subject to the order of the court.

History: En. in substance as Sec. 529, p. 147, Bannack Stat.; re-en. Sec. 301, p. 195, L. 1867; re-en. Sec. 350, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877. **This section en. Sec. 1384, C. Civ. Proc. 1895; re-en. Sec. 6927, Rev. C. 1907; re-en. Sec. 9560, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 789.**

9561. Securities in name of parties. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk of the court.

History: En. in substance as Sec. 530, p. 147, Bannack Stat.; re-en. Sec. 302, p. 196, L. 1867; re-en. Sec. 351, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877. **This section en. Sec. 1385, C. Civ. Proc. 1895; re-en. Sec. 6928, Rev. C. 1907; re-en. Sec. 9561, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 790.**

9562. Duty of clerk in making investments. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

History: En. in substance as Sec. 531, p. 147, Bannack Stat.; re-en. Sec. 303, p. 196, L. 1867; re-en. Sec. 352, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877. **This section en. Sec. 1386, C. Civ. Proc. 1895; re-en. Sec. 6929, Rev. C. 1907; re-en. Sec. 9562, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 791.**

9563. Compensation may be adjudged in certain cases. When it appears that a partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by

owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

History: En. in substance as Sec. 532, p. 147, Bannack Stat.; re-en. Sec. 304, p. 196, L. 1867; re-en. Sec. 353, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877.

This section en. Sec. 1387, C. Civ. Proc. 1895; re-en. Sec. 6930, Rev. C. 1907; re-en. Sec. 9563, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 792.

9564. Share of infant may be paid guardian. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

History: En. in substance as Sec. 533, p. 148, Bannack Stat.; re-en. Sec. 305, p. 196, L. 1867; re-en. Sec. 354, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877.

This section en. Sec. 1388, C. Civ. Proc. 1895; re-en. Sec. 6931, Rev. C. 1907; re-en. Sec. 9564, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 793.

9565. Share of insane person may be paid to guardian. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking, approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

History: En. in substance as Sec. 534, p. 148, Bannack Stat.; re-en. Sec. 306, p. 196, L. 1867; re-en. Sec. 355, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877.

This section en. Sec. 1389, C. Civ. Proc. 1895; re-en. Sec. 6932, Rev. C. 1907; re-en. Sec. 9565, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 794.

9566. Guardian may consent to partition without action. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action, may agree upon the share to be set off to such infant or other person entitled, and may execute a release, in his behalf, to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the court.

History: En. in substance as Sec. 535, p. 148, Bannack Stat.; re-en. Sec. 307, p. 196, L. 1867; re-en. Sec. 356, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877.

This section en. Sec. 1390, C. Civ. Proc. 1895; re-en. Sec. 6933, Rev. C. 1907; re-en. Sec. 9566, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 795.

9567. Sale of dower interest. Where a party has an existing right of dower in the entire property directed to be sold, at the time when a judgment of partition is rendered, the court must consider and determine whether the interests of all the parties require that the right of dower should be excepted from the sale, or that it should be sold.

History: Sec. 1391, C. Civ. Proc. 1895; re-en. Sec. 6934, Rev. C. 1907; re-en. Sec. 9567, R. C. M. 1921.

References

Cited or applied as section 1391, Code of Civil Procedure, in *Hurley v. O'Neill*, 31 M 395, 600, 79 P 242.

9568. Same. If a sale of the property, including the right of dower, is directed, the interest of the party entitled to the right of dower shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. In that case the doweress is entitled to receive from the proceeds of the sale of the whole property a gross sum in satisfaction of her right of dower, or to have one-third of those proceeds paid into court for the purpose of being invested for her benefit.

History: En. Sec. 1392, C. Civ. Proc. 1895; re-en. Sec. 6935, Rev. C. 1907; re-en. Sec. 9568, R. C. M. 1921.

References

Cited or applied as section 1392, Code of Civil Procedure, in *Hurley v. O'Neill*, 31 M 395, 600, 79 P 242.

9569. Married woman may release her interest. A married woman may release to her husband or a purchaser her inchoate right of dower in the property directed to be sold by a written instrument, duly acknowledged by her and certified as required by law with respect to the acknowledgment of a grant by a married woman.

History: En. Sec. 1393, C. Civ. Proc. 1895; re-en. Sec. 6936, Rev. C. 1907; re-en. Sec. 9569, R. C. M. 1921.

9570. Costs of partition a lien on the several shares. The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants for the common benefit, fees of referees, or other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

History: En. in substance as Sec. 536, p. 148, Bannack Stat.; re-en. Sec. 308, p. 196, L. 1867; re-en. Sec. 357, p. 104, L. 1871; rep. Sec. 674, p. 215, L. 1877.

This section en. Sec. 1394, C. Civ. Proc. 1895; re-en. Sec. 6937, Rev. C. 1907; re-en. Sec. 9570, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 796.

Operation and Effect

The services of plaintiff's attorney in preparing the complaint and conducting the trial should be included in the costs of the action, as they are for the common benefit. *Murray v. Conlon*, 19 M 389, 48 P 743.

9571. One referee may be appointed, when. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

History: En. in substance as Sec. 537, p. 148, Bannack Stat.; re-en. Sec. 309, p. 196, L. 1867; re-en. Sec. 358, p. 104, L. 1871; rep. Sec. 674, p. 215, L. 1877.

This section en. Sec. 1395, C. Civ. Proc. 1895; re-en. Sec. 6938, Rev. C. 1907; re-en. Sec. 9571, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 797.

9572. Expenses of previous litigation allowed. If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action, who have paid the expense of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and the same must be pleaded and allowed by the court, and included in the final judgment, and shall be a lien upon the share of each tenant, respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

History: En. Sec. 1396, C. Civ. Proc. 1895; re-en. Sec. 6939, Rev. C. 1907; re-en. Sec. 9572, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 798.

9573. Abstract—when cost of allowed—filing and inspection. If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterward made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is procured by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same, and where it will be kept when finished. The court or judge thereof may direct, from time to time during the progress of the action, who shall have the custody of the abstract.

History: En. Sec. 1397, C. Civ. Proc. 1895; re-en. Sec. 6940, Rev. C. 1907; re-en. Sec. 9573, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 799.

9574. Abstract—how made and verified. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the county clerk or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected, from time to time, if found incorrect, under the direction of the court.

History: En. Sec. 1398, C. Civ. Proc. 1895; re-en. Sec. 6941, Rev. C. 1907; re-en. Sec. 9574, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 800.

9575. Interest on disbursements—when allowed. Whenever, during the progress of the action for partition, any disbursements shall have been

made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

History: En. Sec. 1399, C. Civ. Proc. 1895; re-en. Sec. 6942, Rev. C. 1907; re-en. Sec. 9575, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 801.

References

Cited or applied as section 1399, Code of Civil Procedure, in *State ex rel. Cornue v. Lindsay*, 24 M 352, 357, 61 P 883.

CHAPTER 65

QUO WARRANTO

- Section 9576. When proceedings may be instituted.
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9576. When proceedings may be instituted. A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state;
2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office;
3. Against an association of persons who act as a corporation within this state without being legally incorporated.

History: Statutory quo warranto proceedings were first authorized in 1895. Prior to that, provision was made for an "action for usurpation" by sections 242-247, pp. 93-94, Bannack Stat.; Secs. 310-316, pp. 197-198, L. 1877; Secs. 359-365, pp. 105 and 106, Cod. Stat. 1871; Secs. 397-404, pp. 148-149, L. 1877; Secs. 397-404, 1st Div. Rev. Stat. 1879; Secs. 410-417, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1410, C. Civ. Proc. 1895; re-en. Sec. 6943, Rev. C. 1907; re-en.

Sec. 9576, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 803.

Forfeiture of Franchise Permissible by Quo Warranto

Complaint in an action of the nature of quo warranto brought by the attorney general in behalf of the state to have a ferry franchise declared forfeited for failure of the ferryman to provide a safe and suitable ferry-boat for the accommodation of travelers, examined and held sufficient

9576 et seq.
88 P. (2d) 51

9576
96 P. (2d) 272
96 P. (2d) 915

to state a cause of action, under this section et seq. *State ex rel. Rankin v. Martin*, 68 M 392, 396, 219 P 632.

Immaterial Allegations

Since relator is presumed to know the law relative to the steps necessary to be taken by him to qualify for the office to which he was elected, allegation in his complaint in a quo warranto proceeding that the certificate of election sent him did not advise him as to how and when he should qualify, held immaterial and ordered stricken, the law not requiring the giving of such information. *State ex rel. Wallace v. Callow*, 78 M 308, 313, 254 P 187.

Proceeding Lies Only Against "Public Officer" Not State Employee

A proceeding in quo warranto, when directed against a person alleged to be usurping, intruding into or exercising an office, is proper only in the case, where defendant is a public officer, i. e., one whose office falls within the definition of "public office" as defined in this case, not in the case of one who is a mere state employee. *State ex rel. Nagle v. Page*, 98 M 14, 22, 37 P 2d 575.

9577. When against a corporation. A like action may be brought against a corporation:

1. When it has offended against a provision of an act for its creation, or renewal, or any act altering or amending such acts;
2. When it has forfeited its privileges and franchises by nonuser;
3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises;
4. When it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred.

History: This section en. Sec. 1411, C. Civ. Proc. 1895; re-en. Sec. 6944, Rev. C. 1907; re-en. Sec. 9577, R. C. M. 1921. See also history of Sec. 9576.

Operation and Effect

Complaint in an action of the nature of quo warranto brought by the attorney general in behalf of the state to have a ferry franchise declared forfeited for failure of the ferryman to provide a safe and suitable ferry-boat for the accommodation of travelers, examined and held sufficient to state a cause of action under this section. *State ex rel. Rankin v. Martin*, 68 M 392, 396, 219 P 632.

9578. Who may commence the action. The attorney-general, when directed by the governor, shall commence any such action; and when, upon complaint or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action.

Right of Individual to the Remedy

The authority of the state, represented by the attorney-general, to invoke the remedy by quo warranto is quite extensive, but the right of an individual to the remedy is limited to the single case named in section 9580. *State ex rel. Boyle v. Hall*, 53 M 595, 600, 165 P 757.

When Supreme Court Will Take Original Jurisdiction

The supreme court will take original jurisdiction of a proceeding in quo warranto brought by one elected to the office of county commissioner but which office was filled by appointment for relator's failure to file his official bond within the time required by law, where the emergencies appear to it sufficient to warrant that course. *State ex rel. Wallace v. Callow*, 78 M 308, 313, 254 P 187.

References

Cited or applied as section 1410, Code of Civil Procedure, in *Coleman v. Kerr*, 33 M 198, 201, 83 P 393; *State ex rel. Ford v. Western L. & B. Co.*, 59 M 623; *State ex rel. v. Porter*, 88 M 347, 354, 294 P 363; *State ex rel. Kurth et al. v. Grinde et al.*, 96 M 608, 612, 32 P 2d 15.

Obiter: Where the license of a surety company is sought to be revoked under section 6221, for failure to pay a judgment rendered against it in an action on a bond furnished by it, quo warranto may be resorted to. *Stabler v. Porter*, 72 M 62, 232 P 187.

References

Cited or applied as section 6944, Revised Codes, in *Daily v. Marshall*, 47 M 377, 392, 133 P 681; *Barnes v. Smith*, 48 M 309, 316, 137 P 541; *Hanson Sheep Co. v. Farmers & Traders' State Bank*, 53 M 324, 337, 163 P 1151.

History: This section en. Sec. 1412, C. Civ. Proc. 1895; re-en. Sec. 6945, Rev. C. 1907; re-en. Sec. 9578, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 803. See also history of Sec. 9576.

References

Stabler v. Porter, 72 M 62, 68, 232 P 187.

9579. Upon whose relation. Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under the first subdivision of section 9576, he may require security for costs, to be given as in other cases.

History: This section en. Sec. 1413, C. Civ. Proc. 1895; re-en. Sec. 6946, Rev. C. 1907; re-en. Sec. 9579, R. C. M. 1921. See also history of Sec. 9576.

References

Cited or applied as section 6946, Revised Codes, in State ex rel. Boyle v. Hall, 53 M 595, 600, 165 P 757; State ex rel. Rankin v. Martin, 68 M 392, 396, 219 P 632.

9580. When private person may commence action. A person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or by an attorney and counselor-at-law, may bring an action therefor in the name of the state, as provided in this chapter. On filing the complaint, such person shall enter into an undertaking, with two sufficient sureties, to be approved by the judge or any judge of the court in which the action is brought, conditioned that such person will pay any judgment for costs or damages recovered against him, and all costs and expenses incurred in the prosecution of the action, which undertaking shall be filed with the clerk of the court.

History: This section en. Sec. 1414, C. Civ. Proc. 1895; re-en. Sec. 6947, Rev. C. 1907; re-en. Sec. 9580, R. C. M. 1921. See also history of Sec. 9576.

Id. The chairmanship of the board of state railroad commissioners is not a public office, and the writ of quo warranto does not lie to determine the right of one of its members to act as chairman.

Operation and Effect

A private individual is limited in his right to the remedy by quo warranto to a case in which he claims to be entitled to a public office unlawfully held and exercised by another. State ex rel. Boyle v. Hall, 53 M 595, 600, 165 P 757.

References

Cited or applied as section 1414, Code of Civil Procedure, in State ex rel. Brooks v. Fransham, 19 M 273, 280, 48 P 1.

9581. What complaint to contain. When the action is against a person for usurping an office, the complaint shall set forth the name of the person who claims to be entitled thereto, with an averment of his right thereto, and judgment may be rendered upon the right of the defendant, and also upon the right of the person so averred to be entitled, or only upon the right of the defendant, as justice requires.

History: This section en. Sec. 1415, C. Civ. Proc. 1895; re-en. Sec. 6948, Rev. C. 1907; re-en. Sec. 9581, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 805. See also history of Sec. 9576.

9582. Who made defendants. All persons who claim to be entitled to the same office or franchise may be made defendants in the same action to try their respective rights to such office or franchise.

History: This section en. Sec. 1416, C. Civ. Proc. 1895; re-en. Sec. 6949, Rev. C. 1907; re-en. Sec. 9582, R. C. M. 1921. See also history of Sec. 9576.

9583. Where action brought. An action under this chapter can be brought in the supreme court of the state, or in the district court of the

county in which the defendant, or one of the defendants, resides or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business.

History: This section en. Sec. 1417, C. Civ. Proc. 1895; re-en. Sec. 6950, Rev. C. 1907; re-en. Sec. 9583, R. C. M. 1921. See also history of Sec. 9576.

9584. Application to file complaint, etc. Upon application for leave to file a complaint, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto, and if leave be granted, an entry thereof shall be made on the minutes of the court, or the fact shall be indorsed by the judge on the complaint, which shall then be filed.

History: This section en. Sec. 1418, C. Civ. Proc. 1895; re-en. Sec. 6951, Rev. C. 1907; re-en. Sec. 9584, R. C. M. 1921. See also history of Sec. 9576.

References

Cited or applied as section 6951, Revised Codes, in State ex rel. Ford v. Cutts, 53 M 300, 301, 163 P 470.

9585. Summons. When the complaint is filed without leave and notice, a summons shall issue, and be served as in other cases.

History: This section en. Sec. 1419, C. Civ. Proc. 1895; re-en. Sec. 6952, Rev. C. 1907; re-en. Sec. 9585, R. C. M. 1921. See also history of Sec. 9576.

9586. Service by publication. When a summons is returned not served because the defendant, or its officers or office, cannot be found within the county, the clerk shall publish the summons as in other cases.

History: This section en. Sec. 1420, C. Civ. Proc. 1895; re-en. Sec. 6953, Rev. C. 1907; re-en. Sec. 9586, R. C. M. 1921. See also history of Sec. 9576.

9587. Pleadings. The pleadings shall be as in other cases.

History: This section en. Sec. 1421, C. Civ. Proc. 1895; re-en. Sec. 6954, Rev. C. 1907; re-en. Sec. 9587, R. C. M. 1921. See also history of Sec. 9576.

Operation and Effect

A complaint in an action for usurpation of office, which alleges the election of the relator to the office in question, the making and subscribing of an oath of office, the execution, approval, acceptance, and filing of his official bond, the usurpation and intrusion of the defendant, the refusal of the county attorney to institute the action, and prays that defendant be excluded from holding and exercising the duties of the office, and that the relator be adjudged entitled to hold the same and be installed therein, is good on demurrer. People ex rel. Kern v. McIntyre, 10 M 166, 167, 25 P 100.

Under this section, the pleadings of both parties to a proceeding in quo warranto fall within the rules relating to pleadings in ordinary civil actions, and under them the defendant may interpose as many defenses as he has, even though they be inconsistent, provided they are not so incompatible as to render the one or the other absolutely false, the test of their propriety being whether or not the proof of one necessarily disproves the other. State ex rel. Nagle v. Stafford et al., 97 M 275, 285, 34 P 2d 372.

References

State ex rel. Rankin v. Martin, 68 M 392, 396, 219 P 632; State ex rel. Wallace v. Callow, 78 M 308, 313, 254 P 187.

9588. Judgment. When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs.

History: This section en. Sec. 1422, C. Civ. Proc. 1895; re-en. Sec. 6955, Rev. C. 1907; re-en. Sec. 9588, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 809. See also history of Sec. 9576.

References

State ex rel. Rankin v. Martin, 68 M 392, 396, 219 P 632.

9589. Judgment against directors of corporation. When the action is against a director of a corporation, and the court finds that, at his election, either illegal votes were received, or legal votes were rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted, and of induction in favor of the person who was entitled to be declared elected at such election.

History: This section en. Sec. 1423, C. Civ. Proc. 1895; re-en. Sec. 6956, Rev. C. 1907; re-en. Sec. 9589, R. C. M. 1921. See also history of Sec. 9576.

9590. When court may order new election. In a case named in the last section, the court may order a new election to be held, at a time and place, and by judges, appointed by the court, notice of which election, and naming the judges, shall be given for the time and in the manner provided by law for notice of elections of directors of such corporation; the order of the court shall become obligatory upon the corporation and its officers when a duly certified copy thereof is served upon its secretary personally, or left at its principal office; and the court may enforce its order by attachment, or in any other manner it deems necessary.

History: This section en. Sec. 1424, C. Civ. Proc. 1895; re-en. Sec. 6597, Rev. C. 1907; re-en. Sec. 9590, R. C. M. 1921. See also history of Sec. 9576.

9591. Rights of person adjudged to be entitled to office. If judgment be rendered in favor of the person averred to be entitled to an office, he may, after taking the oath of office, and executing any official bond required by law, take upon him the execution of the office; and he shall immediately thereafter demand of the defendant all the books and papers in his custody or within his power, appertaining to the office from which he has been ousted.

History: This section en. Sec. 1425, C. Civ. Proc. 1895; re-en. Sec. 6958, Rev. C. 1907; re-en. Sec. 9591, R. C. M. 1921. See also history of Sec. 9576.

9592. Action for damages. Such person may, at any time within one year after the date of such judgment, bring an action against the party ousted, and recover the damages he sustained by reason of such usurpation.

History: This section en. Sec. 1426, C. Civ. Proc. 1895; re-en. Sec. 6959, Rev. C. 1907; re-en. Sec. 9592, R. C. M. 1921. See also history of Sec. 9576.

Operation and Effect

The right of action given by this section cannot refer to one for salary. *Wynne v. City of Butte*, 45 M 417, 423, 123 P 531.

9593. Judgment—how enforced. If such defendant refuse or neglect to deliver over any such book or paper pursuant to such demand, he shall be deemed guilty of a contempt of court, and shall be fined in any sum not exceeding ten thousand dollars, and imprisoned in the jail of the county until he complies with the order of the court, or is otherwise discharged by due course of law.

History: This section en. Sec. 1427, C. Civ. Proc. 1895; re-en. Sec. 6960, Rev. C. 1907; re-en. Sec. 9593, R. C. M. 1921. See also history of Sec. 9576.

9594. When corporation has forfeited its rights. When, in any such action, it is found and adjudged that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, or franchises, or has not used the same during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be

dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense, or the exercise of such power.

History: This section en. Sec. 1428, C. Civ. Proc. 1895; re-en. Sec. 6961, Rev. C. 1907; re-en. Sec. 9594, R. C. M. 1921. See also history of Sec. 9576.

9595. Appointment of trustees, etc. The court rendering a judgment dissolving a corporation shall appoint trustees of the creditors and stockholders of the corporation, who, after giving an undertaking, payable to the state, in such sum and with such sureties as the court may designate and approve, conditioned that they will faithfully discharge their trust, and properly pay and apply all money that may come into their hands, shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the money and other property which remain after the payment of debts and necessary expenses.

History: This section en. Sec. 1429, C. Civ. Proc. 1895; re-en. Sec. 6962, Rev. C. 1907; re-en. Sec. 9595, R. C. M. 1921. See also history of Sec. 9576.

9596. Powers and duties of trustees. The trustees shall forthwith demand all money, property, books, deeds, notes, bills, obligations, and papers of every description, within the custody, power, or control of the officers of the corporation, or either of them belonging to the corporation, or in anywise necessary for the settlement of its affairs, or for the discharge of its debts and liabilities, and they may sue for and recover the demands and property of the corporation, and shall be jointly and severally liable to the creditors and stockholders to the extent of its property and effects which come into their hands.

History: This section en. Sec. 1430, C. Civ. Proc. 1895; re-en. Sec. 6963, Rev. C. 1907; re-en. Sec. 9596, R. C. M. 1921. See also history of Sec. 9576.

9597. How trustees placed in possession. An officer of such corporation who refuses or neglects to deliver over any such money, or other things pursuant to such demand, shall be deemed guilty of a contempt of court, and shall be fined not exceeding ten thousand dollars, and imprisoned in the jail of the proper county until he complies with the order of the court, or is otherwise discharged by due course of law; and he shall be liable to the trustees for the value of all money, or other things, so refused or neglected to be surrendered, together with all damages that have been sustained by the stockholders and creditors of the corporation, or any of them, in consequence of such neglect or refusal.

History: This section en. Sec. 1431, C. Civ. Proc. 1895; re-en. Sec. 6964, Rev. C. 1907; re-en. Sec. 9597, R. C. M. 1921. See also history of Sec. 9576.

9598. Judgment for costs. If judgment be rendered against a corporation, or against a person claiming to be a corporation, the court may render judgment for costs against the directors or other officers of the corporation, or against the person claiming to be a corporation.

History: This section en. Sec. 1432, C. Civ. Proc. 1895; re-en. Sec. 6965, Rev. C. 1907; re-en. Sec. 9598, R. C. M. 1921. See also history of Sec. 9576.

9599. Actions have precedence. Actions under this chapter in any court shall have precedence of any civil business pending therein; and the court, if the matter is of public concern, shall, on the motion of the attorney-general, or the attorney of the party, require as speedy a trial of the merits of the case as may be consistent with the rights of the parties.

History: This section en. Sec. 1433, C. Civ. Proc. 1895; re-en. Sec. 6966, Rev. C. 1907; re-en. Sec. 9599, R. C. M. 1921. See also history of Sec. 9576.

9600. Actions in supreme court. Actions under this chapter, commenced in the supreme court, shall be conducted in the same manner as if commenced in the district court, and the clerk of the supreme court shall have the same authority to issue summons and other process, and to enter orders and judgments, as the clerk of the district court has in like cases. All pleadings and the conduct of the trial shall be the same as in the district court. If a jury is required to determine an issue of fact, a jury shall be drawn and selected from the jury-boxes of the county in which the seat of government is located, and the clerk of the district court of said county must place such jury-boxes in the custody of the clerk of the supreme court for that purpose.

History: This section en. Sec. 1434, C. Civ. Proc. 1895; re-en. Sec. 6967, Rev. C. 1907; re-en. Sec. 9600, R. C. M. 1921. See also history of Sec. 9576.

9601. Effect of appeal. If the action is commenced in the district court, an appeal may be taken from the judgment by either party to the supreme court as in other cases, but if there is judgment of ouster against the defendant, there shall be no stay of execution or proceedings pending such appeal.

History: This section en. Sec. 1435, C. Civ. Proc. 1895; re-en. Sec. 6968, Rev. C. 1907; re-en. Sec. 9601, R. C. M. 1921. See also history of Sec. 9576.

CHAPTER 66

ACTIONS AGAINST BOATS

- Section 9602. For what boats may be attached.
9603. Claims that are liens upon boats.
9604. Priority of liens.
9605. Limitation of actions against boats.
9606. When lien to attach.
9607. Liability of rafts—proceedings same as against boats.
9608. Proceedings—how commenced.
9609. Description of boat.
9610. Summons—how served.
9611. Who may serve summons.
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9613. Boat may be discharged before judgment by giving bond.
9614. Execution against boat.
9615. What officer may sell to satisfy execution.
9616. Status of purchaser of fractional interest.
9617. Plaintiff's right to otherwise sue not affected.
9618. Sufficient allegation that services were rendered boat.

9602. For what boats may be attached. Any boat found within the waters of this state is liable:

1. For all debts contracted by the master, owner, agent, clerk, or consignee thereof, on account of supplies furnished for the use of such

boat; or on account of work done or materials furnished in building, repairing, getting out, furnishing, or equipping such boat;

2. For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or any contract relative to the transportation of persons or property, entered into by the master, owner, agent, clerk, or consignee thereof;

3. For all injuries to persons or property by such boat, or by the officers or crew, done in connection with the business of such boat.

History: En. Sec. 1, p. 75, L. 1869; re-en. Sec. 161, p. 59, Cod. Stat. 1871; re-en. Sec. 204, p. 90, L. 1877; re-en. Sec. 204, 1st Div. Rev. Stat. 1879; re-en. Sec. 206, 1st Div. Comp. Stat. 1887; re-en. Sec. 1450, C. Civ. Proc. 1895; re-en. Sec. 6969, Rev. C. 1907; re-en. Sec. 9602, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 813.

Operation and Effect

The provisions of sections 9602 et seq. are not applicable to a steam dredge and amalgamator used for mining purposes. *Dietrich v. Martin*, 24 M 145, 60 P 1087.

9603. Claims that are liens upon boats. Claims growing out of any of the above causes are liens upon such boat, its apparel, tackling, furniture, and appendages, including barges and lighters, if owned by the owners of such boat, and used therewith, at the time suit is commenced.

History: En. Sec. 2, p. 75, L. 1869; re-en. Sec. 162, p. 59, Cod. Stat. 1871; re-en. Sec. 205, p. 90, L. 1877; re-en. Sec. 205, 1st Div. Rev. Stat. 1879; re-en. Sec. 207, 1st Div. Comp. Stat. 1887; re-en. Sec. 1451, C. Civ. Proc. 1895; re-en. Sec. 6970, Rev. C. 1907; re-en. Sec. 9603, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 813.

9604. Priority of liens. Such liens shall take preference of any claim against the boat itself, or any or all of its owners, growing out of any other causes than those above enumerated, and as between themselves they shall be preferred in the following order:

1. Those resulting from wages for their services on board such boat within the year then passed; providing, that such suit is brought within twenty days after the cessation of such labor;

2. Those resulting from contracts made within this state;

3. All other causes.

History: En. Sec. 3, p. 75, L. 1869; re-en. Sec. 163, p. 59, Cod. Stat. 1871; re-en. Sec. 206, p. 90, L. 1877; re-en. Sec. 206, 1st Div. Rev. Stat. 1879; re-en. Sec. 208, 1st Div. Comp. Stat. 1887; re-en. Sec. 1452, C. Civ. Proc. 1895; re-en. Sec. 6971, Rev. C. 1907; re-en. Sec. 9604, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 813.

9605. Limitation of actions against boats. Actions against boats under the provisions of this chapter shall not be brought after the lapse of one year from the time the cause of action accrued.

History: En. Sec. 4, p. 75, L. 1869; re-en. Sec. 164, p. 59, Cod. Stat. 1871; re-en. Sec. 207, p. 90, L. 1877; re-en. Sec. 207, 1st Div. Rev. Stat. 1879; re-en. Sec. 209, 1st Div. Comp. Stat. 1887; re-en. Sec. 1453, C. Civ. Proc. 1895; re-en. Sec. 6972, Rev. C. 1907; re-en. Sec. 9605, R. C. M. 1921.

9606. When lien to attach. The lien shall attach from the commencement of the suit, subject only to such other liens as are of a preferred class.

History: En. Sec. 5, p. 75, L. 1869; re-en. Sec. 165, p. 59, Cod. Stat. 1871; re-en. Sec. 208, p. 91, L. 1877; re-en. Sec. 208, 1st Div. Rev. Stat. 1879; re-en. Sec. 210, 1st Div. Comp. Stat. 1887; re-en. Sec. 1454, C. Civ. Proc. 1895; re-en. Sec. 6973, Rev. C. 1907; re-en. Sec. 9606, R. C. M. 1921.

9607. Liability of rafts*—proceedings same as against boats. Any raft found in any of the waters of this state shall be liable for all debts contracted by the owner, clerk, pilot, or agent thereof, on account of work done or services rendered for such raft. Claims growing out of either of the above causes shall be a lien upon the raft, its tackling and appendages, for the term of twenty days from the time the right thereof accrued, and the same rules shall govern, and the same process shall be had, that are prescribed for similar liens against boats.

History: En. Sec. 6, p. 75, L. 1869; re-en. Sec. 166, p. 59, Cod. Stat. 1871; re-en. Sec. 209, p. 91, L. 1877; re-en. Sec. 209, 1st Div. Rev. Stat. 1879; re-en. Sec. 211, 1st Div. Comp. Stat. 1887; re-en. Sec. 1455, C. Civ. Proc. 1895; re-en. Sec. 6974, Rev. C. 1907; re-en. Sec. 9607, R. C. M. 1921.

9608. Proceedings—how commenced. Any person desiring to take the benefit of this chapter shall file with the clerk of any court, or justice of the peace, having jurisdiction, a complaint in writing, duly verified by the plaintiff, or his agent or attorney, which complaint shall show that the plaintiff is entitled to the benefit of this chapter; whereupon such clerk, or justice of the peace, shall issue a writ of attachment to the proper officer, commanding him to seize the boat, its tackling, apparel, furniture, and appendages, and retain the same until released by due course of law.

History: En. Sec. 7, p. 76, L. 1869; re-en. Sec. 167, p. 60, Cod. Stat. 1871; re-en. Sec. 210, p. 91, L. 1877; re-en. Sec. 210, 1st Div. Rev. Stat. 1879; re-en. Sec. 212, 1st Div. Comp. Stat. 1887; re-en. Sec. 1456, C. Civ. Proc. 1895; re-en. Sec. 6975, Rev. C. 1907; re-en. Sec. 9608, R. C. M. 1921.

9609. Description of boat. The complaint shall describe the boat by name as defendant, but if it have no name, then by such description as will enable the officer attaching to seize the proper property.

History: En. Sec. 8, p. 76, L. 1869; re-en. Sec. 168, p. 60, Cod. Stat. 1871; re-en. Sec. 211, p. 91, L. 1877; re-en. Sec. 211, 1st Div. Rev. Stat. 1879; re-en. Sec. 213, 1st Div. Comp. Stat. 1887; re-en. Sec. 1457, C. Civ. Proc. 1895; re-en. Sec. 6976, Rev. C. 1907; re-en. Sec. 9609, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 815.

9610. Summons—how served. The usual summons shall be issued, directed to the boat by name, or to the property to be attached, if no name appear, and be served upon the master, owner, clerk, agent, or consignee thereof, and if none of them can be found, by posting up a copy in some conspicuous part of the boat, or property to be attached. The writ shall be served according to the directions it contains.

History: En. Sec. 9, p. 76, L. 1869; re-en. Sec. 169, p. 60, Cod. Stat. 1871; re-en. Sec. 212, p. 92, L. 1877; re-en. Sec. 212, 1st Div. Rev. Stat. 1879; re-en. Sec. 214, 1st Div. Comp. Stat. 1887; re-en. Sec. 1458, C. Civ. Proc. 1895; re-en. Sec. 6977, Rev. C. 1907; re-en. Sec. 9610, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 816.

9611. Who may serve summons. Any sheriff, constable, or city marshal may serve the writ and summons above mentioned, whether the same issue from the office of the clerk or from a justice of the peace, and any clerk or justice may, in his discretion, appoint any suitable person to serve such summons and writ, who shall have all the power of a sheriff in the premises.

History: En. Sec. 10, p. 76, L. 1869; re-en. Sec. 170, p. 60, Cod. Stat. 1871; re-en. Sec. 213, p. 92, L. 1877; re-en. Sec. 213, 1st Div. Rev. Stat. 1879; re-en. Sec. 215, 1st Div. Comp. Stat. 1887; re-en. Sec. 1459, C. Civ. Proc. 1895; re-en. Sec. 6978, Rev. C. 1907; re-en. Sec. 9611, R. C. M. 1921.

9612. Who may appear for defendant—no continuance granted plaintiff. Any master, agent, clerk, consignee, or other person interested in the boat may appear by himself, his agent or attorney, for the defendant, and conduct the defense of the suit, and no continuance shall be granted to the plaintiff while the boat is in custody.

History: En. Sec. 11, p. 76, L. 1869; re-en. Sec. 171, p. 60, Cod. Stat. 1871; re-en. Sec. 214, p. 92, L. 1877; re-en. Sec. 214, 1st Div. Rev. Stat. 1879; re-en. Sec. 216, 1st Div. Comp. Stat. 1887; re-en. Sec. 1460, C. Civ. Proc. 1895; re-en. Sec. 6979, Rev. C. 1907; re-en. Sec. 9612, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 821.

Operation and Effect

The filing of a demurrer by a judgment creditor of a boat in an action brought to subject it to claims for services, and in which the creditor assumes to act and appear for himself alone, does not constitute an appearance of the defendant boat under this section. *Dietrich v. Steam Dredge & Amalgamator*, 14 M 261, 267, 36 P 81.

9613. Boat may be discharged before judgment by giving bond. The boat may be discharged at any time before final judgment by giving bonds with at least two sureties, to be approved by the officer serving the writ, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand and costs, conditioned that the obligors will pay the amount found due to the plaintiff, with costs.

History: En. Sec. 12, p. 76, L. 1869; re-en. Sec. 172, p. 60, Cod. Stat. 1871; re-en. Sec. 215, p. 92, L. 1877; re-en. Sec. 215, 1st Div. Rev. Stat. 1879; re-en. Sec. 217, 1st Div. Comp. Stat. 1887; re-en. Sec. 1461, C. Civ. Proc. 1895; re-en. Sec. 6980, Rev.

C. 1907; re-en. Sec. 9613, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 822.

References

Cited or applied as section 217, First Division Compiled Statutes 1887, in *Dietrich v. Martin*, 24 M 146, 60 P 1087.

9614. Execution against boat. If judgment be rendered against the boat before it is discharged, as provided in the last section, execution shall be issued against it, together with its apparel, tacklings, furniture, and appendages.

History: En. Sec. 13, p. 77, L. 1869; re-en. Sec. 173, p. 61, Cod. Stat. 1871; re-en. Sec. 216, p. 93, L. 1877; re-en. Sec. 216, 1st Div. Rev. Stat. 1879; re-en. Sec.

218, 1st Div. Comp. Stat. 1887; re-en. Sec. 1462, C. Civ. Proc. 1895; re-en. Sec. 6981, Rev. C. 1907; re-en. Sec. 9614, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 824.

9615. What officer may sell to satisfy execution. The officer may sell any of the furniture and appendages of the boat, if by doing so he can satisfy the demand; if he sell the boat itself, he must sell it to the bidder who will advance the amount necessary to satisfy the execution for the lowest fractional share of the boat, unless the person appearing for the boat require a different and equally convenient mode of sale.

History: En. Sec. 14, p. 77, L. 1869; re-en. Sec. 174, p. 61, Cod. Stat. 1871; re-en. Sec. 217, p. 93, L. 1877; re-en. Sec. 217, 1st Div. Rev. Stat. 1879; re-en. Sec.

219, 1st Div. Comp. Stat. 1887; re-en. Sec. 1463, C. Civ. Proc. 1895; re-en. Sec. 6982, Rev. C. 1907; re-en. Sec. 9615, R. C. M. 1921.

9616. Status of purchaser of fractional interest. If the fractional share of the boat be thus sold, the purchaser shall hold such share of interest jointly with the owners.

History: En. Sec. 15, p. 77, L. 1869; re-en. Sec. 175, p. 61, Cod. Stat. 1871; re-en. Sec. 218, p. 93, L. 1877; re-en. Sec. 218, 1st Div. Rev. Stat. 1879; re-en. Sec. 220,

1st Div. Comp. Stat. 1887; re-en. Sec. 1464, C. Civ. Proc. 1895; re-en. Sec. 6983, Rev. C. 1907; re-en. Sec. 9616, R. C. M. 1921.

9617. Plaintiff's right to otherwise sue not affected. Nothing herein contained shall affect the right of a plaintiff to sue in the same manner as in other cases, notwithstanding the provisions of this chapter.

History: En. Sec. 16, p. 77, L. 1869; 1st Div. Comp. Stat. 1887; re-en. Sec. 1465, re-en. Sec. 176, p. 61, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6984, Rev. Sec. 219, p. 93, L. 1877; re-en. Sec. 219, C. 1907; re-en. Sec. 9617, R. C. M. 1921.
1st Div. Rev. Stat. 1879; re-en. Sec. 221,

9618. Sufficient allegation that services were rendered boat. It shall be sufficient for the plaintiff to allege in his complaint or affidavit that the services were rendered or material was furnished the boat by its name.

History: En. Sec. 17, p. 77, L. 1869; 1st Div. Comp. Stat. 1887; re-en. Sec. 1466, re-en. Sec. 177, p. 61, Cod. Stat. 1871; re-en. C. Civ. Proc. 1895; re-en. Sec. 6985, Rev. Sec. 220, p. 93, L. 1877; re-en. Sec. 220, C. 1907; re-en. Sec. 9618, R. C. M. 1921.
1st Div. Rev. Stat. 1879; re-en. Sec. 222,

CHAPTER 67

PLACE OF TRIAL OF ACTIONS IN JUSTICE COURTS

- Section 9619. Where actions must be commenced.
9620. Place of trial may be changed in certain cases.
9621. Limitation on change—contents of affidavit.
9622. To what court transferred.
9623. Proceedings after order changing place of trial.
9624. Effect of an order changing place of trial.
9625. Transfer of cases to district court.

9619. Where actions must be commenced. Actions in justices' courts may be commenced, and, subject to the right to change the place of trial, as in this chapter provided, may be tried:

1. When the defendant, or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for the recovery of personal property, or the value thereof, or damages for taking or detaining the same; in any township of the county in which the property, or any part thereof, may be found, or in which the property, or any part thereof, was taken, or in which the defendant or either of the defendants resides;

2. When the defendant, or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for damages for violation of an express or implied contract, or for money due on an express or implied contract, debt, note, or account; in any township of the county in which such contract or obligation is to be or was to have been performed, or such money is to be or was to have been paid, or in which the defendant or either of the defendants resides; and the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed or paid, unless there is a special contract to the contrary;

3. When the defendant, or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for damages for injury to person, property, or reputation; in any township of the county where the injury was committed, or in which the defendant or either of the defendants resides;

4. When the defendant is a nonresident of the county; in any township of any county where he may be found and served with summons personally;

5. When the defendant is a nonresident of the state; in any township of the state;

6. When the parties voluntarily appear and plead, without summons; in any township of the state;

7. In all other cases; in any township of the county in which the defendant, or any one of the defendants, if there be more than one, resides, or may be found and served with summons personally.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 832.

Operation and Effect

The service of a summons issued out of a justice's court does not give jurisdiction over the person of a defendant who was served outside the county of his residence, in the absence of any showing that he could not be found and served in the latter county. *Wilcox v. Toston State Bank*, 53 M 490, 492, 165 P 292.

In the absence of statute giving foreign corporations a domestic residence, they remain nonresidents of the state and may, under this section, subdivision 5, be sued in a justice court in any township of the state. *Pue v. Northern Pacific Ry. Co.*, 78 M 40, 42, 43, 252 P 313.

Id. Plaintiff performed work for defendant railway company in L. & C. county, where defendant's principal place of business was located and where the agent designated for service of process resided; the defendant also did business and had an agent in S. B. county. Plaintiff brought suit in a justice court in the latter county, summons being served on the agent there. Held, under the preceding

rule, that the court acquired jurisdiction to try the cause.

If an action is commenced in a justice court of a county other than the one fixed by this section, the court acquires no jurisdiction, and in such a case, the following section, enumerating the cases in which a change of place of trial may be had, has no application. *State ex rel. General Oil Corp. v. Kelly*, 94 M 445, 448, 23 P 2d 555.

Id. An action to recover money due may not be maintained in a justice court of a county other than that in which the contract was made or the obligation incurred and in which the defendant resides, unless there be a special agreement as to the place of performance or payment.

Id. A justice court is one of limited jurisdiction and there are not presumptions in favor of its jurisdiction; all facts necessary to confer it must appear affirmatively from the docket.

Id. Since the district court on appeal from a justice court would have no jurisdiction of a cause over which the latter court had none, certiorari is available to annul a default judgment rendered by a justice of the peace in a cause over which he had no jurisdiction because commenced in the wrong county.

9620. Place of trial may be changed in certain cases. The court may, at any time before trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party.

2. When either party makes and files an affidavit that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice.

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township, town, or city against him.

4. When, from any cause, the justice is disqualified from acting.

5. When the justice is sick or unable to act.

History: Ap. p. Sec. 594, p. 160, Ban-nack Stat.; re-en. Sec. 700, p. 176, Cod. Stat. 1871; re-en. Sec. 760, 1st Div. Rev. Stat. 1879; re-en. Sec. 780, 1st Div. Comp. Stat. 1887; en. Sec. 1481, C. Civ. Proc. 1895; re-en. Sec. 6897, Rev. C. 1907; re-en. Sec. 9620, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 833.

Operation and Effect

If an action is commenced in a justice court of a county other than the one fixed

by the preceding section, the court acquires no jurisdiction, and in such a case, this section, enumerating the cases in which a change of place of trial may be had, has no application. *State ex rel. General Oil Corp. v. Kelly*, 94 M 445, 448, 23 P 2d 555.

References

Cited or applied as section 6987, Revised Codes, in *State ex rel. Jacobs v. District Court*, 48 M 410, 414, 138 P 1091.

9621. Limitation on change—contents of affidavit. The place of trial cannot be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second, and third subdivisions of the preceding section. The affidavit mentioned in subdivisions one and three of the preceding section must state the facts; the affidavit mentioned in subdivision two of said section need not state the facts, and the filing thereof shall be sufficient to divest the justice as to whom such disqualification is alleged of authority to try the case.

History: En. Sec. 1482, C. Civ. Proc. 1895; re-en. Sec. 6988, Rev. C. 1907; amd. Sec. 1, Ch. 37, L. 1921; re-en. Sec. 9621, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 834.

9622. To what court transferred. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justice's court in the same county.

History: En. Sec. 1483, C. Civ. Proc. 1895; re-en. Sec. 6989, Rev. C. 1907; re-en. Sec. 9622, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 835.

9623. Proceedings after order changing place of trial. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein.

2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least a day before the time fixed for trial. If no answer or demurrer has been made by the defendant, he must be allowed to plead.

History: En. Sec. 1484, C. Civ. Proc. 1895; re-en. Sec. 6990, Rev. C. 1907; re-en. Sec. 9623, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 836.

Operation and Effect

Where defendant on being granted a change of venue, refused to pay the accrued costs, as provided by this section, it was the duty of the justice of the peace to proceed with the trial. *Taney v. Vollenweider*, 28 M 147, 149, 72 P 415.

9624. Effect of an order changing place of trial. From the time the order changing the place of trial is made, the court to which the action is

thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

History: En. Sec. 1485, C. Civ. Proc. 1895; re-en. Sec. 6991, Rev. C. 1907; re-en. Sec. 9624, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 837.

9625. Transfer of cases to district court. The parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, nor can any issue presenting such question be tried by such court; and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same from his docket to the clerk of the district court of the county; and from the time of filing such pleadings or transcript with the clerk, the district court shall have over the action the same jurisdiction as if it had been commenced therein; provided, that in cases of forcible entry and unlawful detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined. When the action is certified to the district court, upon the answer of the defendant, he must file an undertaking, to be approved by the justice, to the effect that he will pay all costs that may be awarded against him on the trial in the district court.

History: Ap. p. Sec. 593, Bannack Stat.; re-en. Sec. 699, p. 176, Cod. Stat. 1871; re-en. Sec. 759, 1st Div. Rev. Stat. 1879; re-en. Sec. 779, 1st Div. Comp. Stat. 1887; en. Sec. 1486, C. Civ. Proc. 1895; re-en. Sec. 6992, Rev. C. 1907; re-en. Sec. 9625, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 838.

Operation and Effect

A complaint filed in a justice of the peace court, if stating a cause of action in ejectment, does not give the justice jurisdiction for any purpose, and he cannot confer jurisdiction on the district court by certifying the case to it. State ex rel. Lott v. District Court, 33 M 356, 358, 83 P 597.

Id. If the question of title to real estate may be raised in an action in unlawful detainer, a justice of the peace cannot certify the cause to the district court without the bond required by this section having been filed.

Id. If the question of title may not be raised in an action in unlawful detainer, all allegations respecting it in the pleadings are surplusage, and the justice of the peace court has jurisdiction to hear the cause, of which jurisdiction it cannot divest itself by certifying the cause to the district court.

Obiter: Since allegations relating to title to or possession of real property are not pertinent to forcible entry and unlawful detainer cases and if pleaded are surplusage, such an action is not subject to certification to the district court under this section. Lambert v. Helena Adjustment Co. et al., 69 M 510, 514, 222 P 1057.

References

Cited or applied as section 6992, Revised Codes, in Mettler v. Adamson, 38 M 198, 203, 99 P 441.

CHAPTER 68

MANNER OF COMMENCING ACTIONS IN JUSTICE COURTS

- Section 9626. Actions—how commenced.
- 9627. Summons may issue within a year.
- 9628. Defendant may waive summons.
- 9629. Parties may appear in person or by attorney.
- 9630. When guardian necessary—how appointed.

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88 P.(2d) 4

- 9631. Summons—how issued, directed, and what to contain.
- 9632. Time for appearance of defendant.
- 9633. Alias summons.
- 9634. Same—within a year.
- 9635. Summons—limitation upon time of service.
- 9636. Service of summons.
- 9637. Hour of appearance.

9626
111 P.(2d) 301,
302

9626. Actions—how commenced. An action in a justice's court is commenced by filing a copy of the account, note, bill, bond, or instrument upon which the action is brought, with a statement of the amount due thereon, or a concise statement in writing of the cause of action, either of which is deemed a complaint.

History: Ap. p. Sec. 554, p. 151, Bannack Stat.; re-en. Sec. 660, p. 168, Cod. Stat. 1871; re-en. Sec. 720, 1st Div. Rev. Stat. 1879; re-en. Sec. 740, 1st Div. Comp. Stat. 1887; en. Sec. 1500, C. Civ. Proc. 1895; re-en. Sec. 6993, Rev. C. 1907; re-en. Sec. 9626, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 839.

Operation and Effect

Since an action can be instituted only by the filing of a formal complaint, or, what is its equivalent, by the filing of a copy of the account, bill, bond, or instrument upon which the action is brought, with a statement of the amount due thereon, a justice cannot issue an attachment or proceed to judgment without this prerequisite. *Shandy v. McDonald*, 38 M 393, 399, 100 P 203.

9627
100 Mont. 253
49 P (2d) 441

9627. Summons may issue within a year. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

History: En. Sec. 1501, C. Civ. Proc. 1895; re-en. Sec. 6994, Rev. C. 1907; re-en. Sec. 9627, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 840.

References

State ex rel. St. George v. Justice Court, 84 M 173, 177, 274 P 495.

9628. Defendant may waive summons. At any time after the complaint is filed, the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

History: En. Sec. 1502, C. Civ. Proc. 1895; re-en. Sec. 6995, Rev. C. 1907; re-en. Sec. 9628, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 841.

Operation and Effect

By joining with his codefendant in a motion to dismiss an action against them, in a justice's court, a party waives service of summons and appears for all purposes. *State ex rel. Beadle v. Smith*, 42 M 492, 494, 113 P 294.

A "general appearance" is made when a party comes into court without limiting the object for which he comes in. *Stofels v. Cherry*, 67 M 443, 445, 215 P 1098.

Id. Where defendant in an action on an account before a justice of the peace

filed an answer to the merits coupling it with a counterclaim, making an offer at the same time to allow judgment to be taken against him for a stated amount with costs, and thereafter on appeal to the district court asked leave to amend his answer, he waived irregularity of service of summons by his general appearance and was precluded from challenging the court's jurisdiction over his person or the subject matter of the action.

Under this section, defendant in a justice's court may waive issuance of summons by appearance and pleading. *State ex rel. St. George v. Justice Court*, 84 M 173, 177, 274 P 495.

9629
66 P (2d) 342,
348

9629. Parties may appear in person or by attorney. Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.

9629
114 P.(2d) 1070

History: En. Sec. 551, p. 151, Bannack Stat.; re-en. Sec. 657, p. 167, Cod. Stat. 1871; re-en. Sec. 717, 1st Div. Rev. Stat. 1879; re-en. Sec. 737, 1st Div. Comp. Stat. 1887; amd. Sec. 1503, C. Civ. Proc. 1895; re-en. Sec. 6996, Rev. C. 1907; re-en. Sec. 9629, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 842.

9630. When guardian necessary—how appointed. When an infant, insane, or incompetent person is a party, he must appear either by his general guardian, if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent, upon the application of a relative or friend.
2. If the infant, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years, and apply at or before the summons is returned; if he be under the age of fourteen years, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice, on his own motion.

History: Ap. p. Sec. 555, p. 151, Bannack Stat.; re-en. Sec. 661, p. 169, Cod. Stat. 1871; re-en. Sec. 721, 1st Div. Rev. Stat. 1879; re-en. Sec. 741, 1st Div. Comp. Stat. 1887; en. Sec. 1504, C. Civ. Proc. 1895; re-en. Sec. 6997, Rev. C. 1907; re-en. Sec. 9630, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 843.

9631. Summons—how issued, directed, and what to contain. The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, the name of the county and city or township in which the action is commenced, and the names of the parties thereto;
2. A sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him;
3. A direction that the defendant appear and answer before the justice, at his office, as specified in the next section. And that if he fail to appear and answer, judgment will be taken against him according to the complaint.

History: Ap. p. Sec. 556, p. 152, Bannack Stat.; re-en. Sec. 662, p. 169, Cod. Stat. 1871; re-en. Sec. 722, 1st Div. Rev. Stat. 1879; re-en. Sec. 742, 1st Div. Comp. Stat. 1887; en. Sec. 1505, C. Civ. Proc. 1895; re-en. Sec. 6998, Rev. C. 1907; re-en. Sec. 9631, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 844.

References
State ex rel. St. George v. Justice Court, 80 M 53, 57, 257 P 1034.

9632. Time for appearance of defendant. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest be indorsed upon the summons, forthwith.
2. In all other cases it shall be made returnable in not less than four nor more than ten days from its date, and shall be served at least four days before the time for appearance.

History: En. Sec. 557, p. 152, Bannack Stat.; re-en. Sec. 663, p. 169, Cod. Stat. 1871; re-en. Sec. 723, 1st Div. Rev. Stat. 1879; re-en. Sec. 743, 1st Div. Comp. Stat. 1887; amd. Sec. 1506, C. Civ. Proc. 1895; re-en. Sec. 6999, Rev. C. 1907; re-en. Sec. 9632, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 845.

9631
amended
L. 39 c. 91
sec. 1 p. 193

9632
amended
L. 37 c. 34
sec. 3
pp. 56, 57

9632
amended
L. 39 c. 196
sec. 1
pp. 497, 498

9632
Sub. 2
196 P.(2d) 453

Operation and Effect

Under this section, the time within which the summons in an action commenced in a justice's court is returnable is fixed at not less than four days; hence where service of summons was made less than four days before time for appearance expired, the justice did not acquire jurisdiction over the person of defendant, and a judgment entered upon such service was void. *State v. Justice of Peace Court et al.*, 69 M 450, 452, 222 P 1055.

In an action for debt brought in a justice of the peace court, the summons was served on the seventh day of a certain

month and made returnable on the eleventh of the same month at 10 A. M. This section provides that summons shall be served at least four days before the time for appearance. Held, under former rulings, that the time between the seventh and the eleventh did not constitute four full days; that therefore the justice did not acquire jurisdiction, and that the judgment rendered was a nullity. *Novaack v. Perich et al.*, 90 M 91, 93, 300 P 240.

References

State ex rel. St. George v. Justice Court, 80 M 53, 57, 257 P 1034; *In re Esterly's Estate*, 97 M 206, 212, 34 P 2d 539.

9633
amended
L. 37 c. 34
sec. 4 p. 57
(Title of act
does not
mention this
section)

9633. Alias summons. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not exceeding ninety days from its date.

History: En. Sec. 1507, C. Civ. Proc. 1895; re-en. Sec. 7000, Rev. C. 1907; re-en. Sec. 9633, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 846.

9633
100 Mont. 253
49 P (2d) 441

9634. Same—within a year. The justice may, within a year from the date of filing the complaint, issue as many alias summonses as may be demanded by the plaintiff.

History: En. Sec. 1508, C. Civ. Proc. 1895; re-en. Sec. 7001, Rev. C. 1907; re-en. Sec. 9634, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 847.

References

State ex rel. St. George v. Justice Court, 84 M 173, 177, 274 P 495.

9635. Summons—limitation upon time of service. The summons cannot be served out of the county of the justice before whom the action is brought, except when the action is brought upon a joint contract or obligation of two or more persons who reside in different counties, and the summons has been served upon the defendant resident of the county, in which case the summons may be served upon the other defendant out of the county; and, except, also, when an action is brought against a party who has contracted to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides; and, except, also, where an action is brought for an injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county where defendant resides.

History: En. Sec. 1509, C. Civ. Proc. 1895; re-en. Sec. 7002, Rev. C. 1907; re-en. Sec. 9635, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 848.

References

State ex rel. General Oil Corp. v. Kelly, 94 M 445, 448, 23 P 2d 555.

9636
100 Mont. 253
49 P (2d) 441

9636. Service of summons. The summons may be served by a sheriff or constable of any of the counties of this state; provided, that when a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the county clerk of the county in which it was issued, to the effect that the person issuing the same was an acting justice of the

peace at the date of the summons; or the summons may be served by any male person resident in the state, over the age of eighteen years, not a party to the suit, and must be served and returned as provided in sections 9110 and 9111; or it may be served by publication, and sections 9117, 9118, and 9119 of this code, so far as they relate to publication of summons, are made applicable to justices' courts; the word "justice" being substituted for the word "clerk" whenever the latter word occurs.

History: En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003, Rev. C. 1907; re-en. Sec. 9636, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 849.

References

Cited or applied as section 1510, Code of Civil Procedure, before amendment, in *Layton v. Trapp*, 20 M 453, 455, 52 P 208; *State ex rel. Reagan v. Harrington*, 31 M 294, 296, 78 P 484; *State ex rel. General Oil Corp. v. Kelly*, 94 M 445, 448, 23 P 2d 555.

9637. Hour of appearance. When all parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiffs and the defendants who have appeared thereof. The parties are entitled to one hour in which to appear after the time fixed in said notice, but are not bound to remain longer than that time, unless both parties have appeared, and the justice, being present, is engaged in the trial of another cause.

9637
amended
L. 37 c. 34
sec. 5 p. 57

History: En. Sec. 1511, C. Civ. Proc. 1895; re-en. Sec. 7004, Rev. C. 1907; re-en. Sec. 9637, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 850.

Operation and Effect

A justice of the peace could not enter judgment by default on failure of defendant to appear at the time set for trial, when defendant had filed an answer putting in issue the allegations of the complaint. Where the record showed that such justice tried the issues and entered judgment on proof adduced by plaintiff, the judgment was not one by default, although the justice's docket recited the notice and entry of defendant's default.

Clark v. Great Northern Ry. Co., 30 M 458, 463, 76 P 1003; *State ex rel. Grissom v. Justice Court*, 31 M 258, 263, 78 P 498.

Failure of a justice of the peace to wait the statutory time of one hour for appearance of defendant before rendition of judgment amounted to a mere irregularity rendering it voidable and not void, and therefore not subject to collateral attack. *Billings Hardware Co. v. Bryan*, 63 M 14, 206 P 418.

References

Cited or applied as section 7004, Revised Codes, in *State ex rel. Beadle v. Smith*, 42 M 492, 495, 113 P 294.

CHAPTER 69

PLEADINGS IN JUSTICE COURTS

- Section 9638. Form of pleadings.
 9639. Pleadings in justices' courts.
 9640. Complaint defined.
 9641. When demurrer to complaint may be put in.
 9642. Answer.
 9643. If the defendant omits to set up counterclaim.
 9644. When plaintiff may demur to answer.
 9645. Proceedings on demurrer.
 9646. New matter deemed denied.
 9647. Amendment of pleadings.
 9648. Answer or demurrer to amended pleadings.
 9649. Copy of account or instrument to be filed.
 9650. Copy deemed genuine if not denied.
 9651. Variance.

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111 P.(2d) 302.
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9638. Form of pleadings. Pleadings in justices' courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended;
2. May, except the complaint, be oral or in writing;
3. Must not be verified, unless otherwise provided in sections 9619 to 9724 of this code;
4. If in writing, must be filed with the justice;
5. If oral, an entry of their substance must be made in the docket;
6. In cases of forcible entry and unlawful detainer, pleadings must be verified.

History: Earlier acts were Sec. 582, p. 158, Bannack Stat.; re-en. Sec. 688, p. 175, Cod. Stat. 1871; re-en. Sec. 748, 1st Div. Rev. Stat. 1879; re-en. Sec. 768, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1520, C. Civ. Proc. 1895; re-en. Sec. 7005, Rev. C. 1907; re-en. Sec. 9638, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 851.

Complaint

A complaint in an action brought in a justice's court to recover the balance of an account for goods, wares, and merchandise, reading as follows: "E. to M. & W., Dr. To balance for merchandise (describing it), \$255.12," was sufficient under this section and section 9640. *Moran v. Ebey*, 39 M 517, 520, 104 P 522.

On appeal from a justice court to the district court, the sufficiency of the complaint must be tested by the rules applicable to the former, and construed with great liberality, plaintiff being required only to state facts sufficient to show the nature of his demand in such a way as to enable a person of common understanding to know what is intended. *Woody v. Security State Bank et al.*, 67 M 109, 113, 214 P 1096.

Oral Confession of Judgment

Where defendant, in an action to recover a debt, in response to a summons out of a justice's court appeared in person on the day set for trial and orally "acknowledged" judgment, he in effect admitted the allegations of the complaint and the judgment entered thereon was to all intents and purposes a judgment on the pleadings, and not open to the objection that as a "confession of judgment" it was void because not evidenced by a writing executed by defendant as required by sections 9868 to 9871. (*Hunter v. Eddy*, 11 M 251, holding otherwise, overruled.) *State ex rel. Kennedy v. Hubbard*, 77 M 170, 173, 253 P 271.

Nature of Entry in Docket

Under the rule that the pleadings in a justice court as well as the statutory requirements with relation thereto must be liberally construed, held that this section, requiring that if a pleading be oral its substance must be entered in the docket, and section 9703, declaring that the justice must enter therein a concise statement of the material parts of all oral pleadings, mean no more than that he shall enter such a recital thereof as would advise a person of common understanding of the nature of the pleadings. *Malano v. Bresnan*, 76 M 366, 370 et seq., 245 P 871.

Technical Rules of Pleading Not Applicable

Technical rules of pleading should not be applied in a justice's court, and a complaint filed therein must be construed with great liberality. *Lambert v. Helena Adjustment Co. et al.*, 69 M 510, 513, 222 P 1057.

The pleadings in justice courts are not required to be in any particular form; a complaint filed in such a court must be construed with great liberality, the plaintiff being required only to state facts sufficient to show the nature of his demand so as to enable a person of common understanding to know what is intended. *Rhule v. Thrasher*, 88 M 468, 475, 295 P 266.

Id. Under the liberal construction of pleadings required by the codes, whatever is necessarily implied from allegations directly or reasonably to be inferred therefrom, is to be treated as averred directly.

References

Cited or applied as section 7005, Revised Codes, in *Wilcox v. Toston State Bank*, 53 M 490, 493, 165 P 292.

9639. Pleadings in justices' courts. The pleadings are:

1. The complaint by the plaintiff;
2. The demurrer to the complaint;

3. The answer by the defendant;

4. The demurrer to the answer.

History: Earlier acts were Sec. 583, p. 158, Bannack Stat.; re-en. Sec. 689, p. 175, Cod. Stat. 1871; re-en. Sec. 749, 1st Div. Rev. Stat. 1879; re-en. Sec. 769, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1521, C. Civ. Proc. 1895; re-en. Sec. 7006, Rev. C. 1907; re-en.

Sec. 9639, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 852.

Operation and Effect

A reply is not one of the pleadings which may be filed in a justice's court. Mettler v. Adamson, 38 M 198, 200, 99 P 441.

9640. Complaint defined. The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based.

History: Earlier acts were Sec. 584, p. 158, Bannack Stat.; re-en. Sec. 690, p. 175, Cod. Stat. 1871; re-en. Sec. 750, 1st Div. Rev. Stat. 1879; re-en. Sec. 770, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1522, C. Civ. Proc. 1895; re-en. Sec. 7007, Rev. C. 1907; re-en. Sec. 9640, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 853.

Operation and Effect

"A copy of the account" does not mean a list of the items constituting it; such list may be obtained under section 9649, the complaint is sufficient where it shows the balance due on account. Moran v. Ebey, 39 M 517, 519, 104 P 522.

The term "account," in this section, is not used in the same sense as it is in section 9167. Moran v. Ebey, 39 M 517, 519, 104 P 522.

9641. When demurrer to complaint may be put in. The defendant may, at any time before answering, demur to the complaint, upon the grounds mentioned in section 9131 of this code, except the ground mentioned in subdivision 5.

History: Earlier acts were Sec. 585, p. 158, Bannack Stat.; re-en. Sec. 691, p. 175, Cod. Stat. 1871; re-en. Sec. 751, 1st Div. Rev. Stat. 1879; re-en. Sec. 771, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1523, C. Civ. Proc. 1895; re-en. Sec. 7008, Rev. C. 1907; re-en. Sec. 9641, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 854.

There is not any reason for requiring the plaintiff to furnish the items of the account in his complaint, so long as the defendant may obtain them under the provisions of section 9649. Moran v. Ebey, 39 M 517, 519, 104 P 522.

The pleadings in justice courts are not required to be in any particular form; a complaint filed in such a court must be construed with great liberality, the plaintiff being required only to state facts sufficient to show the nature of his demand so as to enable a person of common understanding to know what is intended. Rhule v. Thrasher, 88 M 468, 475, 295 P 266.

References

Cited or applied as section 7007, Revised Codes, in Wilcox v. Toston State Bank, 53 M 490, 493, 165 P 292.

Operation and Effect

In a justice's court, all causes of action which a plaintiff has against his adversary may be joined in one complaint, if they are of such a character that the justice has jurisdiction of each of them, and the aggregate of the demands does not exceed three hundred dollars. Reynolds v. Smith, 48 M 149, 151, 135 P 1190.

References

Stoffels v. Cherry, 67 M 443, 445, 215 P 1098; State ex rel. Kennedy v. Hubbard, 77 M 171, 173, 253 P 271.

9642. Answer. The answer may contain a general denial of any or all the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts containing a defense or counterclaim, upon which an action

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111 P.(2d) 302,
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might be brought by the defendant against the plaintiff in a justice's court. He may file a copy of an account, note, bill, bond, or other instrument as a counterclaim.

History: Earlier acts were Sec. 586, p. 158, Bannack Stat.; re-en. Sec. 692, p. 175, Cod. Stat. 1871; re-en. Sec. 752, 1st Div. Rev. Stat. 1879; re-en. Sec. 772, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1524, C. Civ. Proc. 1895; re-en. Sec. 7009, Rev. C. 1907; re-en. Sec. 9642, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 855.

Operation and Effect

Where the defendant, in an action before a justice of the peace, failed to set up a then subsisting counterclaim upon which an action might have been brought in that court, he could not, under this and the following section, thereafter, on appeal to the district court, have it adjudicated. *Walter v. Cox*, 36 M 20, 24, 91 P 1063.

References

Malano v. Bressan, 76 M 366, 370, 245 P 871.

9643. If the defendant omits to set up counterclaim. If the defendant omit to set up a counterclaim in the cases mentioned in the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor. If the counterclaim exceeds three hundred dollars, he need not set it up.

History: Earlier acts were Sec. 587, p. 159, Bannack Stat.; re-en. Sec. 693, p. 175, Cod. Stat. 1871; re-en. Sec. 753, 1st Div. Rev. Stat. 1879; re-en. Sec. 773, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1525, C. Civ. Proc. 1895; re-en. Sec. 7010, Rev. C. 1907; re-en. Sec. 9643, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 856.

Operation and Effect

This and the preceding section demonstrate that it was the policy and purpose of the legislature in enacting them that

all petty claims existing between the parties, and falling within the limited jurisdiction of justices' courts, should be adjusted in one action. *Walter v. Cox*, 36 M 20, 24, 91 P 1063.

A defendant, in an action in a justice of the peace court, does not waive objection to want of jurisdiction over his person, by presenting an answer containing a counterclaim, where he insists, at every stage of the proceedings, that the justice has no jurisdiction. *Wilecox v. Toston State Bank*, 53 M 490, 493, 165 P 292.

9644. When plaintiff may demur to answer. When the answer contains new matter in avoidance, constituting a defense or counterclaim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer, which may be the same as mentioned in section 9153 of this code, except the first subdivision thereof.

History: Earlier acts were Sec. 588, p. 159, Bannack Stat.; re-en. Sec. 694, p. 175, Cod. Stat. 1871; re-en. Sec. 754, 1st Div. Rev. Stat. 1879; re-en. Sec. 774, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1526, C. Civ. Proc. 1895; re-en. Sec. 7011, Rev. C. 1907; re-en.

Sec. 9644, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 857.

References

Cited or applied as section 1526, Code of Civil Procedure, in *Walter v. Cox*, 36 M 20, 24, 91 P 1063.

9645. Proceedings on demurrer. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint.

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith.

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow.

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

History: Earlier acts were Sec. 589, p. 159, Bannack Stat.; re-en. Sec. 695, p. 175, Cod. Stat. 1871; re-en. Sec. 755, 1st Div. Rev. Stat. 1879; re-en. Sec. 775, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1527, C. Civ. Proc. 1895; re-en. Sec. 7012, Rev. C. 1907; re-en. Sec. 9645, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 858.

9646. New matter deemed denied. The new matter contained in the answer or counterclaim is deemed denied by the plaintiff.

History: Earlier acts were Sec. 590, p. 159, Bannack Stat.; re-en. Sec. 696, p. 175, Cod. Stat. 1871; re-en. Sec. 756, 1st Div. Rev. Stat. 1879; re-en. Sec. 776, 1st Div. Comp. Stat. 1887.

to an action to recover the price of certain land sold did not require a replication. The pleadings in the district court on an appeal from a justice or police court are governed by the same rules as pertain to pleadings in such courts. Duane v. Molinak, 31 M 343, 345, 78 P 588.

This section en. Sec. 1528, C. Civ. Proc. 1895; re-en. Sec. 7013, Rev. C. 1907; re-en. Sec. 9646, R. C. M. 1921.

References

Operation and Effect

The filing of an amendment to defendant's answer pleading the statute of frauds

Bell v. Grimstad, 82 M 185, 196, 266 P 394.

9647. Amendment of pleadings. Either party may, at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered necessary, require, as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on the payment of costs, relieve a party from any judgment taken against him by mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment, and upon an affidavit showing good cause therefor.

History: Earlier acts were Sec. 591, p. 159, Bannack Stat.; re-en. Sec. 697, p. 175, Cod. Stat. 1871; re-en. Sec. 757, 1st Div. Rev. Stat. 1879; re-en. Sec. 777, 1st Div. Comp. Stat. 1887.

Sec. 9647, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 859.

This section en. Sec. 1529, C. Civ. Proc. 1895; re-en. Sec. 7014, Rev. C. 1907; re-en.

References

9648. Answer or demurrer to amended pleadings. When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

History: Earlier acts were Sec. 592, p. 159, Bannack Stat.; re-en. Sec. 698, p. 175, Cod. Stat. 1871; re-en. Sec. 758, 1st Div. Rev. Stat. 1879; re-en. Sec. 778, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1530, C. Civ. Proc. 1895; re-en. Sec. 7015, Rev. C. 1907; re-en. Sec. 9648, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 860.

9649. Copy of account or instrument to be filed. When the cause of action or the defense or counterclaim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the party demanding it, and to state that there is due to him thereon from the adverse party a specified sum, but the court may, at any time, require the original account or instrument to be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited, and a copy furnished, may prohibit its being afterwards given in evidence, unless it appear that such instrument is not in the possession of the party pleading it, or under his control. The court may, at any time, require either party to furnish to the other the items of an account or a bill of particulars.

History: Ap. p. Sec. 588, p. 158, Bannack Stat.; re-en. Sec. 694, p. 175, Cod. Stat. 1871; re-en. Sec. 754, 1st Div. Rev. Stat. 1879; re-en. Sec. 774, 1st Div. Comp. Stat. 1887; en. Sec. 1531, C. Civ. Proc. 1895; re-en. Sec. 7016, Rev. C. 1907; re-en. Sec. 9649, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 886.

Operation and Effect

If the term "account," as used in section 9640, was intended to comprise a list of the items, the legislature in this section would doubtless have used the terms "copy of account or bill of particulars," but it did not do so. It used the term "bill of particulars" as synonymous with items of an account as distinguished from the account itself. *Moran v. Ebey*, 39 M 517, 519, 104 P 522.

9650. Copy deemed genuine if not denied. If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, other obligation for the payment of money, or other instrument upon which the action is brought, the defendant shall be deemed to admit the genuineness of all the signatures thereto, unless he specifically deny the same in his answer under oath. In case of a counterclaim, the same rule applies to the plaintiff.

History: En. Sec. 589, p. 159, Bannack Stat.; re-en. Sec. 695, p. 175, Cod. Stat. 1871; re-en. Sec. 755, 1st Div. Rev. Stat. 1879; re-en. Sec. 775, 1st Div. Comp. Stat.

1887; amd. Sec. 1532, C. Civ. Proc. 1895; re-en. Sec. 7017, Rev. C. 1907; re-en. Sec. 9650, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 887.

9651. Variance. A variance between the proof on the trial and the allegations in pleading shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby.

History: En. Sec. 591, p. 159, Bannack Stat.; re-en. Sec. 697, p. 176, Cod. Stat. 1871; re-en. Sec. 757, 1st Div. Rev. Stat. 1879; re-en. Sec. 777, 1st Div. Comp. Stat.

1887; re-en. Sec. 1533, C. Civ. Proc. 1895; re-en. Sec. 7018, Rev. C. 1907; re-en. Sec. 9651, R. C. M. 1921.

CHAPTER 70

PROVISIONAL REMEDIES IN JUSTICE COURTS—ARREST IN CIVIL ACTIONS—ATTACHMENT—CLAIM AND DELIVERY

Section 9652. Order of arrest and arrest of defendant.

9653. Affidavit and undertaking for order of arrest.

9654. A defendant arrested must be taken before the justice immediately.

- 9655. The officer must give notice to the plaintiff of arrest.
- 9656. The officer must detain the defendant.
- 9657. Defendant's answer.
- 9658. Provisions applicable.
- 9659. Writ of attachment shall issue upon affidavit.
- 9660. Undertaking on an attachment must be required.
- 9661. Form of writ—bond to avoid levy.
- 9662. Certain provisions apply to all attachments in justices' courts.
- 9663. How claim and delivery enforced.

9652. Order of arrest and arrest of defendant. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the cases mentioned in section 9194 of this code.

History: En. Sec. 560, p. 153, Bannack Stat.; re-en. Sec. 666, p. 170, Cod. Stat. 1871; re-en. Sec. 726, 1st Div. Rev. Stat. 1879; re-en. Sec. 746, 1st Div. Comp. Stat. 1887; amd. Sec. 1540, C. Civ. Proc. 1895; re-en. Sec. 7019, Rev. C. 1907; re-en. Sec. 9652, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 861.

9653. Affidavit and undertaking for order of arrest. Before an order of arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

History: En. Sec. 561, p. 154, Bannack Stat.; re-en. Sec. 667, p. 170, Cod. Stat. 1871; re-en. Sec. 727, 1st Div. Rev. Stat. 1879; re-en. Sec. 747, 1st Div. Comp. Stat. 1887; amd. Sec. 1541, C. Civ. Proc. 1895; re-en. Sec. 7020, Rev. C. 1907; re-en. Sec. 9653, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 862.

9654. A defendant arrested must be taken before the justice immediately. The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the town, township, or city, if there is another, and if not, then before a justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon as if the summons had been issued and the order of arrest made by him.

History: En. Sec. 562, p. 154, Bannack Stat.; re-en. Sec. 668, p. 171, Cod. Stat. 1871; re-en. Sec. 728, 1st Div. Rev. Stat. 1879; re-en. Sec. 748, 1st Div. Comp. Stat. 1887; amd. Sec. 1542, C. Civ. Proc. 1895; re-en. Sec. 7021, Rev. C. 1907; re-en. Sec. 9654, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 863.

9655. The officer must give notice to the plaintiff of arrest. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons and subscribe a certificate, stating the time of serving the same, the time of arrest, and of his giving notice to the plaintiff.

History: En. Sec. 563, p. 154, Bannack Stat.; re-en. Sec. 669, p. 171, Cod. Stat. 1871; re-en. Sec. 729, 1st Div. Rev. Stat. 1879; re-en. Sec. 749, 1st Div. Comp. Stat. 1887; re-en. Sec. 1543, C. Civ. Proc. 1895; re-en. Sec. 7022, Rev. C. 1907; re-en. Sec. 9655, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 864.

9656. The officer must detain the defendant. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice. The officer shall not be bound to keep such person under arrest more than twenty-four hours, unless the plaintiff advance each day the expenses of keeping such person, which expense shall be taxed as costs in the action, and in no case shall be a charge against the county.

History: En. Sec. 564, p. 154, Bannack Stat.; re-en. Sec. 670, p. 171, Cod. Stat. 1871; re-en. Sec. 730, 1st Div. Rev. Stat. 1879; re-en. Sec. 750, 1st Div. Comp. Stat. 1887; re-en. Sec. 1544, C. Civ. Proc. 1895; re-en. Sec. 7023, Rev. C. 1907; re-en. Sec. 9656, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 865.

9657. Defendant's answer. The defendant may file an answer, under oath, putting in issue the facts stated in the affidavit for the order of arrest, which may be tried by the court unless a jury is demanded, and the plaintiff shall be held to establish such facts, and if he fail to do so, the order of arrest shall be dismissed, and the defendant may proceed upon the undertaking of the plaintiff for his damages occasioned by the arrest. The defendant may apply to the court to be discharged from arrest, upon the ground of the insufficiency of the papers on which the order of arrest was granted.

History: En. Sec. 567, p. 155, Bannack Stat.; re-en. Sec. 673, p. 171, Cod. Stat. 1871; re-en. Sec. 733, 1st Div. Rev. Stat. 1879; re-en. Sec. 753, 1st Div. Comp. Stat. 1887; re-en. Sec. 1545, C. Civ. Proc. 1895; re-en. Sec. 7024, Rev. C. 1907; re-en. Sec. 9657, R. C. M. 1921.

9658. Provisions applicable. The provisions of sections 9875 to 9886 of this code, in relation to the examination and discharge of a defendant imprisoned on execution in a civil action, shall apply to justices' courts and justices of the peace shall have the same powers in their courts as are by said sections granted to the judge.

History: En. Sec. 673, p. 172, Cod. Stat. 1871; re-en. Sec. 733, 1st Div. Rev. Stat. 1879; re-en. Sec. 753, 1st Div. Comp. Stat. 1887; re-en. Sec. 1546, C. Civ. Proc. 1895; re-en. Sec. 7025, Rev. C. 1907; re-en. Sec. 9658, R. C. M. 1921.

9659. Writ of attachment shall issue upon affidavit. A writ to attach the property of the defendant must be issued by the justice at the time of, or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section 9257 of this code.

History: En. Sec. 568, p. 155, Bannack Stat.; re-en. Sec. 674, p. 172, Cod. Stat. 1871; re-en. Sec. 734, 1st Div. Rev. Stat. 1879; re-en. Sec. 754, 1st Div. Comp. Stat. 1887; amd. Sec. 1560, C. Civ. Proc. 1895; re-en. Sec. 7026, Rev. C. 1907; re-en. Sec. 9659, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 866.

9660. Undertaking on an attachment must be required. Before issuing the writ, the justice must require a written undertaking in due form on the part of the plaintiff, with two or more sureties, in a sum of not less than fifty dollars nor more than three hundred dollars, to the effect that if defendant recover judgment the plaintiff will pay all costs that may be awarded to defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Within two days after, or at any time before the service of the writ of attachment upon defendant, he may except to the sufficiency of the sureties, and if he fails to do so, he is deemed to have waived all objections to them. When excepted to, the sureties must, within three days after notice by the defendant of not less than one day, justify before the justice, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the justice shall make an order vacating the writ of attachment.

History: En. Sec. 569, p. 155, Bannack
Stat.; re-en. Sec. 675, p. 172, Cod. Stat.
1871; re-en. Sec. 735, 1st Div. Rev. Stat.
1879; re-en. Sec. 755, 1st Div. Comp. Stat.

1887; amd. Sec. 1561, C. Civ. Proc. 1895;
re-en. Sec. 7027, Rev. C. 1907; amd. Sec.
1, Ch. 86, L. 1911; re-en. Sec. 9660,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 867.

9661. Form of writ—bond to avoid levy. The writ may be directed to the sheriff or any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant in his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant has given him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, in which case to take such undertaking. Such undertaking is to be to the plaintiff or plaintiffs in the action, and shall be approved in writing on the back thereof by the plaintiff or plaintiffs, or his or their attorney or attorneys, or upon their refusal, by the justice issuing such writ.

History: En. Sec. 570, p. 155, Bannack
Stat.; re-en. Sec. 676, p. 172, Cod. Stat.
1871; re-en. Sec. 736, 1st Div. Rev. Stat.
1879; re-en. Sec. 756, 1st Div. Comp. Stat.

1887; re-en. Sec. 1562, C. Civ. Proc. 1895;
amd. Sec. 2, p. 141, L. 1899; re-en. Sec.
7028, Rev. C. 1907; re-en. Sec. 9661,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 868.

9662. Certain provisions apply to all attachments in justices' courts. The sections of this code from section 9261 to section 9293, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff" whenever the writ is directed to a constable, and the word "justice" substituted for "judge."

History: En. Sec. 571, p. 155, Bannack
Stat.; re-en. Sec. 677, p. 172, Cod. Stat.
1871; re-en. Sec. 737, 1st Div. Rev. Stat.
1879; re-en. Sec. 757, 1st Div. Comp. Stat.

1887; re-en. Sec. 1563, C. Civ. Proc. 1895;
re-en. Sec. 7029, Rev. C. 1907; re-en. Sec.
9662, R. C. M. 1921. Cal. C. Civ. Proc.
Sec. 869.

9663. How claim and delivery enforced. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this code from section 9221 to section 9239, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge," and the justice, instead of the plaintiff or his attorney, may, in his discretion, by an indorsement in writing upon the affidavit, order the sheriff or constable to take the property mentioned in affidavit.

History: Ap. p. Sec. 572, p. 156, Ban-
nack Stat.; re-en. Sec. 678, p. 172, Cod.
Stat. 1871; re-en. Sec. 738, 1st Div. Rev.
Stat. 1879; re-en. Sec. 758, 1st Div. Comp.

Stat. 1887; amd. Sec. 1570, C. Civ. Proc.
1895; re-en. Sec. 7030, Rev. C. 1907; re-en.
Sec. 9663, R. C. M. 1921. Cal. C. Civ.
Proc. Sec. 870.

9661
new matter
L. 39 c. 197
p. 498

CHAPTER 71

JUDGMENTS BY DEFAULT

Section 9664. Judgment when defendant fails to appear.

9665. Judgment against defendant on demurrer.

9664. Judgment when defendant fails to appear. If the defendant fails to appear and answer or demur within the time specified in the summons, or one hour thereafter, then, upon proof of service of summons, the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just.

History: En. Sec. 1580, C. Civ. Proc. 1895; re-en. Sec. 7031, Rev. C. 1907; re-en. Sec. 9664, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 871.

References

Cited or applied as section 1580, Code of Civil Procedure, in *Maxey v. Cooper*, 21 M 456, 457, 54 P 562; State ex. rel. St. George v. Justice Court, 80 M 53, 57, 257 P 1034.

9665. Judgment against defendant on demurrer. In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended, and the defendant fails to answer it as amended, within the time allowed by the court;

2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once;

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

History: En. Sec. 1581, C. Civ. Proc. 1895; re-en. Sec. 7032, Rev. C. 1907; re-en. Sec. 9665, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 872.

References

Cited or applied as section 1581, Code of Civil Procedure, in *Maxey v. Cooper*, 21 M 456, 457, 54 P 562.

CHAPTER 72

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICE COURTS

Section 9666. Time when trial must be commenced.

9667. When court may, of its own motion, postpone trial.

9668. Postponement by consent.

9669. Postponement upon application of a party.

9670. No continuance for more than ten days to be granted, unless upon filing of undertaking.

9666. Time when trial must be commenced. Unless postponed, as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in section 9637, and the trial must proceed and there must be no adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of.

History: En. Sec. 1590, C. Civ. Proc. 1895; re-en. Sec. 7033, Rev. C. 1907; re-en. Sec. 9666, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 873.

Operation and Effect

The record of a justice court must affirmatively show all jurisdictional facts,

and particularly that plaintiff appeared at the time set for hearing of the case, or within an hour thereafter if he did not then appear, the justice lost jurisdiction for all purposes save to dismiss the action without prejudice. *Peterson v. Feely*, 88 M 459, 462, 293 P 667.

9667. When court may, of its own motion, postpone trial. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

History: En. Sec. 1591, C. Civ. Proc. 1895; re-en. Sec. 7034, Rev. C. 1907; re-en. Sec. 9667, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 874.

Operation and Effect

While it appears that a justice of the peace may, with the consent of the parties, take a case under advisement, the adjournment of the trial, so brought about by stipulation, must be to a time and place appointed for that purpose, and an order to that effect entered upon his docket. *State ex rel. Collier v. Houston*, 36 M 178, 181, 92 P 476.

This section refers specifically to a postponement of the trial; that is, the trial on the merits after issue has been reached and a definite time has been fixed for it, as provided in section 9637, but the justice, of necessity, has the power to postpone a case when he is hearing another one at the time set for hearing. *State ex rel. Beadle v. Smith*, 42 M 492, 495, 113 P 294.

References

Cited or applied as section 7034, Revised Codes, in *State ex rel. Akin v. Williams*, 50 M 582, 585, 148 P 333.

9668. Postponement by consent. The court may, by the consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

History: En. Sec. 1592, C. Civ. Proc. 1895; re-en. Sec. 7035, Rev. C. 1907; re-en. Sec. 9668, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 875.

References

Cited or applied as section 7035, Revised Codes, in *State ex rel. Akin v. Williams*, 50 M 582, 585, 148 P 333.

9669. Postponement upon application of a party. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody; but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged.

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by, the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the

action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice may order the defendant discharged from custody.

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on trial, with the same effect, and subject to the objections, as if the witness were produced. But the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given, on the trial, or offered and overruled as improper, the trial must not be postponed.

History: Ap. p. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Sec. 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Proc. 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 876.

Operation and Effect

Where a justice of the peace continued a cause upon the oral application of plaintiff, made out of court without a showing

such as required by this section, and refused to dispose of the cause at the time originally set for hearing, he lost jurisdiction, and a judgment entered by him, after hearing testimony in support of the complaint at the time to which the cause had been continued, was void. *State ex rel. Akin v. Williams*, 50 M 582, 585, 148 P 333.

References

Cited or applied as section 1593, Code of Civil Procedure, in *State ex rel. Collier v. Houston*, 36 M 178, 181, 92 P 476.

9670. No continuance for more than ten days to be granted, unless upon filing of undertaking. No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

History: En. Sec. 598, p. 162, Bannack Stat.; re-en. Sec. 704, p. 178, Cod. Stat. 1871; re-en. Sec. 764, 1st Div. Rev. Stat. 1879; re-en. Sec. 784, 1st Div. Comp. Stat. 1887; amd. Sec. 1594, C. Civ. Proc. 1895; re-en. Sec. 7037, Rev. C. 1907; re-en. Sec.

9670, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 877.

References

Peterson v. Feely, 88 M 459, 293 P 667.

CHAPTER 73

TRIALS IN JUSTICE COURTS

Section 9671. Issue defined, and the different kinds.

9672. Issue of law—how raised.

9673. Issue of fact—how raised.

9674. Issue of law—how tried.

9675. Issue of fact—how tried.

9676. Jury—how waived.

9677. Either party failing to appear, trial may proceed at request of other party.

9678. Challenges to jurors.

9671. Issue defined, and the different kinds. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

- 1. Of law; and,
- 2. Of fact.

History: En. Sec. 1600, C. Civ. Proc. 1895; re-en. Sec. 7038, Rev. C. 1907; re-en. Sec. 9671, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 878.

9672. Issue of law—how raised. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

History: En. Sec. 1601, C. Civ. Proc. 1895; re-en. Sec. 7039, Rev. C. 1907; re-en. Sec. 9672, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 879.

9673. Issue of fact—how raised. An issue of fact arises:

- 1. Upon a material allegation in the complaint controverted by the answer; and,
- 2. Upon new matter in the answer, except an issue of law is joined thereon.

History: En. Sec. 1602, C. Civ. Proc. 1895; re-en. Sec. 7040, Rev. C. 1907; re-en. Sec. 9673, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 880.

9674. Issue of law—how tried. An issue of law must be tried by the court.

History: En. Sec. 1603, C. Civ. Proc. 1895; re-en. Sec. 7041, Rev. C. 1907; re-en. Sec. 9674, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 881.

9675. Issue of fact—how tried. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

History: En. Sec. 1604, C. Civ. Proc. 1895; re-en. Sec. 7042, Rev. C. 1907; re-en. Sec. 9675, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 882.

9676. Jury—how waived. A jury may be waived:

- 1. By consent of parties entered in the docket;
- 2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact;
- 3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

History: En. Sec. 1605, C. Civ. Proc. 1895; re-en. Sec. 7043, Rev. C. 1907; re-en. Sec. 9676, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 883.

9677. Either party failing to appear, trial may proceed at request of other party. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

History: Ap. p. Sec. 600, p. 162, Bank Stat.; re-en. Sec. 706, p. 178, Cod. Stat. 1871; re-en. Sec. 766, 1st Div. Rev. Stat. 1879; re-en. Sec. 786, 1st Div. Comp. Stat. 1887; amd. Sec. 1606, C. Civ. Proc. 1895; re-en. Sec. 7044, Rev. C. 1907; re-en. Sec. 9677, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 884.

9678. Challenges to jurors. The challenges are either peremptory or for cause. Each party is entitled to two peremptory challenges. Either party may challenge for cause on any grounds set forth in section 9344. Challenges for cause must be tried by the justice.

History: Ap. p. Sec. 604, p. 162, Bank Stat.; re-en. Sec. 710, p. 178, Cod. Stat. 1871; re-en. Sec. 770, 1st Div. Rev. Stat. 1879; re-en. Sec. 1790, 1st Div. Comp. Stat. 1887; amd. Sec. 1607, C. Civ. Proc. 1895; re-en. Sec. 7045, Rev. C. 1907; re-en. Sec. 9678, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 885.

CHAPTER 74

JUDGMENTS (OTHER THAN DEFAULT) IN JUSTICE COURTS

Section 9679. Judgment by confession.

9680. Judgment of dismissal entered in certain cases without prejudice.

9681. Judgment upon verdict.

9682. Judgment after trial by the court.

9683. Judgment in claim and delivery—how entered—judgment when the defendant is subject to arrest.

9684. Actions against joint debtors.

9685. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.

9686. Judgment upon counterclaim.

9687. Offer to compromise before trial.

9688. Costs must be included in the judgment.

9689. Abstract of judgment.

9690. Abstract may be filed and docketed in district clerk's office.

9691. Issuance of execution.

9692. Lien of judgment.

9679. Judgment by confession. Judgment upon confession may be entered up in any justice's court specified in the confession, as provided in sections 9683 to 9871 of this code.

History: En. Sec. 1620, C. Civ. Proc. 1895; re-en. Sec. 7046, Rev. C. 1907; re-en. Sec. 9679, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 889.

9680. Judgment of dismissal entered in certain cases without prejudice. Judgment that the action be dismissed without prejudice to a new action, may be entered with costs in the following cases:

1. When the plaintiff voluntarily dismisses the action, at or before the close of his evidence, when there is no counterclaim.

2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter.

3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court.

4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, town, or city; but if the objection is taken and overruled, it is the cause of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

History: En. Sec. 605, p. 163, Bannack Stat.; re-en. Sec. 711, p. 179, Cod. Stat. 1871; re-en. Sec. 771, 1st Div. Rev. Stat. 1879; re-en. Sec. 791, 1st Div. Comp. Stat. 1887; amd. Sec. 1621, C. Civ. Proc. 1895; re-en. Sec. 7047, Rev. C. 1907; re-en. Sec. 9680, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 890.

Operation and Effect

The docket of a justice of the peace must show affirmatively all the facts necessary to confer jurisdiction. Such justice cannot enter a judgment in favor of the plaintiff, where he fails to appear at the time specified in the summons, or within one hour thereafter. State ex rel. Kenyon

v. Laurandean, 21 M 216, 218, 53 P 536. See also Driscoll v. Creighton, 24 M 140, 142, 60 P 989.

The postponement of a case necessarily postpones the beginning of the hour during which the defendant must await the appearance of the plaintiff before he can demand a dismissal of the action. State ex rel. Beadle v. Smith, 42 M 492, 495, 113 P 294.

The record of a justice court must affirmatively show all jurisdictional facts, and particularly that plaintiff appeared at the time set for hearing of the case, or within an hour thereafter; if he did not then appear, the justice lost jurisdiction

9680
amended
L. 37 c. 34
sec. 2 p. 56

for all purposes, save to dismiss the action without prejudice (this section). *Peterson v. Feely*, 88 M 459, 293 P 667.

References

Cited or applied as section 7047, Revised Codes, in *Wilcox v. Toston State Bank*, 53 M 490, 494, 165 P 292; In *re Bitter Root Irr. Dist.*, 67 M 436, 446, 218 P 945.

9681. Judgment upon verdict. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict.

History: En. Sec. 608, p. 163, *Bannack Stat.*; re-en. Sec. 714, p. 180, *Cod. Stat.* 1871; re-en. Sec. 774, 1st Div. Rev. Stat. 1879; re-en. Sec. 794, 1st Div. Comp. Stat. 1887; amd. Sec. 1622, *C. Civ. Proc.* 1895; re-en. Sec. 7048, Rev. C. 1907; re-en. Sec. 9681, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 891.

Operation and Effect

A justice of the peace, who, upon the return of a verdict for plaintiff for the amount of a note and interest, and for defendant for the costs of the action, has rendered a judgment in accordance with such verdict immediately, has no jurisdiction eight days afterward to set aside such judgment as to the defendant, and to add to the judgment for plaintiff an attorney's fee and the costs of suit. *State ex rel. Johnson v. Case*, 14 M 520, 522, 37 P 95.

9682. Judgment after trial by the court. When the trial is by the court, judgment must be entered at the close of the trial.

History: En. Sec. 608, p. 163, *Bannack Stat.*; re-en. Sec. 714, p. 180, *Cod. Stat.* 1871; re-en. Sec. 774, 1st Div. Rev. Stat. 1879; re-en. Sec. 794, 1st Div. Comp. Stat. 1887; amd. Sec. 1623, *C. Civ. Proc.* 1895; re-en. Sec. 7049, Rev. C. 1907; re-en. Sec. 9682, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 892.

Operation and Effect

Where a justice of the peace, after submission of a cause to him for determination, took it under advisement, without the consent of the parties, appointing neither time nor place for the rendition of judgment, he lost jurisdiction, and the judgment, rendered about a month thereafter, without notice to the parties, was void. *State ex rel. Collier v. Houston*, 36 M 178, 180, 92 P 476.

9683. Judgment in claim and delivery—how entered—judgment when the defendant is subject to arrest. The judgment in an action for claim and delivery in justices' courts must be entered substantially in the form required by section 9406 of this code. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject must be stated in the judgment.

History: Ap. p. Sec. 612, p. 164, *Bannack Stat.*; re-en. Sec. 718, p. 179, *Cod. Stat.* 1871; re-en. Sec. 778, 1st Div. Rev. Stat. 1879; re-en. Sec. 798, 1st Div. Comp.

Stat. 1887; amd. Sec. 1624, *C. Civ. Proc.* 1895; re-en. Sec. 7050, Rev. C. 1907; re-en. Sec. 9683, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 893.

9684. Actions against joint debtors. If the action be on a contract against two or more defendants, and the summons be served on one or more but not on all, the judgment shall be entered up only against those who were served, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all and the separate property of the defendants served.

History: En. Sec. 609, p. 163, *Bannack Stat.*; re-en. Sec. 715, p. 180, *Cod. Stat.* 1871; re-en. Sec. 775, 1st Div. Rev. Stat. 1879; re-en. Sec. 795, 1st Div. Comp. Stat.

1887; re-en. Sec. 1625, *C. Civ. Proc.* 1895; re-en. Sec. 7051, Rev. C. 1907; re-en. Sec. 9684, R. C. M. 1921.

9685. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be entered for the residue.

History: En. Sec. 610, p. 163, Bannack Stat.; re-en. Sec. 716, p. 180, Cod. Stat. 1871; re-en. Sec. 776, 1st Div. Rev. Stat. 1879; re-en. Sec. 796, 1st Div. Comp. Stat. 1887; re-en. Sec. 1626, C. Civ. Proc. 1895; re-en. Sec. 7052, Rev. C. 1907; re-en. Sec. 9685, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 894.

Operation and Effect

This section recognizes the principle, that in an action for the recovery of a fine, penalty, or forfeiture given by statute or ordinance, where the amount in controversy does not exceed three hundred dollars, the jurisdiction of the justice's court is not dependent upon the amount which the plaintiff might recover, but upon the amount which he demands. Reynolds v. Smith, 48 M 149, 151, 135 P 1190.

9686. Judgment upon counterclaim. Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess.

History: En. Sec. 1627, C. Civ. Proc. 1895; re-en. Sec. 7053, Rev. C. 1907; re-en. Sec. 9686, R. C. M. 1921.

9687. Offer to compromise before trial. If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum in excess of the offer, he cannot recover costs, but costs must be adjudged against him, and, if he recover, be deducted from his recovery. The offer and failure to accept cannot be given in evidence nor affect the recovery, otherwise than as to costs.

History: En. Sec. 611, p. 164, Bannack Stat.; re-en. Sec. 717, p. 180, Cod. Stat. 1871; re-en. Sec. 777, 1st Div. Rev. Stat. 1879; re-en. Sec. 797, 1st Div. Comp. Stat. 1887; amd. Sec. 1628, C. Civ. Proc. 1895; re-en. Sec. 7054, Rev. C. 1907; re-en. Sec.

9687, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 895.

References

State ex rel. Kennedy v. Hubbard, 77 M 170, 172, 253 P 271.

9688. Costs must be included in the judgment. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

History: Ap. p. Sec. 643, p. 171, Bannack Stat.; re-en. Sec. 748, p. 186, Cod. Stat. 1871; re-en. Sec. 808, 1st Div. Rev. Stat. 1879; re-en. Sec. 828, 1st Div. Comp.

Stat. 1887; re-en. Sec. 1629, C. Civ. Proc. 1895; re-en. Sec. 7055, Rev. C. 1907; re-en. Sec. 9688, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 896.

9689. Abstract of judgment. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

"State of Montana }
County of.....} ss.

....., plaintiff, v., defendant.

In justice's court, before, justice of the peace, township (city or town), 19..... (inserting date of abstract). Judgment entered for plaintiff (or defendant) for \$....., on the day of I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, or (as the case may be) in the court of, justice of the peace, as it appears by his docket, now in my possession, as his successor in office.

....., Justice of the Peace."

History: Ap. p. Sec. 614, p. 164, Ban-nack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1630, C. Civ. Proc. 1895; re-en. Sec. 7056, Rev. C. 1907; re-en. Sec. 9689, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 897.

Operation and Effect

The entries in a justice's docket, or a transcript thereof, certified by the justice, is of sufficient evidentiary value to make out a prima facie case of the facts there recorded; but this is so only by virtue of section 9704. *Miller v. Miller*, 47 M 150, 152, 131 P 23.

References

Cited or applied as section 7056, Revised Codes, in *Pierson v. Daly*, 49 M 478, 481, 143 P 957; *Kitts v. Woods*, 52 M 569, 570, 160 P 512.

9690. Abstract may be filed and docketed in district clerk's office. The abstract may be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and the judgment docketed in the judgment-docket of the district court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

History: Ap. p. Sec. 614, p. 164, Ban-nack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1631, C. Civ. Proc. 1895; re-en. Sec. 7057, Rev. C. 1907; re-en. Sec. 9690, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 898.

Operation and Effect

The code provisions, which authorize the filing and docketing of an abstract of a judgment of a justice of the peace with the clerk of the district court, do not convert such judgment into a final judgment of the district court; they were intended merely to devise a method by which the judgment of the justice, as such, may be

made a lien upon the real estate of the defendant and be enforceable by execution in any county of the state. *Pierson v. Daly*, 49 M 478, 481, 143 P 957.

Id. Where the abstract of a justice's judgment has been filed with, and docketed by, a clerk of the district court, an order of the district court quashing an execution issued by the clerk thereon, and striking such abstract from the files, is not a special order after final judgment made appealable by section 9731.

References

Cited or applied as section 7057, Revised Codes, in *Miller v. Miller*, 47 M 150, 152, 131 P 23; *Kitts v. Woods*, 52 M 569, 570, 160 P 512.

9691. Issuance of execution. From the time of docketing in the clerk's office, execution may be issued thereon by the clerk to the sheriff of any county in the state, in the same manner and with like effect as if issued on a judgment of the district court.

History: Ap. p. Sec. 614, p. 164, Ban-nack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1632, C. Civ. Proc. 1895;

amd. Sec. 1, p. 242, L. 1897; re-en. Sec. 7058, Rev. C. 1907; re-en. Sec. 9691, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 899.

Operation and Effect

Though the clerk of the district court may issue the execution, he issues it upon the judgment of the justice, as such, made such by transformation of the justice's judgment. The fact that the clerk issues

the execution does not divest the justice of his control over it, for the statute does not so provide; and since the control of its process is vested exclusively in the court upon whose authority it issues, the justice has exclusive control of the execution, whether issued by himself or by the clerk of the district court. *Pierson v. Daly*, 49 M 478, 482, 143 P 957.

9692. Lien of judgment. The judgment rendered in a justice's court creates no lien upon any lands of the defendant, unless such abstract is filed as aforesaid in the office of the clerk of the district court of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for six years, unless the judgment be previously satisfied.

History: Ap. p. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1633, C. Civ. Proc. 1895; amd. Sec. 2, p. 243, L. 1897; re-en. Sec. 7059, Rev. C. 1907; re-en. Sec. 9692, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 900.

Operation and Effect

It is clear from the provisions of this section and the following section that the lien of the judgment continues for the period of six years from the date of the judgment, and not from the date of the filing and docketing. *Pierson v. Daly*, 49 M 478, 481, 143 P 957.

CHAPTER 75

EXECUTION FROM JUSTICE COURTS

Section 9693. Execution—time for issuance.

9694. Form of execution.

9695. Renewal of execution.

9696. Duty of officer receiving execution.

9697. Proceedings supplementary to execution.

9693. Execution—time for issuance. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

History: En. Sec. 615, p. 165, Bannack Stat.; re-en. Sec. 721, p. 181, Cod. Stat. 1871; re-en. Sec. 781, 1st Div. Rev. Stat. 1879; re-en. Sec. 801, 1st Div. Comp. Stat. 1887; amd. Sec. 1640, C. Civ. Proc. 1895; re-en. Sec. 7060, Rev. C. 1907; amd. Sec. 1, Ch. 38, L. 1921; re-en. Sec. 9693, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 901.

References

Cited or applied as section 7060, Revised Codes, in *Pierson v. Daly*, 49 M 478, 481, 143 P 957.

9694. Form of execution. The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its issuance. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township, town, or city where, and the time when, it was rendered; the amount of the judgment, if it be for money; and if less than the whole is due, the true amount due

thereon. It must contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of sections 9416 to 9453 of this code, in an execution to the sheriff, except that it shall not direct the officer to in any manner levy upon or satisfy the judgment, or any interest thereon, from any real property.

History: En. Sec. 616, p. 165, Bannack 1887; amd. Sec. 1641, C. Civ. Proc. 1895; Stat.; amd. Sec. 722, p. 181, Cod. Stat. amd. Sec. 1641, p. 243, L. 1897; re-en. Sec. 1871; re-en. Sec. 782, 1st Div. Rev. Stat. 7061, Rev. C. 1907; re-en. Sec. 9694, R. C. M. 1879; re-en. Sec. 802, 1st Div. Comp. Stat. 1921. Cal. C. Civ. Proc. Sec. 902.

9695. Renewal of execution. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterward issued.

History: En. Sec. 1642, C. Civ. Proc. 1895; re-en. Sec. 7062, Rev. C. 1907; re-en. Sec. 9695, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 903.

9696. Duty of officer receiving execution. The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of sections 9416 to 9453 of this code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

History: En. Sec. 617, p. 165, Bannack 1887; amd. Sec. 1643, C. Civ. Proc. 1895; Stat.; re-en. Sec. 723, p. 181, Cod. Stat. re-en. Sec. 7063, Rev. C. 1907; re-en. Sec. 1871; re-en. Sec. 783, 1st Div. Rev. Stat. 9696, R. C. M. 1921. Cal. C. Civ. Proc. 1879; re-en. Sec. 803, 1st Div. Comp. Stat. Sec. 904.

9697. Proceedings supplementary to execution. The sections of this code, from sections 9454 to 9461, both inclusive, are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff," and the word "justice" for the word "judge."

History: En. Sec. 1644, C. Civ. Proc. 1895; re-en. Sec. 7064, Rev. C. 1907; re-en. Sec. 9697, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 905.

CHAPTER 76

CONTEMPTS IN JUSTICE COURTS

Section 9698. Contempts a justice may punish for.

9699. Proceedings for contempt—when committed in presence of court.

9700. Same—when not committed in presence of court.

9701. Punishments for contempt.

9702. The conviction must be entered in the docket.

9698. Contempts a justice may punish for. A justice may punish, as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous, or insolent behavior toward the justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding.

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him.

4. Disobedience to a subpoena duly served, or refusing to be sworn or to answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him.

History: En. Sec. 1650, C. Civ. Proc. 1895; re-en. Sec. 7065, Rev. C. 1907; re-en. Sec. 9698, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 906.

9699. Proceedings for contempt—when committed in presence of court.

When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

History: En. Sec. 1651, C. Civ. Proc. 1895; re-en. Sec. 7066, Rev. C. 1907; re-en. Sec. 9699, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 907.

9700. Same—when not committed in presence of court. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse must be given. The justice may thereupon discharge him, or may convict him of the offense.

History: En. Sec. 1652, C. Civ. Proc. 1895; re-en. Sec. 7067, Rev. C. 1907; re-en. Sec. 9700, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 908.

9701. Punishments for contempt. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed, in any one case, one hundred dollars, and such imprisonment one day.

History: En. Sec. 630, p. 168, Bannack 1887; amd. Sec. 1653, C. Civ. Proc. 1895; Stat.; re-en. Sec. 736, p. 184, Cod. Stat. re-en. Sec. 7068, Rev. C. 1907; re-en. Sec. 1871; re-en. Sec. 796, 1st Div. Rev. Stat. 9701, R. C. M. 1921. Cal. C. Civ. Proc. 1879; re-en. Sec. 816, 1st Div. Comp. Stat. Sec. 909.

9702. The conviction must be entered in the docket. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

History: En. Sec. 631, p. 168, Bannack 1887; amd. Sec. 1654, C. Civ. Proc. 1895; Stat.; re-en. Sec. 737, p. 184, Cod. Stat. re-en. Sec. 7069, Rev. C. 1907; re-en. Sec. 1871; re-en. Sec. 797, 1st Div. Rev. Stat. 9702, R. C. M. 1921. Cal. C. Civ. Proc. 1879; re-en. Sec. 817, 1st Div. Comp. Stat. Sec. 910.

CHAPTER 77

DOCKETS OF JUSTICES

- Section 9703. Docket—what to contain.
 9704. Entries therein primary evidence of the facts.
 9705. An index to the docket must be kept.
 9706. Dockets must be delivered by justice to his successor.
 9707. Proceedings when office becomes vacant and before a successor is appointed.
 9708. Docket of predecessor.
 9709. Justice elected to fill vacancy.
 9710. Justices equally entitled.

9703. Docket—what to contain. Every justice must keep a book, denominated a "docket," in which he must enter:

1. The title of every action or proceeding;
2. The object of the action or proceeding; and, if a sum of money be claimed, the amount thereof;
3. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact;
4. The time when the parties, or either of them, appear, or their non-appearance, if default be made; a minute of the pleading and motions, if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings;
5. Every adjournment, stating on whose application and to what time;
6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial;
7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request;
8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge;
9. The judgment of the court, specifying the costs included, and the time when rendered, and an itemized statement of the costs;
10. The issuing of the execution, when issued, and to whom; the renewals thereof, if any, and when made; and a statement of any money paid to the justice, when and by whom;
11. The receipt of a notice of appeal, if any be given, and of the undertaking on appeal, if any be filed.

History: Secs. 9703-9709, R. C. M. 1921, were en. Secs. 619-624, pp. 166, 167, Ban-nack Stat.; re-en. Secs. 725-730, pp. 183, 184, Cod. Stat. 1871; re-en. Secs. 785-790, 1st Div. Rev. Stat. 1879; re-en. Secs. 805-810, 1st Div. Comp. Stat. 1887; amd. in a few minor particulars by Secs. 1660-1667, C. Civ. Proc. 1895.

This section re-en. Sec. 7070, Rev. C. 1907; re-en. Sec. 9703, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 911.

Operation and Effect

While it appears that a justice of the peace may, with the consent of the parties, take a case under advisement, the adjournment of the trial, so brought about by stipulation, must be to a time and place appointed for that purpose, and an order to that effect entered upon his docket. State ex rel. Collier v. Houston, 36 M 178, 181, 92 P 476.

Under the rule that the pleadings in a justice court as well as the statutory requirements with relation thereto must be liberally construed, held that section 9638, requiring that if a pleading be oral its

substance must be entered in the docket, and this section, declaring that the justice must enter therein a concise statement of the material parts of all oral pleadings, mean no more than that he shall enter such a recital thereof as would advise a person of common understanding of the nature of the pleadings. Malano v. Bres-san, 76 M 366, 370, 371, 245 P 871.

Id. A general denial has no "parts" within the meaning of this section, providing that if a pleading in the court be oral an entry shall be made in the docket containing a concise statement of the "material parts," hence an entry that defendant interposed an oral general denial is sufficient.

References

Cited or applied as section 1660, Code of Civil Procedure, in Clark v. Great Northern Ry. Co., 30 M 458, 463, 76 P 1003; as section 7070, Revised Codes, in Miller v. Miller, 47 M 150, 152, 131 P 23; Billings Hardware Co. v. Bryan, 63 M 14, 206 P 418.

9704
100 Mont. 253
49 P (2d) 441

9704. Entries therein primary evidence of the facts. The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in sections 9619 to 9728 provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated.

History: En. Sec. 1661, C. Civ. Proc. 1895; re-en. Sec. 7071, Rev. C. 1907; re-en. Sec. 9704, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 912.

Operation and Effect

An abstract of a judgment rendered in the justice of the peace court and filed in the district court, the docket itself having been lost, is not admissible as prima facie evidence of the validity of the judgment. *Miller v. Miller*, 47 M 150, 153, 131 P 23.

9705
100 Mont. 253
49 P (2d) 441

9705. An index to the docket must be kept. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs and defendants must be entered in the index, in the alphabetical order of the first letter of the family name.

History: En. Sec. 1662, C. Civ. Proc. 1895; re-en. Sec. 7072, Rev. C. 1907; re-en. Sec. 9705, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 913.

9706. Dockets must be delivered by justice to his successor. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, his own as well as those of his predecessors, or any other which may be in his custody, to be kept as public records.

History: En. Sec. 1663, C. Civ. Proc. 1895; re-en. Sec. 7073, Rev. C. 1907; re-en. Sec. 9706, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 914.

9707. Proceedings when office becomes vacant and before a successor is appointed. If the office of a justice become vacant by his death or removal from the township, town, or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk, to be by him delivered to the successor in office of the justice.

History: En. Sec. 1664, C. Civ. Proc. 1895; re-en. Sec. 7074, Rev. C. 1907; re-en. Sec. 9707, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 915.

9708. Docket of predecessor. Any justice with whom the docket of his predecessor, or of any other justice, is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In the case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purpose of this section, considered the successor of such former justice.

History: En. Sec. 1665, C. Civ. Proc. 1895; re-en. Sec. 7075, Rev. C. 1907; re-en. Sec. 9708, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 916.

9709. Justice elected to fill vacancy. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township, town, or city from that time is the successor.

History: En. Sec. 1666, C. Civ. Proc. 1895; re-en. Sec. 7076, Rev. C. 1907; re-en. Sec. 9709, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 917.

9710. Justices equally entitled. When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, a judge of the district court must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of the justice going out of office, or whose office has become vacant.

History: En. Sec. 1667, C. Civ. Proc. 1895; re-en. Sec. 7077, Rev. C. 1907; re-en. Sec. 9710, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 918.

CHAPTER 78

GENERAL PROVISIONS RELATING TO JUSTICE COURTS

- Section 9711. Justices may issue subpoenas and final process to any part of the county.
9712. Blanks must be filled in all papers issued by a justice, except subpoenas.
9713. Justices to receive all moneys collected and pay same to parties.
9714. In case of disability of justice, another justice may attend on his behalf.
9715. Justices may require security for costs.
9716. Who entitled to costs.
9717. What provisions of code applicable to justices' courts.
9718. Deposit of money in lieu of undertaking.
9719. Special constables—appointment.
9720. Authority of deputy.
9721. Execution of process by retiring constable.
9722. Depositions—how taken.
9723. When name of defendant is unknown.
9724. How appeals may be taken.

9711. Justices may issue subpoenas and final process to any part of the county. Justices of the peace may issue subpoenas in any action or proceedings in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

History: En. Sec. 632, p. 168, Bannack 1887; re-en. Sec. 1680, C. Civ. Proc. 1895; Stat.; re-en. Sec. 738, p. 185, Cod. Stat. re-en. Sec. 7078, Rev. C. 1907; re-en. Sec. 1871; re-en. Sec. 798, 1st Div. Rev. Stat. 9711, R. C. M. 1921. Cal. C. Civ. Proc. 1879; re-en. Sec. 818, 1st Div. Comp. Stat. Sec. 919.

9712. Blanks must be filled in all papers issued by a justice, except subpoenas. The summons, execution, and other papers made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void.

9712
new matter
L. 39 c. 197
p. 498

History: En. Sec. 625, p. 167, Bannack Stat.; re-en. Sec. 731, p. 184, Cod. Stat. 1871; re-en. Sec. 791, 1st Div. Rev. Stat. 1879; re-en. Sec. 811, 1st Div. Comp. Stat. 1887; re-en. Sec. 1681, C. Civ. Proc. 1895; re-en. Sec. 7079, Rev. C. 1907; re-en. Sec. 9712, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 920.

Operation and Effect

One who knowingly uses a summons, writ of attachment or similar process purported to have issued from a justice of the peace court but which is void under this section, because not completely filled out by the justice, and enforces collection by means of it, is guilty of extortion. In re Fred-erick, 71 M 205, 209, 227 P 999.

Id. An attorney who, in violation of this section, in the enforcement of money claims, made use of summonses and writs of attachment furnished him by a justice of the peace signed by the latter but the blanks in which were not filled out but were filled out by the attorney, though guilty of professional misconduct, held,

sufficiently punished by suspension from office for a period of thirty days, in view of his youth and alleged ignorance of the fact that the practice was culpable, his previous irreproachable conduct and reputation, and his frankness in acknowledging his fault.

9713. Justices to receive all moneys collected and pay same to parties. Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them, without delay.

History: En. Sec. 644, p. 171, Bannack Stat.; re-en. Sec. 749, p. 186, Cod. Stat. 1871; re-en. Sec. 809, 1st Div. Rev. Stat. 1879; re-en. Sec. 829, 1st Div. Comp. Stat.

1887; amd. Sec. 1682, C. Civ. Proc. 1895; re-en. Sec. 7080, Rev. C. 1907; re-en. Sec. 9713, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 921.

9714. In case of disability of justice, another justice may attend on his behalf. In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same township, town, or city, or adjoining township may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

History: En. Sec. 626, p. 168, Bannack Stat.; re-en. Sec. 732, p. 184, Cod. Stat. 1871; re-en. Sec. 792, 1st Div. Rev. Stat. 1879; re-en. Sec. 812, 1st Div. Comp. Stat.

1887; amd. Sec. 1683, C. Civ. Proc. 1895; re-en. Sec. 7081, Rev. C. 1907; re-en. Sec. 9714, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 922.

9715. Justices may require security for costs. Justices may, in all cases, require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

History: En. Sec. 645, p. 171, Bannack Stat.; re-en. Sec. 750, p. 187, Cod. Stat. 1871; re-en. Sec. 810, 1st Div. Rev. Stat. 1879; re-en. Sec. 830, 1st Div. Comp. Stat.

1887; re-en. Sec. 1684, C. Civ. Proc. 1895; re-en. Sec. 7082, Rev. C. 1907; re-en. Sec. 9715, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 923.

9716. Who entitled to costs. The prevailing party in justice courts is entitled to costs of the action and also of all proceedings taken by him in aid of execution issued upon any judgment recovered therein, except in townships wherein there is located a municipal court neither party shall be entitled to tax or collect any cost, nor shall any costs be included in the judgment.

History: En. Sec. 1685, C. Civ. Proc. 1895; re-en. Sec. 7083, Rev. C. 1907; re-en. Sec. 9716, R. C. M. 1921; amd. Sec. 19, Ch. 177, L. 1935. Cal. C. Civ. Proc. Sec. 924.

Operation and Effect

This section impliedly authorizes the district court to tax against the unsuc-

cessful party in that court the costs incurred in the trial of the cause in the justice's court, where they were included in the cost bill, although the justice of the peace had failed to make entry of costs on his docket. *Duckett v. Biggs*, 57 M 443, 188 P 938.

9716
amended
L. 37 c. 156
sec. 1 p. 496

9717. What provisions of code applicable to justices' courts. Justices' courts, being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in sections 9619 to 9728 of this code, are applicable to justices' courts and the proceedings therein.

History: En. Sec. 1686, C. Civ. Proc. 1895; re-en. Sec. 7084, Rev. C. 1907; re-en. Sec. 9717, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 925.

9718. Deposit of money in lieu of undertaking. In civil cases arising in justices' courts, wherein an undertaking is required as prescribed in this code, the plaintiff or defendant may deposit with said justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking.

History: En. Sec. 1687, C. Civ. Proc. 1895; re-en. Sec. 7085, Rev. C. 1907; re-en. Sec. 9718, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 926.

9719. Special constables—appointment. If in any township there should be no duly elected, appointed, or qualified constable, but not otherwise, a justice of the peace in such township may, at the request of a party, after being satisfied that it is expedient to do so, specially depute any proper person of suitable age not interested in the action to serve a summons, with or without an order to arrest the defendant, or with or without a writ of attachment, or to serve an execution. The justice shall be liable upon his official bond for all official acts of the person so deputed. Such deputation shall be in writing made on the process, and a note thereof made on the justice's docket.

History: En. Sec. 627, p. 168, Bannack Stat.; re-en. Sec. 733, p. 184, Cod. Stat. 1871; re-en. Sec. 793, p. 187, 1st Div. Rev. Stat. 1879; re-en. Sec. 813, 1st Div. Comp. Stat. 1887; amd. Sec. 1688, C. Civ. Proc. 1895; amd. Sec. 1, p. 138, L. 1899; re-en. Sec. 7086, Rev. C. 1907; re-en. Sec. 9719, R. C. M. 1921.

Operation and Effect

An official act of a special officer, for which a justice of the peace will be liable, is what is done under color of or by virtue of his office, but in excess of his authority, as where, having a writ of attachment, he

destroys the property instead of seizing and holding it, or imprisons the debtor while seizing and holding the goods, and pretends to do these things under warrant or color of his office. *Ramsey v. Burns*, 27 M 154, 159, 69 P 711.

When service of summons in an action pending in a justice's court is made by a person appointed by the justice, proof of service must be made by affidavit. *Layton v. Trapp*, 20 M 453, 455, 52 P 208.

This section did not affect section 9636, authorizing a nonofficial person to serve a justice's summons. *State ex rel. Reagan v. Harrington*, 31 M 294, 296, 78 P 484.

9720. Authority of deputy. The person so deputed shall have the authority of a constable in relation to the service, execution, and return of such process, and shall be subject to the same obligations.

History: En. Sec. 628, p. 168, Bannack Stat.; re-en. Sec. 734, p. 184, Cod. Stat. 1871; re-en. Sec. 794, 1st Div. Rev. Stat. 1879; re-en. Sec. 814, 1st Div. Comp. Stat.

1887; re-en. Sec. 1689, C. Civ. Proc. 1895; re-en. Sec. 7087, Rev. C. 1907; re-en. Sec. 9720, R. C. M. 1921.

9721. Execution of process by retiring constable. A constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has begun to execute, in the same manner as if he were still in office, and his sureties shall be liable to the same extent.

9718
115 P.(2d) 291

History: En. Sec. 629, p. 168, Bannack Stat.; re-en. Sec. 735, p. 184, Cod. Stat. 1871; re-en. Sec. 795, 1st Div. Rev. Stat. 1879; re-en. Sec. 815, 1st Div. Comp. Stat.

1887; re-en. Sec. 1690, C. Civ. Proc. 1895; re-en. Sec. 7088, Rev. C. 1907; re-en. Sec. 9721, R. C. M. 1921.

9722. Depositions—how taken. Depositions to be used in justices' courts may be taken as provided in sections 10643 to 10658 of this code.

History: En. Sec. 1691, C. Civ. Proc. 1895; re-en. Sec. 7089, Rev. C. 1907; re-en. Sec. 9722, R. C. M. 1921.

9723. When name of defendant is unknown. Where the plaintiff is ignorant of the name, or part of the name of a defendant, that defendant may be designated in the summons, and in any other process or proceeding in the action, by a fictitious name, or by so much of his name as is known, adding a description, identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action, and as sufficiently described therein for all purposes. When his name, or the remainder of his name is known, or becomes known, the justice, before whom the action is pending, must amend the proceedings already taken, by the insertion of the true or full name, in place of the fictitious name or part of a name; and all subsequent proceedings must be taken under the name so inserted.

History: En. Sec. 1692, C. Civ. Proc. 1895; re-en. Sec. 7090, Rev. C. 1907; re-en. Sec. 9723, R. C. M. 1921.

9724. How appeals may be taken. Appeals may be taken from a judgment of a justice's court, as provided in sections 9754 to 9761 of this code.

History: En. Sec. 1693, C. Civ. Proc. 1895; re-en. Sec. 7091, Rev. C. 1907; re-en. Sec. 9724, R. C. M. 1921.

CHAPTER 79

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS

Section 9725. How commenced.

9726. Summons must issue on filing complaint.

9727. Defendant may plead orally or in writing.

9728. Proceedings to be conducted as in justices' courts.

9725. How commenced. Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title and section, and the number thereof.

History: En. Sec. 1700, C. Civ. Proc. 1895; re-en. Sec. 7092, Rev. C. 1907; re-en. Sec. 9725, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 929.

References

City of Miles City v. Drum, 60 M 451, 452, 199 P 719; State ex rel. Marquette v. Police Court, 86 M 297, 308, 283 P 430.

9726. Summons must issue on filing complaint. Immediately after filing the complaint, a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing.

History: En. Sec. 1701, C. Civ. Proc. 1895; re-en. Sec. 7093, Rev. C. 1907; re-en. Sec. 9726, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 930.

References

City of Miles City v. Drum, 60 M 451, 452, 199 P 719; State ex rel. Marquette v. Police Court, 86 M 297, 308, 283 P 430.

9727. Defendant may plead orally or in writing. On the return of the summons, the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless, for good cause shown, an adjournment is granted.

History: En. Sec. 1702, C. Civ. Proc. 1895; re-en. Sec. 7094, Rev. C. 1907; re-en. Sec. 9727, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 931.

9728. Proceedings to be conducted as in justices' courts. All proceedings in civil actions in police courts must, except as in this chapter otherwise provided, be conducted in the same manner as civil actions in justices' courts.

History: En. Sec. 1703, C. Civ. Proc. 1895; re-en. Sec. 7095, Rev. C. 1907; re-en. Sec. 9728, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 933.

CHAPTER 80

APPEALS TO SUPREME COURT

- Section 9729. How judgments and orders may be reviewed.
 9730. Party aggrieved may appeal—names of parties.
 9731. From what judgment or order an appeal may be taken.
 9732. Time for taking appeal.
 9733. Appeal—how taken.
 9734. Undertaking or deposit on appeal.
 9735. Stay of proceedings—money judgments.
 9736. Stay of proceedings—judgment for delivery of documents or personal property.
 9737. Stay of proceedings—judgment directing execution of conveyance.
 9738. Stay of proceedings—sales of real property.
 9739. Stay of proceedings—court may limit security.
 9740. Undertakings may be in one instrument.
 9741. Justification of sureties.
 9743. Appeals by executors, administrators, or guardians.
 9742. Cases in which stay of proceedings not allowed.
 9744. Acts of same valid when appointment vacated.
 9745. Record on appeal from orders other than new trial.
 9746. Authentication of copies—abbreviated record.
 9747. When an appeal may be dismissed.
 9748. Effect of dismissal.
 9749. Supplementing defective record.
 9750. What the court may review on an appeal from a judgment.
 9751. Ruling against respondent may be reviewed.
 9752. Remedial powers of an appellate court.
 9753. Remittitur must be certified to the clerk of the district court.

9729. How judgments and orders may be reviewed. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in sections 9729 to 9761 of this code, and not otherwise.

History: En. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, p. 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; re-en. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. C. 1907; re-en. Sec. 9729, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 936.

Applicable to Decrees in Probate

Decrees in probate proceedings, including those relative to the settlement of guardians, are not, technically speaking,

judgments, but the mode of review applicable to judgments is, by this section and the next two succeeding sections, made applicable to many of them, and a trial court has no greater power over these than it has over formal judgments. *State ex rel. McHatton v. District Court*, 55 M 324, 329, 176 P 608; *Hoppin v. Long*, 74 M 558, 578, 241 P 636.

Operation and Effect

The district court in a judicial district composed of but one county, having regularly made an appealable order, has no

power to set it aside on its own motion, where such order was not made inadvertently or improvidently. *Whitbeck v. Montana Central Ry. Co.*, 21 M 102, 106, 52 P 1098.

While all of the decisions of district courts are subject to review by the supreme court, under some appropriate procedure, causes may be removed to it by appeal only under the limitations and regulations prescribed by statute. *Pierson v. Daly*, 49 M 478, 480, 143 P 957.

9730. Party aggrieved may appeal—names of parties. A party aggrieved may appeal in the cases prescribed in sections 9729 to 9761 of this code. The party appealing is known as the appellant, and the adverse party as the respondent.

History: En. Sec. 248, p. 94, *Bannack Stat.*; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, *Cod. Stat.* 1871; re-en. Sec. 407, p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420, 1st Div. Comp. Stat. 1887; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 938.

Party Aggrieved

An administrator with the will annexed, and an heir of a beneficiary under the decedent's will, are "parties aggrieved" under this section, and can appeal from a decree granting a distribution of the estate. *In re Davis' Estate*, 27 M 235, 239, 70 P 721.

A person, in his capacity as administrator, cannot appeal from an order disallowing his individual claim against the estate, and on such appeal his individual rights will not be considered. *In re Barker's Estate*, 26 M 279, 283, 67 P 941.

On a joint appeal, errors not common to both appellants may be considered, but one appellant will not be permitted to assume a position antagonistic to that of the other. *Anderson v. Northern Pacific Ry. Co.*, 34 M 181, 191, 85 P 884. See also *Rand v. Butte Electric Ry. Co.*, 40 M 398, 414, 107 P 87.

While any party aggrieved may appeal, no matter whether the judgment be joint or several, he must serve with notice all other parties who are interested in opposing the relief which he seeks by his appeal, if they formally appeared in the action below, else his appeal will prove ineffectual. *Spokane Ranch & Water Co. v. Beatty*, 37 M 342, 349, 96 P 727, 97 P 838.

Since an appeal does not lie from an order denying a motion for leave to file a complaint in intervention, and the unsuccessful movant, not being a party to the

References

Cited or applied as section 1720, Code of Civil Procedure, in *State ex rel. Jackson v. Kennie*, 24 M 45, 51, 60 P 589; *Murphy v. Patterson*, 24 M 591, 592, 63 P 380; as section 7096, Revised Codes, in *re Mettler v. Adamson*, 38 M 198, 201, 99 P 441; *Ringling v. Biering et al.*, 83 M 391, 394, 272 P 688; *Heater v. Boston & Montana Corp. et al.*, 84 M 500, 505, 277 P 11; *State v. District Court*, 89 M 531, 537, 300 P 235; *State ex rel. Brophy v. District Court*, 95 M 479, 483, 27 P 2d 509.

action, cannot appeal from the final judgment entered therein, he may have the order reviewed on application to the supreme court for writ of supervisory control. *State v. District Court et al.*, 75 M 132, 143, 242 P 431.

Unless a party has an interest in the subject of litigation which is injuriously affected by an order made or judgment rendered therein, he is not an "aggrieved party," within the meaning of this section, and cannot appeal therefrom. *Griffith v. Montana W. G. Assn.*, 75 M 466, 469, 244 P 277.

Id. In an action by a mortgagee for damages for the conversion of a mortgaged crop, in which a bank had intervened as holder of orders given it by the mortgagor drawn on defendant purchaser of the grain which remained unpaid, where plaintiff claimed nothing as against the intervener and the latter made no claim to anything in which plaintiff was interested and the judgment merely awarded to plaintiff the damages claimed, not mentioning intervener, held, that the bank was not aggrieved and therefore not entitled to appeal from the judgment, and appeal dismissed.

Under this section, only an aggrieved party has the right of appeal; hence where the widow of a testator, as defendant in a proceeding to have the probate of the will revoked and heirship determined, asserted that she was entitled to one-half of decedent's estate, both under the will and under the law of succession in case the will should be declared invalid, and by the decree she was awarded all she asked, she was not an aggrieved party and therefore not entitled to appeal from the decree otherwise in favor of plaintiffs. *In re Bernheim's Estate*, 82 M 198, 266 P 378.

A devisee under a will to whom the property devised had been awarded in a proceeding to determine heirship, but who

claimed that the court had not acquired jurisdiction because of faulty publication of notice as regards unknown claimants, thus endangering the validity of the decree and hence his title to the property decreed to him, by possible claims thereafter made by such claimants, was an "aggrieved party" within the meaning of this section, and as such entitled to appeal. In re Baxter's Estate, 98 M 291, 296, 39 P 2d 186.

References

Cited or applied as section 7097, Revised Codes, in Cummings v. Reins Copper Co., 40 M 599, 610, 107 P 904; Hoppin v. Long, 74 M 558, 578, 241 P 636; Hornbeck et al. v. Richards, 80 M 27, 29, 257 P 1025; Swanberg v. National Surety Co., 86 M 340, 350, 283 P 761; Harrington v. H. D. Lee Mercantile Co., 97 M 40, 54, 33 P 2d 553.

9731
175 P.(2d) 765

9731
174 P.(2d) 571
(dissent)

9731. From what judgment or order an appeal may be taken. An appeal may be taken to the supreme court from a district court in the following cases:

1. From a final judgment entered in an action or special proceedings commenced in a district court, or brought into district court from another court.

2. From an order granting a new trial; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judgments or orders in actions for partition as determine the rights and interests of the respective parties and direct partition to be made.* (In any of the cases mentioned in this subdivision the supreme court, or a judge thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.)

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

History: Ap. p. Sec. 262, p. 97, Bannack Stat.; amd. Sec. 331, p. 201, L. 1867; re-en. Sec. 380, p. 110, Cod. Stat. 1871; amd. Sec. 431, p. 157, L. 1877; re-en. Sec. 431, 1st Div. Rev. Stat. 1879; re-en. Sec. 444, 1st Div. Comp. Stat. 1887; amd. Sec. 1722, C. Civ. Proc. 1895; amd. Sec. 1, p. 146, L. 1899; re-en. Sec. 7098, Rev. C. 1907; amd. Sec. 10, Ch. 225, L. 1921; re-en. Sec. 9731, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 963.

Subd. 1—Final Judgments

Appeal From a Portion of the Judgment is Unauthorized

The statute permitting an appeal from a final judgment contemplates an appeal from the whole thereof, and therefore an appeal from only a portion of it does not lie. Lohman v. Poor et al., 68 M 579, 220 P 1094.

9731
165 P.2d 207

9731
100 Mont. 507
50 P (2d) 859
100 Mont. 602
52 P (2d) 152

9731 subsec. 2
101 Mont. 121
53 P (2d) 118

9731
63 P (2d) 1033

9731
74 P (2d) 10
..... Mont.

9731
86 P.(2d) 757

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88 P.(2d) 33

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111 P.(2d) 812

9731
124 P.(2d) 1012

9731
Subsec. 2
141 P.(2d) 372,
373
..... subsec. 3
102 Mont. 76
55 P (2d) 1296

9731
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79 P.(2d) 558
.....Mont.....

9731
amended
L. 41 c. 41
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9731
116 P.(2d) 291

9731(3)
140 P.(2d) 585

9731
171 P.(2d) 997

9731
Subsec. 3
177 P.(2d) 867,
868

9731
187 P.(2d)
1015
193 P.(2d) 632

9731, subd. 3
204 P.(2d) 805

Defective Judgment of Dismissal Not Appealable

An entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken. A pretended judgment of dismissal, which was not in fact a dismissal, is not appealable. *Kinman v. Scheuer*, 30 M 73, 74, 75 P 690.

Id. An appeal from an order denying a motion to adopt a general verdict and special findings and to set aside the special verdict in a suit in equity must be dismissed where the record shows no judgment of dismissal or other final judgment.

Final Judgment Contemplated by This Section

The "final judgment" referred to in this section is a judgment rendered by the district court, and not that rendered by a justice of the peace from which an appeal is prosecuted. *Raymond v. Raymond*, 32 M 170, 172, 79 P 1056.

An order to disclose assets of a decedent's estate is not a "final judgment," within the meaning of subdivision 1 of this section, from which an appeal lies. *In re Roberts' Estate*, 48 M 40, 42, 135 P 909.

Id. The expression "final judgment," as used in subdivision 1 of this section, refers only to those judgments known at common law as final judgments, as defined in section 9313; it does not include statutory determinations termed "orders" or "judgments" in probate proceedings.

Under this section, either the state or the claimant may appeal from the judgment rendered in a proceeding under the enforcement act of 1917, relative to searches, seizures, and forfeitures of intoxicating liquors. *State ex rel. Prato v. District Court*, 55 M 560, 566, 179 P 497.

Under this section, an appeal lies from the final, or formal, judgment granting (or denying) a peremptory writ of prohibition, but does not lie from an order entered in the minutes of the district court directing the peremptory writ to issue. *State v. Lemkie*, 62 M 51, 52, 202 P 1109.

In an action for a partnership accounting in which defendants among other things, claimed that plaintiff had purchased certain lands with partnership funds, the judgment, which determined all the material issues involved, a referee being appointed to take an account of the partnership affairs to report the facts, and which left nothing undetermined except the title to a homestead patented to plaintiff also claimed as partnership property, was final in the sense used in this section, authorizing an appeal from a "final judgment." *Wilson v. Wilson et al.*, 64 M 533, 539, 210 P 896.

A proceeding in habeas corpus, the object of which is to determine the right to the custody of a minor, is a special proceeding of a civil nature to enforce private rights; the disposition made of it by the court is a judgment from which an appeal may be taken under this section. *In re Thompson*, 77 M 466, 469, 251 P 163.

The right of appeal did not exist at common law; it is purely statutory, and unless a judgment appealed from as a final judgment authorized by this section, and defined by section 9313 as "the final determination of the rights of the parties in an action or proceeding," is in reality final—not merely interlocutory—an appeal therefrom does not lie. *Ringling v. Biering et al.*, 83 M 391, 394 et seq., 272 P 688.

Final Judgment in a Special Proceeding

An order of the district court directing an executor to execute a lease of certain realty belonging to his testator's estate is not a "final judgment in a special proceeding" from which an appeal will lie. *Tuohy's Estate*, 23 M 305, 307, 58 P 722.

No appeal lies from a summary judgment against sureties in proceedings for the forfeiture of a bail bond, though the judgment is final; it is not "a judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court." *State ex rel. Van v. District Court*, 54 M 577, 579, 172 P 540.

Necessity That Record Show

Where the record does not show that any judgment has been entered in the case in the court below, an appeal from the judgment will be dismissed. *Lisker v. O'Rourke*, 28 M 129, 131, 72 P 416, 755.

Id. A minute entry directing judgment to be entered for defendant is not a judgment.

Scope of Action in General

The statutes do not limit the right of appeal from final judgment, or the power of the supreme court on such appeals, but merely provide for independent appeals from interlocutory judgments and the extent of relief to be granted thereon. *Finlen v. Heinze*, 27 M 107, 117, 69 P 829, 70 P 517.

"Special Proceeding"

An application for the appointment of a receiver to work a mining claim pending a suit to settle a controversy as to the title is not a "special proceeding" within the meaning of this section. *State ex rel. Heinze v. District Court*, 28 M 227, 233, 72 P 613.

Subd. 2—Orders**A. What Orders May Be Appealed From****Declaring a Trust and Removing**

A judgment declaring a trust and removing the trustee is a final order from which an appeal will lie, notwithstanding that it directs the trustee to file an inventory and an account of all property received by him as trustee. *Bryant v. Davis*, 22 M 534, 537, 57 P 143.

Order Appointing a Receiver

An ex parte order appointing a receiver is appealable. *Rumney v. Donovan*, 28 M 69, 71, 72 P 305.

Order Denying an Injunction

An appeal lies from an order denying an injunction. *Bown v. Somers*, 55 M 434, 435, 178 P 287.

Order Denying a Preference

Under this section, a creditor of an insolvent bank seeking to have his claim against the bank established as a preferred one has an appeal from an adverse order of the court; where he fails to appear within the time allowed, the order becomes final. *State v. Banking Corporation of Montana*, 81 M 489, 494, 264 P 106.

Order Directing Clerk of Court to Deliver Receivership Funds to Defendant

Where, on motion to vacate an order appointing a receiver made some seven years prior thereto, the court, in addition to vacating the order, directed the clerk of court to pay to defendants the funds collected by the receiver, the latter part of the order, appealed from as a whole, was appealable under this section. *Burgess v. Lasby et al.*, 94 M 534, 542, 24 P 2d 147.

Order Refusing to Dissolve an Injunction

Where a motion to dissolve a temporary restraining order was heard at once and the matter of propriety of its issuance presented to the court as fully as it could have been on hearing of an order to show cause issued, and the court in denying the motion, instead of preserving the status quo, authorized one party to the action to harvest and sell crops (the subject in controversy) while restraining his opponent from interfering with him, its order was an adjudication of the right of the former to an injunction pendente lite, from which an appeal lay under this section. *Labbitt v. Bunston*, 80 M 293, 298, 260 P 727.

An order denying a motion to dissolve a temporary injunction is an appealable order, and if not appealed from, the correctness of the order may not, under section 9750, be reviewed on appeal from the judgment in the action in which the order was made. *Little Horn State Bank v. Gross et al.*, 89 M 472, 476, 300 P 277.

Order Refusing to Vacate the Order of Appointment of a Receiver

This statute should be understood as creating the right to appeal from an order refusing to vacate the order of appointment of a receiver where the motion to vacate is based, not upon the conditions existing when the order was made, but upon facts occurring subsequently to the making of the original order. *Forrester v. B. & M. C. C. & S. M. Co.*, 24 M 148, 152, 60 P 1088, 61 P 309.

Order Requiring the Payment of Alimony Pendente Lite

An order requiring the payment of alimony pendente lite is one from which an appeal lies. *State ex rel. McGrath v. District Court*, 82 M 463, 465, 267 P 803.

Special Order Made After Final Judgment

An order refusing to stay an execution upon a judgment is a "special order made after final judgment" and appealable. *Clarke v. Goner*, 2 M 538.

An order made in proceedings supplemental to execution is a special order made after final judgment, and is therefore appealable. *Barber v. Briscoe*, 9 M 341, 347, 23 P 726; *Hayes v. District Court*, 11 M 225, 227, 28 P 259.

An order made after judgment, and which extends the time for filing a bill of exceptions, is an appealable order. *Beach v. Spokane Ranch & Water Co.*, 21 M 7, 8, 52 P 560.

Where a decree determining partnership accounts is rendered after the dissolution of the firm, and the receiver therefor is thereafter ordered to sell the partnership property, an appeal from an order confirming such sale does not raise any question concerning the order of sale, since such order is a special order, made after final judgment, from which an appeal is authorized. *Murphy v. Patterson*, 24 M 591, 592, 63 P 380.

When made after entry of final judgment, an order striking out the statement on motion for a new trial is an order from which an appeal may be taken. *Beach v. Spokane Ranch & Water Co.*, 25 M 367, 368, 65 P 106; *State ex rel. Finlen v. District Court*, 26 M 372, 376, 68 P 465.

An order amending a judgment already entered is a special order after final judgment, and therefore appealable. *State ex rel. B. & M. Min. Co. v. District Court*, 32 M 20, 23, 79 P 410.

The special order, made after final judgment, from which an appeal lies, must be an order affecting the rights of some party to the action, growing out of the judgment previously entered. It must be an order affecting rights incorporated in the judgment. *Chicago, Milwaukee & St. Paul Ry. Co. v. White*, 36 M 437, 440, 93 P 350; *Weed v. Weed*, 55 M 599, 601, 179 P 827.

An order refusing to set aside a judgment is a special one made after final judgment; and, as such, is appealable under this section. It cannot be reviewed on appeal from a new trial order, as the two proceedings are separate and distinct from each other. *Canning v. Fried*, 48 M 560, 565, 139 P 448.

An order quashing an execution issued by a clerk of the district court on an abstract of a justice's judgment, filed with and docketed by him under section 9690, and striking such abstract from the files, is not a special order after final judgment made appealable by this section. *Pierson v. Daly*, 49 M 478, 483, 143 P 957.

Since denial of an order to set aside the findings and judgment in an action in ejectment was a special order made after final judgment, it was appealable, and failure to appeal therefrom bars review on appeal from the judgment. *Stack v. Coyle*, 59 M 444, 449, 197 P 747.

An order, made after judgment, denying a motion to set aside a default and judgment, is appealable under this section; hence, where no appeal was taken, the alleged error in refusing the motion was not reviewable on appeal from the judgment. (On rehearing.) *Batchoff v. Butte Pacific Copper Co.*, 60 M 179, 191, 198 P 132.

Under the rule that certiorari does not lie where appeal is available, held, that an order so modifying a decree of divorce as to suspend payment of alimony and awarding the custody of a minor child to the father upon remarriage of the mother was a special order made after final judgment and appealable (this section), and that therefore the writ of review was not available to review the correctness of the order. *State v. District Court et al.*, 69 M 322, 324, 221 P 543.

To render a special order made after final judgment appealable under this section it must be one affecting rights incorporated in the judgment. *Apple v. Seaver*, 70 M 65, 223 P 830.

Id. An order denying defendant's motion for leave to amend his answer after

judgment had been rendered and motion for new trial denied was not a special order made after final judgment within the meaning of this section, and was therefore not appealable.

Where no judgment has been entered in a civil action at the time the court without authority strikes the entry of default from the files, certiorari lies to correct the error; where the court makes such an order within jurisdiction, and no judgment has been entered, supervisory control lies; but where such order is made after judgment, certiorari does not lie even though the court exceeded its jurisdiction, since then an appeal lies from the order as from a special order made after final judgment. *State v. District Court et al.*, 83 M 400, 407 et seq., 272 P 525.

Held, that an order amending a judgment entered four months prior thereto was a special order made after final judgment and as such appealable under subdivision 2 of this section, and that therefore its correctness may not be reviewed on certiorari. *State v. District Court et al.*, 97 M 530, 536, 37 P 2d 567.

B. What Orders May Not be Appealed From

Order Allowing Amendment of an Affidavit for Writ of Attachment

An order permitting amendment of an affidavit for writ of attachment is not appealable (this section). *Hetrick v. Renwald*, 73 M 426, 236 P 1089.

Order Annulling an Order Appointing a Receiver

An order annulling an order appointing a receiver is not appealable, but may be reviewed on appeal from the final judgment. *Taintor v. St. John*, 50 M 358, 362, 146 P 939.

Order Authorizing the Payment of a Fund Deposited in Court

An order authorizing the payment of a fund deposited in court in condemnation proceedings to the person entitled thereto is not one directing the delivery, transfer, or surrender of property within the meaning of this section, and is therefore not appealable. *Chicago, Milwaukee & St. Paul Ry. Co. v. White*, 36 M 437, 439, 93 P 350.

Order Correcting the Verdict

An order of the district court correcting the verdict in a civil action is not one from which an appeal may be taken. *Frank v. Symons*, 35 M 56, 63, 88 P 561.

Order Denying a Motion for Leave to File a Complaint in Intervention

An appeal from an order denying a motion for leave to file a complaint in inter-

vention does not lie, this section not authorizing it. *Equity Co-operative Assn. v. Milling Co.*, 63 M 26, 37, 206 P 349.

Order Dismissing an Action for Failure of Defendant to Have Judgment Entered

An order dismissing an action for failure of defendant company to demand and have entered a judgment in its favor, within six months after rendition of verdict, is not a final judgment nor an order from which an appeal may be taken. *Hovey v. Northern Pacific Ry. Co.*, 39 M 40, 41, 101 P 146.

Order Made Before Judgment to Set Aside a Default

An order made before final judgment, refusing to set aside a default, is not appealable. *Bowen v. Webb*, 34 M 61, 64, 85 P 739.

An order, made before final judgment, refusing to set aside a default, is not appealable. *Bullard v. Zimmerman et al.*, 82 M 434, 446, 268 P 512.

Order Overruling a Motion to Quash an Alternative Writ of Mandate

An order overruling a motion to quash an alternative writ of mandate is not an appealable one. *State ex rel. Frost v. Barnett*, 49 M 252, 254, 141 P 287.

An order of the district court denying an application for an alternative writ of mandate is not one of the orders enumerated in subdivisions 2 and 3 of this section, from which an appeal may be taken, and hence an appeal therefrom does not lie. *State v. Lay et al.*, 89 M 541, 543, 300 P 238.

Order Overruling a Motion to Reject Findings

An order overruling a motion to reject findings made by the jury is not appealable. *Johns v. Barnes*, 31 M 426, 427, 78 P 703.

Appeals do not lie under this section, from orders rejecting findings of the jury, from conclusions of law, or from the action of the court in adopting certain findings of the jury and making findings of its own, the questions thus sought to be raised being reviewable on appeal from the judgment. *Bode v. Rollwitz et al.*, 60 M 481, 491, 199 P 688.

Order Overruling a Motion to Strike an Affidavit Filed in Support of a Motion for the Modification of a Decree Granting a Divorce

An appeal does not lie from an order overruling a motion to strike an affidavit filed in support of a motion for the modi-

fication of a decree granting a divorce, such order not being one of the orders made appealable by this section, nor a special order made after final judgment from which an appeal may be taken. *Weed v. Weed*, 55 M 599, 600, 179 P 827.

Order Refusing a Motion to Modify a Former Order—Exception

The general rule that, when an appeal can be taken from an order refusing a motion to modify the former order is not appealable, does not apply when the original order was irregularly issued, or was made without notice. *Beach v. Spokane Ranch & Water Co.*, 21 M 7, 8, 52 P 560. See also *Butte Consolidated Min. Co. v. Frank*, 24 M 506, 511, 62 P 922.

Order Refusing or Granting a Restraining Order on Injunction

There is no appeal from an order granting or refusing a restraining order pending the hearing of an order to show cause why an injunction should not issue. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 25 M 135, 139, 63 P 1043.

This section does not authorize an appeal from a temporary restraining order pending the hearing of an order to show cause why an injunction pendente lite should not be issued. *Maloney v. King*, 25 M 256, 257, 64 P 668.

Order Refusing to Allow an Amendment

An appeal does not lie from an order refusing to allow an amendment to the complaint, or striking the complaint from the files. *Owen v. McCormick*, 5 M 255, 256, 5 P 280. See also *Murphy v. King*, 6 M 30, 31, 9 P 585.

Order Refusing to Grant Application for Writ of Review

The order of the district court refusing to take jurisdiction of the application for writ of review was neither a judgment from which an appeal could have been taken nor an appealable order, even if it had contained a positive direction that the proceeding be dismissed, the general rule being that a judgment of dismissal for want of jurisdiction is not one from which an appeal lies; hence relator's right to relief by mandate was not barred by any right of appeal. *State v. District Court*, 89 M 531, 537, 300 P 235.

Order Requiring Appellee on Appeal From Justice Court to Give Bond

This section and the following section being exclusive, an appeal will not lie from an order of a district court requiring that appellee on an appeal from justice's

court give the bond required of a plaintiff, not a resident of the state, since such an order is not designated therein. *State ex rel. Allen v. Napton*, 24 M 450, 455, 62 P 686. See also *Threlkeld v. O'Neal*, 26 M 209, 211, 66 P 940; *State ex rel. Prescott*, 27 M 179, 180, 70 P 516.

Order Striking From Files a Document Constituting Part of the Record

An appeal does not lie from an order striking from the files a pleading or other document constituting a part of the record of a cause. *State ex rel. Smotherman v. District Court*, 50 M 119, 122, 145 P 724.

Order Substituting a Claimant of Property

An order substituting a claimant of property, on application of defendant in a claim and delivery action, in lieu of defendant, is not a final determination from which an appeal is allowable. *State ex rel. Weinstein Co. v. District Court*, 28 M 445, 449, 72 P 867.

Order Sustaining a Demurrer and Directing the Dismissal of the Action

A minute entry of an order sustaining a demurrer to the plaintiff's complaint, and directing the dismissal of his action, is not an order from which an appeal can be taken; the order, in view of sections 9313 and 9772, is not a judgment. *Pentz v. Corscadden*, 49 M 581, 144 P 157.

An appeal from an order sustaining a demurrer does not lie; nor may such an order made in a proceeding arising out of an action in which a judgment had been entered be treated as a special order made after final judgment, where such judgment was a conditional interlocutory determination, and not a final one. *Heater v. Boston & Montana Corp. et al.*, 84 M 500, 505, 277 P 11.

Order Sustaining a Demurrer or an Order Sustaining a Motion to Quash a Writ of Prohibition

Neither an order sustaining a demurrer nor an order sustaining a motion to quash an alternative writ of prohibition is appealable. *State ex rel. Allen v. Hawkins*, 33 M 177, 179, 82 P 952.

Order Sustaining or Overruling a Motion to Dismiss an Appeal From Justice Court

An order sustaining a motion to dismiss an appeal from a justice's court is not appealable. *Territory v. Morehouse*, 8 M 310, 312, 21 P 663; *Franzman v. Davies*, 32 M 251, 253, 80 P 251.

An order of the district court, overruling a motion to dismiss an appeal to

that court from a judgment of a justice of the peace, is not a final judgment, nor a special order made after final judgment, so as to be appealable under this section. *Raymond v. Raymond*, 32 M 170, 171, 79 P 1056.

An order of the district court dismissing an appeal from a justice's court is not appealable. *Palmer v. Spaulding*, 34 M 1, 2, 85 P 369.

Subd. 3—Probate Judgments and Orders

A. What May be Appealed From

In General

Appeals from judgments or orders in probate proceedings are allowed only under the provisions of subdivision 3 of this section, except in the single case of an order granting or refusing a new trial, which may be taken under subdivision 2. *Tuohy's Estate*, 23 M 305, 307, 58 P 722.

Order Allowing Fees of Administratrix and Attorneys

Action of the district court, sitting in probate, in approving an agreement between an administratrix and attorneys who had acted for the executrix whom she succeeded in the administration of the estate as well as for herself, under which she had promised to pay them a fee of \$5,000 for their services, and in fixing her fee as administratrix, if erroneous was reviewable on appeal under this section, and not on application for writ of supervisory control. *State ex rel. Brophy v. District Court*, 97 M 83, 91, 33 P 2d 266.

Order Confirming a Guardian's Account

An order confirming a guardian's account, being appealable under this section, and no appeal having been taken therefrom, questions respecting its settlement cannot be considered on a subsequent appeal from an order of sale of the ward's real estate. *In re Scheuer's Estate*, 31 M 606, 611, 79 P 244.

Order Denying a Motion for a New Trial in Proceedings for Distribution of an Estate

An appeal lies from an order denying a motion for a new trial in proceedings for the distribution of an estate under section 10323. *In re Davis' Estate*, 27 M 235, 244, 70 P 721.

Order Fixing Inheritance Tax

The action of the court in fixing the amount of an inheritance tax, and in directing its payment, may be reviewed on appeal, either from the order itself or from the decree directing the delivery. *State ex rel. Floyd v. District Court*, 41 M 357, 368, 109 P 438.

An order of the district court fixing the amount of an inheritance tax due from an estate and directing its payment is appealable; hence failure to appeal barred the state from calling in question the correctness of the order on appeal from the decree allowing the final account of the executor, after payment of the tax. In re Sattes' Estate, 59 M 220, 222, 195 P 1033.

Order for Partial Distribution of an Estate

An appeal lies from an order for the partial distribution of an estate. State ex rel. Leyson v. District Court, 26 M 378, 379, 68 P 411.

An appeal may be taken from a part of an order or judgment decreeing certain persons to be entitled to share in the distribution of an estate under a will, such an order not being a "final" judgment. In re Klein's Estate, 35 M 185, 201, 88 P 798.

Order Granting an Allowance to a Widow

An order granting an allowance to a widow out of the estate of her intestate is appealable, and, where an appeal therefrom is not taken within sixty days, it becomes final and conclusive, and may not thereafter be attacked collaterally. In re Dougherty's Estate, 34 M 336, 343, 86 P 38.

Order Refusing to Confirm Sale of Property

Under subdivision 3 of this section, authorizing an appeal from a judgment or order made by the district court sitting in probate "against * * * directing * * * the sale or conveyance of real property," an appeal lies from an order refusing to confirm an administrator's sale of such property. In re McLure's Estate, 76 M 476, 485, 248 P 362.

B. What May Not be Appealed From

Order Directing the Execution of a Lease of Realty

An appeal will not lie from an order directing the execution of a lease of realty under subdivision 3 of this section, as the word "conveyance," as used in the statute, does not include a lease. Tuohy's Estate, 23 M 305, 308, 58 P 722.

Order Disallowing a Claim Against an Estate

An order disallowing a claim against an estate is not appealable. In re Barker's Estate, 26 M 279, 283, 67 P 941.

Order Granting a Motion to Strike Objection to Final Account and to Petition for Distribution

An order granting a motion to strike out objections to the final account of an executrix and to a petition for distribution of the estate is not appealable. State ex rel. Cotter v. District Court, 34 M 303, 305, 87 P 614.

Order Refusing to Revoke Probate

Under this section, subdivision 3, only such orders in probate proceedings as therein enumerated are appealable; hence an order dismissing a petition for the revocation of the probate of a will—in effect an order refusing to revoke its probate—not being included in the enumeration, is not appealable. In re Ferguson's Estate, 73 M 596, 597, 237 P 1105.

Order Refusing to Vacate Decree of Distribution, etc.

Under subdivision 3 of this section, orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, are not appealable. In re Kelly's Estate, 31 M 356, 357, 78 P 579, 79 P 244.

An erroneous order overruling a motion to vacate a decree of distribution of an estate not being an appealable one, and relatrix not having any other plain, speedy and adequate remedy, supervisory control lies to annul the order. State v. District Court et al., 62 M 60, 67, 203 P 860.

Order Requiring a Disclosure of Decedent's Assets

An order of court requiring a person, charged with concealing or disposing of the assets of a decedent's estate, to make a disclosure of such assets, under sections 10141 and 10142, is not appealable. In re Roberts' Estate, 48 M 40, 42, 135 P 909.

In General

Appealability of an Order Does Not Rest Upon Its Operative Effect

The appealability of an order does not rest upon what may be its operative effect, and therefore the question whether it is void or not cannot govern its appealability. State v. District Court et al., 97 M 530, 536, 37 P 2d 567.

Definition of "Final Judgment"

The term "final judgment," as used in subdivision 2 of this section, refers only to those judgments known at common law as final judgments, and has no application to the statutory determinations and orders termed "orders or judgments" in probate proceedings. Tuohy's Estate, 23 M 305,

307, 58 P 722; *In re Kelly's Estate*, 31 M 356, 359, 78 P 579, 79 P 244; *In re Dougherty's Estate*, 34 M 336, 340, 86 P 38; *In re Klein's Estate*, 35 M 185, 202, 88 P 798; *In re Roberts' Estate*, 48 M 40, 42, 135 P 909.

Not Applicable to Matters in Penal Code

This section provides only for appeals in civil cases, and has no application to any matter contained in the Penal Code. *State ex rel. Jackson v. Kennie*, 24 M 45, 51, 60 P 589.

Operation and Effect

An appeal is authorized by statute only, and unless the judgment or order which it is sought to have reviewed in this mode falls fairly within the enumeration of appealable orders or judgments made by the statute, the appeal does not lie. *Tuohy's Estate*, 23 M 305, 306, 58 P 722; *State ex rel. Jackson v. Kennie*, 24 M 45, 50, 60 P 589; *Taintor v. St. John*, 50 M 358, 362, 146 P 939; *Weed v. Weed*, 55 M 599, 600, 179 P 827.

References

Cited or applied as section 444, First Division Compiled Statutes 1887, in *Mining Company v. Weinstein*, 7 M 346, 17 P 108; as section 1722, Code of Civil Procedure, before amendment, in *Whitbeck v. Montana Central Ry. Co.*, 21 M 102, 107, 52 P 1098; *Forrester v. Boston & M. C. C. & S. M. Co.*, 22 M 430, 432, 56 P 868; *Jordan v. Andrus*, 26 M 37, 38, 66 P 502; *Maloney v. King*, 26 M 487, 488, 68 P 1012; *Maloney v. King*, 26 M 492, 493, 68 P 1014; before amendment, in *State ex rel. Donovan v. District Court*, 27 M 415, 419, 71 P 401; as amended, in *Bordeaux v. Bordeaux*,

32 M 159, 161, 80 P 6; *Great Falls Meat Co. v. Jenkins*, 33 M 417, 423, 84 P 74; *State ex rel. Klein v. District Court*, 35 M 364, 367, 90 P 161; as section 7098, Revised Codes, in *State ex rel. Mackey v. District Court*, 40 M 359, 362, 106 P 1098; *State ex rel. Grogan v. District Court*, 44 M 72, 76, 119 P 174; *Molt v. Northern Pacific Ry. Co.*, 44 M 471, 477, 120 P 809; *State ex rel. Mannix v. District Court*, 51 M 310, 322, 152 P 753; *Anaconda Copper Min. Co. v. Pilot Butte Min. Co.*, 51 M 443, 451, 153 P 1006; *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 609, 172 P 1030; *State ex rel. McHatton v. District Court*, 55 M 324, 329, 176 P 608; *In re Estate of Murphy*, 57 M 273, 280, 188 P 146; *Philbrick v. American Bank & Trust Co.*, 58 M 376, 388, 193 P 59; *State ex rel. Rankin v. District Court*, 70 M 322, 325, 225 P 804; *State ex rel. Altop v. District Court et al.*, 72 M 49, 55, 231 P 99; *Hoppin v. Long*, 74 M 558, 578, 241 P 636; *State ex rel. Thompson v. District Court*, 75 M 147, 242 P 959; *Hornbeck et al. v. Richards*, 80 M 27, 29, 257 P 1025; *State ex rel. Rankin v. Banking Corporation*, 80 M 49, 50, 257 P 1020; *Barth v. Ely*, 85 M 310, 327, 278 P 1002; *State v. Wibaux County Bank*, 85 M 532, 542, 281 P 341; *Swanberg v. National Surety Co.*, 86 M 340, 350, 283 P 761; *In re McCracken's Estate*, 87 M 342, 344, 287 P 941; *Scholefield v. Merrill Mortuaries, Inc.*, 93 M 192, 203, 17 P 2d 1081; *State ex rel. Johnston v. District Court*, 93 M 439, 445, 19 P 2d 220; *In re Toomey's Estate*, 97 M 489, 495, 31 P 2d 729; *State v. District Court et al.*, 96 M 600, 606, 31 P 2d 837; *State ex rel. Brophy v. District Court*, 95 M 479, 483, 27 P 2d 509; *State ex rel. Finley v. District Court*, 99 M 200, 43 P 2d 682.

9732. Time for taking appeal. An appeal may be taken:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered within six months after the entry of such judgment.
2. From a judgment rendered, on an appeal from an inferior court, within ninety days after the entry of such judgment.
3. From an order granting a new trial; from an order granting, dissolving, or modifying an injunction; from an order refusing to grant, dissolve, or modify an injunction; from an order dissolving or refusing to dissolve or modify an attachment; from an order changing or refusing to change a place of trial; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order directing the delivery, transfer, or surrender of property; from any special order made after final judgment; from an interlocutory judgment or order in actions for partition of real property, and from an order confirming, changing, modifying, or setting aside the report in whole or in part of the

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74 P (2d) 10

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80 P (2d) 368

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Subsec. 3
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Rel. matter
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139 P (2d) 529

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subsec. 1
186 P. (2) 895

referees in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court filed with the clerk. In any of the cases mentioned in this subdivision the supreme court, or a judge thereof, may stay all proceedings under the order appealed from on such conditions as may seem proper.

4. From the judgment or orders mentioned in subdivision 3 of the next preceding section, within sixty days after the judgment or order is made or entered, or filed with the clerk.

History: Ap. p. Sec. 251, p. 95, *Ban-nack Stat.*; amd. Sec. 320, p. 199, L. 1867; re-en. Sec. 369, p. 107, *Cod. Stat.* 1871; amd. Sec. 408, p. 150, L. 1877; re-en. Sec. 408, 1st Div. Rev. Stat. 1879; re-en. Sec. 421, 1st Div. Comp. Stat. 1887; amd. Sec. 1723, C. Civ. Proc. 1895; amd. Sec. 1, p. 147, L. 1899; re-en. Sec. 7099, Rev. C. 1907; amd. Sec. 11, Ch. 225, L. 1921; re-en. Sec. 9732, R. C. M. 1921; amd. Sec. 1, Ch. 39, L. 1925. Cal. C. Civ. Proc. Sec. 939.

Subd. 1—Final Judgments

Amendments After Entry of Judgment—When Time for Appeal Begins to Run

Where, in an action to set aside a fraudulent conveyance, an erroneous description of the land in the judgment was not corrected until some seventy days after its entry, the property rights of the defendant thus not becoming affected until after amendment, the rule that an order amending a judgment after entry is a special order after final judgment, and therefore appealable only within sixty days, does not apply, but the computation of time within which to perfect an appeal from the judgment dates from the time the amendment was made. *State Bank of New Salem v. Schultze*, 63 M 410, 416, 209 P 599.

Judgment of Industrial Accident Board

The Industrial Accident Board is not an inferior court within the meaning of this section providing that an appeal from a judgment rendered on an appeal from an inferior court must be taken within ninety days after the entry of such judgment; hence failure of appellant to serve and file its notice of appeal within ninety days from the entry of the judgment of the district court on appeal from an order of the board does not warrant dismissal of the appeal to the supreme court. *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 595, 254 P 880.

Operation in General

An appeal from a final judgment, not taken within one year after entry thereof, will be dismissed. *Gallagher v. Cornelius*, 23 M 27, 28, 57 P 447; *Ramsey v. Burns*, 24 M 234, 235, 61 P 129; *Kaufman v.*

Cooper, 38 M 6, 9, 98 P 504; *Reynolds v. Fitzpatrick*, 40 M 593, 595, 107 P 902; *Wilson v. Norris*, 43 M 454, 455, 117 P 100.

Under this section an appeal from a final judgment must be taken within six months after entry; where not taken until after the expiration of that time it will be dismissed. *Hodson et al. v. O'Keeffe*, 71 M 322, 324, 229 P 722.

In the absence of constitutional restriction, the legislature may grant or take away the right of appeal, and if it grants it, it may prescribe such restrictions and limitations as it may see fit to impose, and having prescribed that an appeal from a final judgment must be taken within six months after entry thereof, the supreme court does not acquire jurisdiction of such appeal unless taken within that time. *Kline v. Murray et al.*, 79 M 530, 535, 257 P 465.

Time for Appeal From Decision of County Superintendent of Schools

No time having been fixed by statute within which an appeal may be taken from the decision of a county superintendent of schools, and in the absence of regulations by the state superintendent with relation thereto, the appeal may be taken within a reasonable time after the making of the decision, a limitation of six months being deemed reasonable. *State ex rel. School Dist. v. Trumper*, 69 M 468, 478, 222 P 1064.

What Constitutes Final Judgment Under This Section

Where, pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed to work the property, but on appeal the order of appointment was reversed, and afterward an order was entered in the nature of a final judgment against the plaintiff in the action for the amount allowed the receiver for compensation, counsel fees, etc., the same was a "final order in an action," and appealable within one year, and not an order "with respect to a receivership," appealable for sixty days only. *State ex rel. Heinze v. District Court*, 28 M 227, 233, 72 P 613.

When a judgment has been entered and no further questions can come before the

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96 P.(2d) 939

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court except such as are necessary for carrying it into effect, it is final within the meaning of this section authorizing an appeal therefrom, judgments of dismissal or nonsuit constituting final judgment. *Kline v. Murray et al.*, 79 M 530, 535, 257 P 465.

Subd. 2—Judgments Rendered on Appeal From an Inferior Court

Operation in General

An appeal from a judgment of a district court rendered on an appeal from a justice's court, if not taken within ninety days after its entry, will be dismissed for want of jurisdiction. *Morris v. McLaughlin*, 25 M 151, 152, 64 P 219; *Warren v. Humble*, 26 M 495, 496, 68 P 851; *Schatzlein Paint Co. v. Passmore*, 26 M 500, 502, 68 P 1113; *Hopkins v. Kitts*, 37 M 26, 27, 94 P 201.

Subd. 3—Appealable Orders

Effect of Appeal Within Time by Only Part of the Parties

Where only one of a number of creditors of an insolvent bank, grouped under a certain class, appealed within sixty days from an order of the district court refusing them a preference right to payment of their claims, and secured a reversal thereof as to her the order as to the non-appealing claimants became final, and the action of the court in thereafter reinstating them as preferred creditors and prorating the money available in the bank for that purpose among them and the successful appellant was error. *State ex rel. Rankin v. Banking Corporation*, 80 M 49, 51, 257 P 1020.

Operation in General

An appeal from an order granting motion for a new trial, not taken within sixty days from the filing of the order, will be dismissed on motion. *Nelson v. Donovan*, 14 M 78, 35 P 227.

An appeal from a special order, made after final judgment, not taken within the statutory period of sixty days, will be dismissed for want of jurisdiction. *Jackman v. Hymer*, 42 M 168, 170, 111 P 720.

Where the record discloses that more than sixty days had elapsed from the entry of the order overruling a motion for a new trial to the giving of the notice of appeal therefrom, such attempted appeal will be dismissed. *Powell v. May*, 29 M 71, 73, 74 P 80.

Where a creditor of an insolvent bank by order of court is denied a preference of payment of his claim but fails to appeal therefrom within the time allowed by this section the order becomes final and the propriety of the court's order is not subject to review on appeal. *State v. Wibaux County Bank*, 85 M 532, 542, 281 P 341.

Under this section, an appeal lies from an order changing the place of trial, and where such an appeal is perfected the fact that appellant in his brief discusses his motion to strike that of defendant for change of venue on the ground that the papers in connection therewith were never served on plaintiff, furnishes no ground for dismissal of the appeal. *Helena Adjustment Co. v. Predivich*, 98 M 162, 164, 37 P 2d 651.

Supreme Court May Not Suspend Injunction During the Pendency of an Appeal Therefrom

Pending an appeal from an injunction order, pendente lite, restraining appellants from entering, or mining, in part of a certain lode claim of which they were in possession, they may not have an order from the supreme court suspending the injunction, since the supreme court is not authorized to suspend the operation of, vacate, or set aside a prohibitory injunction order during the pendency of an appeal therefrom. *Maloney v. King*, 26 M 487, 490, 68 P 1012.

Subd. 4—Probate Judgments and Orders

Operation in General

This section provides that an appeal from a final order must be taken within sixty days after it is made or entered. On July 1 the district court made an order, entered in the minutes, vacating one confirming a sale of real property belonging to an estate. On July 12 a formal order was made and filed. On September 7 an appeal was taken from the latter order. Held that the order of July 1 was the order from which the appeal should have been taken; that the order made on July 12 did not alter or amend the former one nor extend the time within which the appeal could be taken; that therefore the appeal was not taken within the sixty-day period prescribed by this subdivision and was vulnerable to a motion to dismiss. In *re McCracken's Estate*, 87 M 342, 344, 287 P 941.

Where the trial court, in a probate proceeding, filed its findings of fact and conclusions of law three weeks before entry of the decree, stating in effect that formal decree would follow (a practice commended as enabling the parties to move for amendment of findings and conclusions before entry of decree), the statutory period for appeal ran from the date of entry of the decree and not from the time the findings and conclusions were filed. In *re Toomey's Estate*, 96 M 489, 495, 31 P 2d 729.

References

Cited or applied as section 421, First Division Compiled Statutes 1887, in *Min-*

ing Company v. Weinstein, 7 M 346, 17 P 108; as section 1723, Code of Civil Procedure, before amendment, in Whitbeck v. Montana Central Ry. Co., 21 M 102, 107, 52 P 1098; as amended, in Forrester v. Boston & M. C. C. & S. M. Co., 22 M 430, 432, 56 P 868; State ex rel. Allen v. Napton, 24 M 450, 455, 62 P 686; Jordan v. Andrus, 26 M 37, 38, 66 P 502; before amendment, in Threlkeld v. O'Neal, 26 M 209, 211, 66 P 940; as amended, in In re Reilly's Estate, 26 M 358, 359, 67 P 1121; Maloney v. King, 26 M 492, 493, 68 P 1014; Finlen v. Heinze, 27 M 107, 113, 69 P 829, 70 P 517; as section 7099, Revised Codes, in State ex rel. Gattan v. District

Court, 39 M 134, 136, 101 P 961; Huffine v. Lincoln, 53 M 474, 475, 164 P 888; McCormick et al. v. Shields, 63 M 9, 13, 205 P 831; State ex rel. Deck v. District Court, 64 M 110, 112, 207 P 1004; Hale et al. v. Belgrade Co., Ltd., et al., 74 M 308, 312, 240 P 371; Atkinson v. Bonners Ferry Lbr. Co., Ltd., 74 M 393, 396, 240 P 823; Hoppin v. Long, 74 M 558, 570, 241 P 636; Labbitt v. Bunston, 80 M 293, 298, 260 P 727; Bond Lumber Co. v. Timmons et al., 82 M 497, 500, 267 P 802; Brunner v. Carter County, 92 M 594; State ex rel. Thelen v. District Court, 93 M 149, 156, 17 P 2d 57; Great Northern Ry. Co. v. Hatch et al., 98 M 269, 38 P 2d 976.

9733. Appeal—how taken. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless, within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

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100 Mont. 508
50 P (2d) 859
102 Mont. 255
58 P (2d) 499

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81 P.(2d) 702
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109 P.(2d) 60

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120 P.(2d) 563,
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136 P.(2d) 544
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173 P.(2d) 117

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202 P.(2d) 242

History: Ap. p. Sec. 252, p. 95, Ban-nack Stat.; re-en. Sec. 321, p. 199, L. 1867; re-en. Sec. 370, p. 107, Cod. Stat. 1871; en. Sec. 409, p. 150, L. 1877; re-en. Sec. 409, 1st Div. Rev. Stat. 1879; re-en. Sec. 422, 1st Div. Comp. Stat. 1887; re-en. Sec. 1724, C. Civ. Proc. 1895; re-en. Sec. 7100, Rev. C. 1907; re-en. Sec. 9733, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 940.

Appeal From More Than One Order—Effect

An order settling an administrator's account, disallowing two certain items, and directing him to deliver certain stock to a special administratrix, though included in one paper, is in effect several distinct and separate orders, and, though embraced in one notice of appeal, will be so treated for the purposes of the appeal. In re Barker's Estate, 26 M 279, 282, 67 P 941. See also MacGinnis v. Boston & M. C. C. & S. M. Co., 29 M 428, 445, 75 P 89.

Effect of Failure to File Appeal Bond Within Five Days

In the absence of a waiver or of a deposit of money, the failure to file appeal bond within five days after service of notice of appeal, as required by this section, renders the appeal wholly ineffectual. Hines v. Carl, 22 M 501, 502, 57 P 88; Hahn v. James, 26 M 50, 51, 66 P 463.

By express provision of this section, omission to file an undertaking in support

of an appeal renders the appeal ineffectual for any purpose. Johns v. Barnes, 31 M 426, 427, 78 P 703.

An appeal of one who fails to file an undertaking on appeal or deposit money in lieu thereof will be dismissed in the absence of a waiver of the requirement. In re Bernheim's Estate, 82 M 198, 206, 266 P 378.

Failure to file an undertaking on appeal to the supreme court within five days after service of notice thereof or to deposit money in lieu thereof with the clerk, renders the appeal subject to dismissal, in view of the positive requirement of this section that unless the undertaking be filed or the deposit made "the appeal is ineffectual for any purpose." Clarke v. Swartz, 87 M 1, 3, 285 P 177.

Service of Notice Must be On All Adverse Parties

Since under sections 15 and 10713, words in the singular include the plural, the provision of this section, that a party intending to appeal from an order or judgment of the district court must file and serve a notice of appeal "on the adverse party or his attorney" must, where there are more than one adverse party, be read to mean service on all adverse parties or their attorneys. Mitchell v. Banking Corp. of Montana, 81 M 459, 464, 264 P 127.

Id. While this section does not require that a notice of appeal be addressed to

an adverse party or adverse parties, service only be required, where appellant does so address it, the address affixed shows the intention of appellant to give notice to those addressed and the effect of the notice is limited accordingly.

Statute Must be Strictly Followed

The statutory provisions regulating the mode of perfecting appeals must be strictly followed. *Creek v. Bozeman Water Works Co.*, 22 M 327, 331, 56 P 362; *Hines v. Carl*, 22 M 501, 502, 57 P 88; *Washoe Copper Co. v. Hickey*, 23 M 319, 322, 58 P 866; *Featherman v. Granite County*, 28 M 462, 464, 72 P 972.

Appeals are subject to statutory regulation, and in order to confer jurisdiction upon the appellate court there must be at least a substantial compliance with the statute. *State ex rel. Rosenstein v. District Court*, 41 M 100, 102, 108 P 580.

Time for Filing Undertaking is Not Extended by Serving Notice by Mail

The time of filing an undertaking on appeal is not extended by the provisions of section 9781 in a case in which the appellee resides at a distance and service of the notice of appeal is made through the mails. *Johnson County Sav. Bank v. Joe Klaffki Co.*, 26 M 384, 386, 68 P 410.

Undertaking Must be Filed Within Five Days of Service of Notice on Adverse Party

An undertaking on appeal, unless waived, must be filed within five days of the service of the notice on the adverse party, and not within five days from the filing of the notice with the clerk, if the filing occurs after the date of such service. *Johnson County Sav. Bank v. Joe Klaffki Co.*, 26 M 384, 385, 68 P 410.

When Notice Must be Filed and Served

An attempted appeal from a judgment will be dismissed where the notice is not served on the respondent, or filed in the office of the clerk of the court, until after one year from the date of the judgment. *Ramsey v. Burns*, 24 M 234, 235, 61 P 129.

Where a notice of appeal from an order denying a new trial was not filed with the clerk of the district court and served within sixty days after the order denying the motion was entered, the appeal from such order must be dismissed. *Threlkeld v. O'Neal*, 26 M 209, 212, 66 P 940.

Who is an Adverse Party

An adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal. *T. C. Power & Bro. v. Murphy*, 26 M 387, 389,

68 P 411; *Merk v. Bowery Min. Co.*, 31 M 298, 304, 78 P 519; *Anderson v. Red Metal Min. Co.*, 36 M 312, 323, 93 P 44.

Where plaintiff recovers judgment in an action to foreclose a mortgage, and a deficiency judgment against the mortgagor, he failing to answer, he is an interested and necessary party to an appeal taken by other defendants, who claim liens on the mortgaged premises superior to the mortgage, and if notice of such appeal is not served on him, as required by this section, the appeal will be dismissed. *T. C. Power & Bro. v. Murphy*, 26 M 387, 389, 68 P 411.

In an action by plaintiffs against their lessee and defendant to quiet title to mining property, the lessee was not, under the particular circumstances of the case, an "adverse party" on whom defendants were required to serve notice of appeal. *Merk v. Bowery Min. Co.*, 31 M 298, 303, 78 P 519.

An adverse party, within the meaning of this section, relative to the requirement that an appellant must serve the adverse party with notice of his intention to appeal, is one who has an interest in opposing the object sought to be accomplished by the appeal. *Spokane Ranch & Water Co. v. Beatty*, 37 M 342, 350, 96 P 727, 97 P 838.

An "adverse party" is one who is shown by the record to have an interest in opposing the object sought to be accomplished by the appeal; a party not of record is not an "adverse party," upon whom service of notice of appeal is necessary. *Cummings v. Reins Copper Co.*, 40 M 599, 610, 107 P 904.

A person to whom, subsequent to the commencement of mortgage foreclosure proceedings, one of the defendants had by bargain and sale deed transferred an interest in the real property theretofore acquired at an execution sale, but who had not thereafter been made a party defendant by substitution or otherwise, was not a party to the record, and therefore not an "adverse party" upon whom service of notice of appeal was necessary. *Jenkins v. Carroll*, 42 M 302, 307, 112 P 1064.

A defendant who had no interest in opposing the object sought by an appeal taken by his codefendant, and who could not be prejudicially affected by anything done by the supreme court on appeal, was not an "adverse party" within the meaning of this section, upon whom it was necessary to serve notice of appeal. *Riley v. Blacker*, 51 M 364, 369, 152 P 758.

An "adverse party" within the meaning of this section, upon whom the appellant must serve a notice of appeal, is one who

has an interest in the object sought to be accomplished by the appeal, and under that section a party to a judgment whose rights may be injuriously affected by its reversal or modification is entitled to notice. *Great Falls Nat. Bk. v. Young et al.*, 67 M 328, 333, 215 P 651.

Where nonappearing devisees whose interests rather than being injuriously affected by the reversal of an order denying the petition of others to require the executor to make final account and turn over the real property of the estate to the devisees could only be benefited thereby, they were not "adverse" parties within the meaning of this section, providing that notice of appeal must be served upon "the adverse party or his attorney." In *re McGovern's Estate*, 77 M 182, 195 et seq., 250 P 812.

Persons named in the complaint as defendants but not served with summons were not parties to the action and, therefore, were not adverse parties upon whom it was necessary to serve notice of appeal; no judgment could have been entered against them and therefore a reversal or modification of the judgment appealed from could not injuriously affect their rights, and failure to serve them with notice did not affect the jurisdiction of the appellate court. *Mitchell v. Banking Corp. of Montana*, 81 M 459, 464, 264 P 127.

An "adverse party" within the meaning of this section, upon whom it is necessary to serve notice of appeal, is a party to a judgment whose rights may be injuriously affected by its reversal or modification, or one who has an interest in opposing the

object sought to be accomplished by the appeal, hence one who would be benefited by a reversal is not an adverse party. In *re Baxter's Estate*, 94 M 257, 265, 22 P 2d 182.

An "adverse party" within the meaning of this section, requiring the service of notice of appeal on such party, is one who has an interest in opposing the object sought to be accomplished by the appeal, hence where the interests of heirs in an estate matter were identical with that of one appealing, they were not "adverse" parties, and service of notice of appeal on them was not required. In *re Toomey's Estate*, 96 M 489, 495, 31 P 2d 729.

References

Cited or applied as section 1724, Code of Civil Procedure, in *Hill v. Cassidy*, 24 M 108, 110, 60 P 811; *Schatzlein Paint Co. v. Passmore*, 26 M 500, 502, 68 P 1113; *Hynes v. Barnes*, 30 M 25, 27, 75 P 523; *State ex rel. Hodgdon v. District Court*, 33 M 119, 122, 82 P 663; *State ex rel. Hall v. District Court*, 34 M 112, 119, 85 P 872; *Thomas v. Boston & M. C. C. & S. M. Co.*, 34 M 370, 373, 86 P 499, 87 P 972; as section 7100, Revised Codes, in *Jackway v. Hymer*, 42 M 168, 169, 111 P 720; *Marlowe v. Michigan Stove Co.*, 48 M 342, 345, 137 P 539; *Anaconda Copper Min. Co. v. Pilot-Butte Min. Co.*, 51 M 443, 451, 153 P 1006; *Jarrett v. Hart*, 54 M 50, 51, 167 P 695; *State v. District Court et al.*, 61 M 346, 349, 202 P 575; *City of Bozeman v. Nelson*, 73 M 147, 162, 237 P 528; *R. H. Lee v. C. R. Stiffler et al.*, 77 M 617; *State v. District Court et al.*, 88 M 290, 292, 292 P 904; *Helena Adjustment Co., v. Predovich*, 98 M 162, 37 P 2d 651.

9734. Undertaking or deposit on appeal. The undertaking on appeal must be in writing, and must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

History: En. Sec. 410, p. 151, L. 1877; re-en. Sec. 410, 1st Div. Rev. Stat. 1879; re-en. Sec. 423, 1st Div. Comp. Stat. 1887; re-en. Sec. 1725, C. Civ. Proc. 1895; re-en. Sec. 7101, Rev. C. 1907; re-en. Sec. 9734, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 941.

Defective Undertakings on Appeal

An undertaking on appeal which provides for the payment by appellants of all damages and costs which may be awarded against them on the appeal, but omits the words "or on a dismissal thereof," is defective but not void, and a motion to dismiss the appeal for such defect

will be denied where a new and sufficient undertaking is filed before the motion is heard. *Woodman v. Calkins*, 12 M 456, 457, 31 P 63.

Where the appeal bond, on appeal from a final judgment and from an order denying appellant's motion for a new trial, was conditioned that it should be void if appellant paid all damages and costs awarded against it "on said appeals, or on a dismissal thereof," not exceeding the sum of three hundred dollars, the undertaking was insufficient in that the words "or either of them" should have been inserted in each of the alternative conditions, and

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because of such omission the sureties were not liable upon said undertaking unless both appeals should be affirmed or both dismissed. *Baker v. Butte City Water Co.*, 24 M 31, 32, 60 P 488. See also *Ramsey v. Burns*, 24 M 234, 236, 61 P 129; *Coleman v. Perry*, 24 M 237, 238, 61 P 309; *Frary v. Dwyer*, 26 M 414, 415, 68 P 1133.

Where an appeal undertaking recited four distinct appeals, one from the judgment and three from orders, and that, in consideration "of such appeal, etc., appellant will pay all damages and costs which may be awarded against her," the undertaking was invalid for ambiguity, in not stating which appeal it was intended to secure. *Creek v. Bozeman Water Works Co.*, 22 M 327, 329, 56 P 362. See also *Murphy v. Northern Pacific Ry. Co.*, 22 M 577, 579, 57 P 278; *Washoe Copper Co. v. Hickey*, 23 M 319, 321, 58 P 866; *Grace v. Paulson*, 23 M 337, 59 P 1; *Richter v. Eagle Life Assn.*, 24 M 346, 348, 61 P 878; *Pirrie v. Moule*, 33 M 1, 3, 81 P 390; *Faust v. Rustler Min. & Mill. Co.*, 34 M 368, 369, 86 P 421; *In re Kappler's Estate*, 38 M 419, 422, 100 P 228.

If an appeal undertaking, reciting separate appeals from the judgment and from different orders, is void for ambiguity as to which appeal it is intended to refer to, appellant cannot escape the effect of the ambiguity by claiming that the orders are not appealable, and the bond therefor refers to the judgment, as the court, in determining the validity of the undertaking, will not examine the record to see what orders are appealable. *Creek v. Bozeman Water Works Co.*, 22 M 327, 329, 56 P 362. See also *Gassert v. Strong*, 38 M 18, 29, 98 P 497.

An undertaking on appeal is abortive if words are used therein which render it meaningless and nugatory as an indemnity for costs in any amount. *In re Kappler's Estate*, 38 M 419, 422, 100 P 228.

No Writing is Necessary Where Money is Deposited in Place of Undertaking

While a written undertaking on appeal must specify the purpose for which it is given, where money is deposited in lieu of such undertaking no writing is required, the statute declaring the purpose for which it is deposited. *In re McGovern's Estate*, 77 M 182, 195, 250 P 812.

Separate Undertaking Must be Given for Each Order or Judgment Appealed

Where different appeals are taken except when combined with an appeal from an order granting or denying a new trial, taken at the same time, the statute requires an undertaking in the sum of three hundred dollars to effectuate each appeal, and unless this requirement is met or the

undertaking is waived, or a deposit is made to take its place, the appeal is ineffective. *In re Kappler's Estate*, 38 M 419, 422, 100 P 228.

Where appeals are taken from a judgment and from any order other than one denying a new trial, or from more than one order, a separate undertaking in the sum of three hundred dollars must be filed for each, or, if both are included in the same paper, appropriate references must be made to show which appeal each is intended to effectuate, even though one of the orders appealed from may be a non-appealable order. *Pirrie v. Moule*, 33 M 1, 5, 81 P 390.

Signature of Party Not Necessary to Undertaking

An undertaking filed in conformity with this and the following section need not be signed by the party in whose behalf it is given. *Russell v. Chicago, Burlington & Quincy Ry. Co.*, 37 M 10, 11, 94 P 501.

Undertaking Must Specify What is Appealed From

Where an appellant served notice that he desired to appeal from a judgment and an order denying a new trial, but the undertaking referred to an appeal from the judgment only, the appeal will be treated as abandoned as far as it relates to the order denying a new trial, and to that extent will be dismissed, irrespective of the intention of appellant. *Hurley v. O'Neill*, 24 M 293, 294, 61 P 658.

Undertaking is a Bond

An undertaking on appeal is technically a "bond" within the common-law definition, save that it need not be under seal. *King v. Elling*, 24 M 470, 482, 62 P 783.

When One Undertaking is Sufficient

Where the purpose of a petition in an estate matter was to have the executor render a final account, settle the estate and deliver possession of the real estate to the devisees, on appeal from the order denying the petition and dismissing the proceeding the appellants were required to furnish but one joint appeal bond in the sum of \$300. *In re McGovern's Estate*, 77 M 182, 195, 250 P 812.

References

Cited or applied as section 1725, Code of Civil Procedure, in *Creek v. Bozeman Water Works Co.*, 22 M 327, 329, 56 P 362; *Hines v. Carl*, 22 M 501, 502, 57 P 88; *Baker v. Butte City Water Co.*, 24 M 31, 32, 60 P 488; *Hill v. Cassidy*, 24 M 108, 110, 60 P 811; *Russell v. Chicago, Burlington & Quincy Ry. Co.*, 37 M 10, 11, 94 P 501; *State ex rel. Robinson v. Clements*, 37 M 96, 99, 94 P 837; as section

7101, Revised Codes, in *In re Kappler's Estate*, 38 M 419, 422, 100 P 228; *Comerford v. United States F. & G. Co.*, 59 M 243, 260, 196 P 984; *State v. District*

Court et al., 88 M 290, 292, 292 P 904; *Cummer v. Moon*, 92 M 605; *Helena Adjustment Co. v. Predovich*, 98 M 162, 37 P 2d 651.

9735. Stay of proceedings—money judgments. If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated.

History: Ap. p. Sec. 264, p. 97, *Bannack Stat.*; re-en. Sec. 333, p. 202, L. 1867; re-en. Sec. 382, p. 110, *Cod. Stat.* 1871; amd. Sec. 411, p. 151, L. 1877; re-en. Sec. 411, 1st Div. Rev. Stat. 1879; re-en. Sec. 424, 1st Div. Comp. Stat. 1887; en. Sec. 1726, C. Civ. Proc. 1895; re-en. Sec. 7102, Rev. C. 1907; re-en. Sec. 9735, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 942.

Judgment for Amount of Undertaking on Motion of Respondent on Dismissal of Appeal One by Consent and Not Appealable

Since, under this section, sureties on an undertaking on appeal from a money judgment agree, *inter alia*, to pay the amount of the judgment on dismissal of the appeal, and that judgment against them may be entered on motion of respondent, a judgment so entered against them on dismissal of the appeal for failure to file transcript on appeal was a consent judgment from which they had no right to appeal. *Waldrop v. Maser et al.*, 96 M 242, 244, 30 P 2d 83.

Operation and Effect

Though this section may not provide a stay of execution, in case a writ of man-

date is issued by the district court to compel the transfer of a cause from a police to a justice's court (a question not decided), the supreme court may, nevertheless, issue any appropriate writ to insure an appeal. *State ex rel. Brass v. Horn*, 36 M 418, 420, 93 P 351.

This section provides that execution of a money judgment pending appeal may be stayed by the filing of a supersedeas bond signed by two or more sureties who shall bind themselves, if the judgment be affirmed, to pay the judgment, etc., and that if the appellant does not make payment within thirty days after the filing of the remittitur in the district court, judgment may be entered against them on motion of the respondent. Held, that the sureties on such a bond submit themselves to the jurisdiction of the court and assent to and adopt the provisions of the law for the enforcement of the obligation incurred by their bond, hence waive any right they might otherwise have had to the mode of its enforcement and, therefore, are not entitled to notice of motion for judgment or an opportunity to be heard. *St. George v. Boucher et al.*, 88 M 173, 178, 293 P 313.

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Held, that where a party in addition to being awarded a money judgment is also adjudged to be the owner and entitled to the immediate possession of real property, there are in effect two judgments, so far as concerns the furnishing of stay or supersedeas bonds, under the provisions of this section and 9738, and under such circumstances appellant is not required, in order to entitle him to a stay of execution of the judgment relating to the real property, after furnishing the bond required by section 9738, *supra*, for that purpose, to also furnish one to stay proceedings on

the money part of the judgment, provided for by this section. *State v. District Court et al.*, 88 M 290, 294, 292 P 904.

References

Cited or applied as section 1726, Code of Civil Procedure, in *Beck v. Fransham*, 21 M 117, 119, 53 P 96; *State ex rel. Reins v. District Court*, 22 M 449, 456, 57 P 89, 145; *Hill v. Cassidy*, 24 M 108, 110, 60 P 811; *Comerford v. United States F. & G. Co.*, 59 M 243, 253, 196 P 984; *Sunburst Oil & Refining Co. v. Callender*, 84 M 178, 187, 274 P 834.

9736. Stay of proceedings—judgment for delivery of documents or personal property. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

History: En. Sec. 265, p. 98, *Bannack Stat.*; re-en. Sec. 334, p. 202, L. 1867; re-en. Sec. 383, p. 110, *Cod. Stat.* 1871; re-en. Sec. 412, p. 151, L. 1877; re-en. Sec. 412, 1st Div. Rev. Stat. 1879; re-en. Sec. 425, 1st Div. Comp. Stat. 1887; re-en. Sec. 1727, C. Civ. Proc. 1895; re-en. Sec. 7103, Rev. C. 1907; re-en. Sec. 9736, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 943.

Operation and Effect

A complaint to recover on the undertaking, though indefinite, in failing to allege specifically that the amount of the stay bond was fixed by the court, is sufficient, as against a general demurrer, if the undertaking itself, containing such recital, is set out in the complaint. *Sullivan v. Fried*, 42 M 335, 341, 112 P 535.

Id. Since the filing of the undertaking required by this section operates *ipso facto* to stay execution, the fact that it was stayed need not be specifically alleged in the complaint in an action to recover on such undertaking.

Id. Where the undertaking contains a number of obligations, the first being in the form of the usual undertaking on appeal, describing the judgment which it is sought to have the court review, and another obligation, in the form of that required to be given under this section to stay execution pending appeal, simply refers to "said judgment so appealed from," the words quoted are sufficient, in an action on the last obligation, to identify the judgment.

Where an unsuccessful party in an action seeking the recovery of money fails to move for a stay of proceedings pending appeal under this section, or apply for a writ of supersedeas, but pays the money over, such payment is not necessarily to be considered a voluntary one. *Nepstad v. East Chicago Oil Assn., Inc.*, 96 M 183, 188, 29 P 2d 643.

References

Cited or applied as section 7103, Revised Codes, in *Chestnut v. Sales*, 49 M 318, 320, 141 P 986.

9737. Stay of proceedings—judgment directing execution of conveyance. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

History: En. Sec. 266, p. 98, Bannack Stat.; re-en. Sec. 335, p. 202, L. 1867; re-en. Sec. 384, p. 111, Cod. Stat. 1871; re-en. Sec. 413, p. 152, L. 1877; re-en. Sec. 413, 1st Div. Rev. Stat. 1879; re-en. Sec. 426, 1st Div. Comp. Stat. 1887; re-en. Sec. 1728, C. Civ. Proc. 1895; re-en. Sec. 7104, Rev. C. 1907; re-en. Sec. 9737, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 945.

Operation and Effect

Where the president of a corporation, on appealing from a judgment which di-

rected him to execute and deliver to a certain person a certificate of a certain number of shares in the corporation, executed the certificate, and deposited it in court to abide the appeal, and then gave the supersedeas bond required to stay the execution, pursuant to this section, the person named in the certificate as the owner of the shares therein mentioned was not, during the pendency of the appeal, entitled to vote such shares at corporate meetings. *Durfee v. Harper*, 22 M 373, 375, 56 P 589.

9738. Stay of proceedings—sales of real property. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

History: En. Sec. 267, p. 98, Bannack Stat.; re-en. Sec. 336, p. 202, L. 1867; re-en. Sec. 385, p. 111, Cod. Stat. 1871; re-en. Sec. 414, p. 152, L. 1877; re-en. Sec. 414, 1st Div. Rev. Stat. 1879; re-en. Sec. 427, 1st Div. Comp. Stat. 1887; re-en. Sec. 1729, C. Civ. Proc. 1895; re-en. Sec. 7105, Rev. C. 1907; re-en. Sec. 9738, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 945.

NOTE.—The words “or the appeal dismissed” first appeared in section 411, Laws of 1877.

Operation and Effect

Held, that where a party in addition to being awarded a money judgment is also adjudged to be the owner and entitled to the immediate possession of real property, there are in effect two judgments, so far as concerns the furnishing of stay or supersedeas bonds under the provisions of section 9735 and this section, and under such circumstances appellant is not required, in order to entitle him to a stay

of execution of the judgment relating to the real property, after furnishing the bond required by this section, for that purpose, to also furnish one to stay proceedings on the money part of the judgment, provided for by section 9735. *State v. District Court et al.*, 88 M 290, 294, 292 P 904.

Id. A judgment reciting that a party is the owner and entitled to the immediate possession of certain real property and that any and all rights of the adverse party therein and thereto, including the right of possession thereof, are thereby ended and determined, is one for the possession of the property, and directs delivery thereof within the meaning of this section, prescribing the conditions under which execution thereof may be stayed pending appeal.

References

Whitecomb v. Beyerlein, 84 M 470, 471 et seq., 276 P 430.

9739. Stay of proceedings—court may limit security. Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter

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embraced in the action, and not affected by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double of the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained, and unless, within five days after the entry of the order appealed from, such appeal be perfected.

History: Ap. p. Sec. 268, p. 99, *Ban-nack Stat.*; amd. Sec. 337, p. 202, L. 1867; re-en. Sec. 386, p. 111, *Cod. Stat.* 1871; en. Sec. 415, p. 152, L. 1877; re-en. Sec. 415, 1st Div. Rev. Stat. 1879; re-en. Sec. 428, 1st Div. Comp. Stat. 1887; re-en. Sec. 1730, C. Civ. Proc. 1895; re-en. Sec. 7106, Rev. C. 1907; re-en. Sec. 9739, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 946.

Operation and Effect

The filing of a notice and undertaking on appeal stays the proceedings of the trial court upon the judgment or order appealed from, but does not divest the court of power to settle and certify such statements as are required to present matters of law or fact to the appellate court. *William Mercantile Co. v. Fussy*, 13 M 401, 403, 34 P 189.

Where an appeal is taken from an order granting an interlocutory injunction, it does not thereafter prevent the court from appointing a receiver in the same action. *State ex rel. Boston & M. C. C. & S. M. Co. v. District Court*, 22 M 241, 243, 56 P 281.

This section does not grant to the supreme court the power to allow temporary alimony or suit money pending an appeal in a divorce case. *Bordeaux v. Bordeaux*, 26 M 533, 535, 69 P 103.

9740. Undertakings may be in one instrument. The undertakings prescribed in the foregoing sections may be in one instrument or several, at the option of the appellant. In case of an appeal from a final judgment, and from an order granting or refusing a new trial, taken at the same time, only one undertaking need be given, as prescribed in section 9733 of this code. The sureties on such undertaking must justify as required by section 9825 of this code.

History: Ap. p. Sec. 269, p. 99, *Ban-nack Stat.*; re-en. Sec. 338, p. 203, L. 1867; re-en. Sec. 387, p. 111, *Cod. Stat.* 1871; re-en. Sec. 416, p. 153, L. 1877; re-en. Sec. 416, 1st Div. Rev. Stat. 1879; re-en. Sec. 429, 1st Div. Comp. Stat. 1887; re-en. Sec. 1731, C. Civ. Proc. 1895; re-en. Sec. 7107, Rev. C. 1907; re-en. Sec. 9740, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 947.

Id. The district court has jurisdiction, notwithstanding a judgment in favor of the husband for divorce, at any time prior to the determination of an appeal from the judgment, or prior to the expiration of the time for appeal, to require the husband to pay any money necessary to enable the wife to support herself, or to further prosecute or defend the action.

The trial court has no authority, after an appeal from a judgment in a claim and delivery action has been perfected, to correct the judgment by entering a judgment in the alternative, its action in so doing being a "proceeding in the court below upon the judgment," and a "matter embraced therein." *Hynes v. Barnes*, 30 M 25, 27, 75 P 523.

References

Cited or applied as section 428, First Division Compiled Statutes 1887, in *Martin v. Maxey*, 14 M 85, 35 P 667; as section 1730, Code of Civil Procedure, in *State ex rel. Reins v. District Court*, 22 M 449, 456, 57 P 89, 145; *State v. District Court et al.*, 61 M 346, 349, 202 P 575; *Hoppin v. Long*, 74 M 558, 571, 241 P 636; *In re Murphy's Estate*, 99 M 73, 43 P 2d 230.

Operation and Effect

While but one undertaking in the sum of three hundred dollars is required on appeal from a final judgment, and from an order refusing or granting a new trial, taken at the same time, this rule of practice does not apply when an appeal is taken from a judgment and from any other order, or from several orders only.

Creek v. Bozeman Water Works Co., 22 M 327, 329, 56 P 362.

In case of different appeals from a final judgment, and an order granting or denying a new trial, taken at the same time, one undertaking in the penalty of three hundred dollars is sufficient. In re Kappler's Estate, 38 M 419, 423, 100 P 228.

Whatever may be the number of appeals taken at the same time, only one undertaking need be filed, but the penalty in all cases, except where the appeals from the final judgment are combined with an appeal from an order granting or denying a new trial, taken at the same time, must be sufficient in amount to support all of them, and the references must be so made to each of them that the penalty may be properly apportioned. In re Kappler's Estate, 38 M 419, 423, 100 P 228.

The purpose of the provision contained in the first sentence of this section is to enable an appellant to have one set of sureties execute one instrument instead of

several, and to make the merely formal parts of one of the obligations assumed by them answer for all, and thus relieve him of the necessity of writing out each instrument in full. Sullivan v. Fried, 42 M 335, 342, 112 P 535.

In view of this section and of sections 9397 and 9731, the trial court, notwithstanding the perfecting of an appeal from a judgment, retains jurisdiction over a motion for a new trial; and an appeal may be taken from an order denying the new trial, although, before such order was entered, an appeal from the judgment has been perfected. Molt v. Northern Pacific Ry. Co., 44 M 471, 477, 120 P 809.

References

Cited or applied as section 1731, Code of Civil Procedure, in Baker v. Butte City Water Co., 24 M 31, 32, 60 P 488; Hill v. Cassidy, 24 M 108, 110, 60 P 811; Nolan v. Montana Central Ry. Co., 24 M 327, 329, 61 P 880; King v. Elling, 24 M 470, 473, 62 P 783; Pirrie v. Moule, 33 M 1, 3, 81 P 390.

9741. Justification of sureties. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in this chapter, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the district court, or the clerk thereof, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of sections 9729 to 9761 of this code, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

History: En. Sec. 338, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417, 1st Div. Rev. Stat. 1879; re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc. 1895; re-en. Sec. 7108, Rev. C. 1907; re-en. Sec. 9741, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 948.

Operation and Effect

Sureties on a stay bond on appeal were not liable, though they failed to justify as required, where respondent, before determination of the appeal, issued execution against appellant. State ex rel. Reins v. District Court, 22 M 449, 454, 57 P 89, 145.

Id. The statute requiring a justification of sureties on a stay bond is directory, and meant to be for respondent's, not appellant's, benefit, and may be waived by respondent. See also Morin v. Wells, 30 M 76, 80, 75 P 688.

This section applies in case of an appeal by defendant in ejectment involving an unpatented mining claim. The statutes and courts of this state do not recognize any distinction between possessory rights to mining claims upon public lands and real estate held under other titles. State ex rel. Baker v. District Court, 24 M 330, 332, 61 P 882. See also Cobban v. Meagher, 42 M 399, 408, 113 P 290.

The provision of this section, that unless the sureties justify when excepted to, execution of the judgment or order appealed from is no longer stayed, does not render the appeal ineffectual because of the failure to justify, but only destroys the effect of the undertaking in so far as it may operate as a supersedeas—the appeal remains though execution is no longer stayed. King v. Elling, 24 M 470, 482, 62 P 783.

A failure of the sureties on an undertaking on appeal to justify, after exception to their sufficiency, does not render the appeal ineffectual so as to authorize a dismissal thereof, but merely destroys the effect of the undertaking in so far as it would operate as a supersedeas. *Threlkeld v. O'Neal*, 26 M 209, 211, 66 P 940.

Exception to the sufficiency of sureties on an undertaking or bond within the

meaning of this section has reference to their solvency or pecuniary sufficiency, rather than their qualifications to act as such; and objection to the form of the undertaking challenges their qualifications in respects other than their financial worth. *Whitcomb v. Beyerlein*, 84 M 470, 473, 276 P 430.

References

Calvert et al. v. Anderson et al., 78 M 334, 338, 254 P 184.

9742. Cases in which stay of proceedings not allowed. In cases not provided for in sections 9735, 9736, 9737, and 9738, the perfecting of the appeal by giving the undertaking or making the deposit mentioned in section 9734 stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court. And except, also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this state. Also except where a judgment grants a writ of mandamus, or of prohibition, against a tribunal, corporation, public officer, or board, commanding certain acts to be done which ought to be done by such tribunal, corporation, public officer, or board, and not involving the payment or allowance of money or its equivalent.

History: En. Sec. 271, p. 99, *Bannack Stat.*; re-en. Sec. 340, p. 203, L. 1867; re-en. Sec. 389, p. 112, *Cod. Stat.* 1871; amd. Sec. 418, p. 153, L. 1877; re-en. Sec. 418, 1st Div. Rev. Stat. 1879; re-en. Sec. 431, 1st Div. Comp. Stat. 1887; amd. Sec. 1733, C. Civ. Proc. 1895; re-en. Sec. 7109, Rev. C. 1907; re-en. Sec. 9742, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 949.

Operation and Effect

The supreme court is not authorized to suspend the operation of, vacate, or set aside a prohibitory injunction order during the pending of an appeal therefrom. *Maloney v. King*, 26 M 487, 489, 68 P 1012. See also *Finlen v. Heinze*, 27 M 107, 117, 69 P 829, 70 P 517.

A mandatory injunction is stayed by perfecting an appeal from the decree.

Maloney v. King, 26 M 492, 493, 68 P 1014.

Where both parties appealed from an order granting a new trial in part, a bond executed on the appeal did not stay the execution of the judgment. *Coombs v. Barker*, 33 M 74, 79, 81 P 737.

Though this section may not provide a stay of execution, in case a writ of mandate is issued by the district court to compel the transfer of a cause from a police to a justice's court (a question not decided), the supreme court may, nevertheless, issue any appropriate writ to insure an appeal. *State ex rel. Brass v. Horn*, 36 M 418, 420, 93 P 351.

References

Labbit v. Bunston, 80 M 293, 303, 260 P 727.

9743. Appeals by executors, administrators, or guardians. When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the district court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and his sureties thereon shall be liable as on such undertaking.

History: En. Sec. 1734, C. Civ. Proc. 1895; re-en. Sec. 7110, Rev. C. 1907; re-en. Sec. 9743, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 965.

Operation and Effect

After the preliminary stage, in which the court may stay proceedings under section 9401, has passed, the matter of stay is no longer lodged in the discretion of

the trial court, but is governed by other provisions of the code which must be complied with pending appeal. State ex rel. Robinson v. Clements, 37 M 96, 99, 94 P 837.

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9744. Acts of same valid when appointment vacated. When the judgment or order appointing an executor, or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

History: En. Sec. 1735, C. Civ. Proc. 1895; re-en. Sec. 7111, Rev. C. 1907; re-en. Sec. 9744, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 966.

9745. Record on appeal from orders other than new trial. On an appeal from an order, except an order granting a new trial, the appellant must furnish the court with a copy of the notice of appeal of the judgment or order appealed from, and of all papers and evidence used on the hearing in the court below. Such papers, filed, and evidence, when certified by the clerk of the court to be correct and accompanied by a certificate of the judge that such records have been used at the hearing in the district court, may be considered on appeal without further identification. Appeals from orders overruling the motion for a new trial are hereby abolished, and all questions heretofore raised on such an appeal may be raised on an appeal from the judgment. Such questions may be raised and reviewed regardless of whether or not motion for new trial has been made in the trial court.

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History: En. Sec. 1737, C. Civ. Proc. 1895; re-en. Sec. 7113, Rev. C. 1907; amd. Sec. 12, Ch. 225, L. 1921; re-en. Sec. 9745, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1929. Cal. C. Civ. Proc. Sec. 951.

Appeal From Order Denying a New Trial Abolished

By this section, the appeal from an order denying a new trial is abolished. Tripp v. Silver Dyke Min. Co., 70 M 120, 122, 224 P 272; Frost et al. v. Long & Co. et al., 71 M 141, 153, 228 P 75; Lap-pin v. Martin et al., 71 M 233, 241, 228 P 763; Schmuck v. Beck, 72 M 606, 613, 234 P 477; Dever v. Girson, 75 M 412, 243 P 812.

Held, that Chapter 225, Laws of 1921 (this section), abolishing the appeal from an order denying a new trial, does not offend against the provision of section 23, Article V, of the Constitution, that an Act containing a subject not embraced in the title shall be void as to that subject. Kline v. Murray et al., 79 M 530, 540, 257 P 465.

Applicable to Probate Matters

In probate proceedings, the provisions of this code regulating bills of exception, statements, and appeals in ordinary actions are applicable, and, so far as may

be, the analogies between them must govern. In re Dougherty's Estate, 34 M 336, 341, 86 P 38.

Extent of Review Where No Motion for a New Trial Was Made

Construing prior to amendment by Chapter 87, Laws of 1929, on appeal from the judgment in an action in which no motion for a new trial nor one for a directed verdict was made by appellant, the record, prepared under this section, embodying a bill of exceptions, will be examined as to the sufficiency of the evidence, solely for the purpose of ascertaining whether the judgment is supported by any substantial evidence. Clifton-Applegate-Toole v. Drain Dist. No. 1, 82 M 312, 319, 320, 267 P 207.

Since amendment by Chapter 87, Laws of 1929, providing, inter alia, that all questions formerly raised by an appeal from a new trial order are reviewable on appeal from the judgment, the rule announced in Hanlon v. Manger, 85 M 31, 277 P 433, that in the absence of a motion for a new trial, the supreme court on appeal in which insufficiency of the evidence to support the judgment is urged, is limited to a determination of the question whether there is any substantial evidence to support the judg-

ment, is no longer controlling. *Benema v. Union Cent. Life Ins. Co.*, 94 M 138, 142, 21 P 2d 69.

Mandatory Provision

The provisions of this section and of section 9746 are mandatory, and were enacted so that the appellate court may know that the record presented to it contains correct copies of the papers which are required for a review. *First Nat. Bank v. Gebo*, 46 M 263, 267, 127 P 463.

Papers to be Incorporated in Bill of Exceptions

On appeal from an order setting aside a default judgment, the only method by which the papers used by the court below on the hearing can be certified to the supreme court as the papers used on the hearing is by incorporating the same in the bill of exceptions. *Emerson v. McNair*, 28 M 578, 581, 73 P 121.

On appeals from orders other than those granting or refusing new trials, the papers used on the hearing in the trial court must be made a part of the record by a bill of exceptions, settled in the usual way, and if not so incorporated, they are not properly a part of the record and cannot be considered on appeal. *In re Dougherty's Estate*, 34 M 336, 341, 86 P 38.

Papers not made a part of the record on appeal by statute can be put into or made a part of it only by bill of exceptions or statement duly certified by the judge sitting in the cause. Papers, supposedly used at a hearing of a motion to set aside a default, which are not brought into the record on appeal by bill of exceptions, nor identified in any way, but are merely certified to by the clerk of the district court as being all the papers used on the hearing of the motion, are not properly in the record and will be stricken out. *Manuel v. Scott*, 37 M 29, 30, 94 P 487.

This Statute Abolishing Appeal From Order Denying a New Trial is Not Applicable to Criminal Proceedings

An order denying a new trial in a criminal cause is not reviewable on appeal from the judgment. *State v. English*, 71 M 343, 350, 229 P 727.

What Record on Appeal From Order Should Include

On an appeal from an order, except when the code otherwise provides, the order, and the paper and evidence upon which the order was granted, should be incorporated in a bill of exceptions, for the purpose of identifying the same. *Rumney Land & Cattle Co. v. Detroit & Montana Cattle Co.*, 19 M 557, 560, 49 P 395.

The record on appeal from an order vacating or refusing to vacate a default consists of the papers used on the motion, whatever they are. *Manuel v. Scott*, 37 M 29, 31, 94 P 487.

Unless the papers specified in this section, certified as required by section 9746, are furnished to the appellate court, before the submission of the cause, the judgment will be affirmed. *First Nat. Bank v. Gebo*, 46 M 263, 267, 127 P 463.

On appeal from an order vacating a default judgment, a transcript certified by the clerk as a true copy of plaintiff's bill of exceptions, purporting to be a narrative of the proceedings had and done in respect to the motion to vacate and to contain all the papers relative thereto, and settled and certified by the judge as a true and correct record of the proceedings, sufficiently complied with this section, relative to what the record on appeal in such cases should contain. *Beller v. Le Boeuf*, 50 M 192, 194, 145 P 945.

The record on appeal from an order settling the final account of an executor which contained the papers used at the hearing, properly authenticated by the clerk of the court, was sufficient, it not being necessary to bring up the whole record of the lower court. *In re Estate of Murphy*, 57 M 273, 188 P 146.

What is Not Properly Part of the Record

On appeal from an order setting aside a default judgment, the judgment roll as such is not properly a part of the record. *Emerson v. McNair*, 28 M 578, 580, 73 P 121.

When Reviewable in Absence of a Bill of Exceptions

On appeal from an order (to dissolve temporary injunction) the transcript of the testimony, certified by the trial judge, the clerk and the stenographer of the court as correct, but not incorporated in a bill of exceptions, may, under this section, be considered in determining whether there was sufficient evidence to warrant the order. *Atkinson v. Roosevelt County et al.*, 71 M 165, 174 et seq., 227 P 811.

References

*Cited or applied as section 1737, Code of Civil Procedure, in *Beach v. Spokane Ranch & Water Co.*, 25 M 367, 376, 65 P 106; *Cornish v. Floyd-Jones*, 26 M 153, 155, 66 P 838; as section 7113, Revised Codes, in *Latimer v. Nelson*, 47 M 545, 546, 133 P 680; *Morrow v. Dahl et al.*, 66 M 251, 258, 213 P 602; *Vaill v. Northern Pacific Ry. Co.*, 66 M 301, 306, 213 P 446; *In re Bitter Root Irr. Dist.*, 67 M 436, 441, 218 P 945; *Outlook F. E. Co. v. American*

S. Co., 70 M 8, 15, 223 P 905; Apple v. Seaver, 70 M 65, 67, 223 P 830; Baroch v. Greater Montana Oil Co., 70 M 93, 94, 225 P 800; City of Bozeman v. Nelson,

73 M 147, 162, 237 P 528; Hoppin v. Long, 74 M 558, 570, 241 P 636; Russell v. Sunburst Refining Co., 83 M 452, 462, 272 P 998.

9746. Authentication of copies—abbreviated record. All papers furnished to the supreme court on appeal shall, before the transcript is filed therein, be certified by the clerk or by the attorneys in the case to be correct, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or that a deposit has been made as provided for in section 9741, or the stipulation of the party waiving an undertaking or deposit. The appellant may present to the supreme court, or any justice thereof, a copy of the record from which are omitted those parts thereof which appellant believes to be immaterial to any question arising on the appeal, and thereupon, if it shall appear, prima facie, that the parts omitted are so immaterial, the court or justice shall make an order allowing such abbreviated record to be served and filed as the transcript on appeal, and directing the clerk of the district court to certify to such transcript, which order shall save to the respondent the right to suggest a diminution of the record in case he can show that without the parts omitted the appeal cannot be fairly and fully heard and determined. The certificate of the clerk of the district court shall refer to such order of the supreme court or justice.

History: Ap. p. Sec. 1739, C. Civ. Proc. 1895; en. Sec. 3, Ch. 42, L. 1907; Sec. 7115, Rev. C. 1907; amd. Sec. 13, Ch. 225, L. 1921; re-en. Sec. 9746, R. C. M. 1921; amd. Sec. 1, Ch. 19, L. 1925. Held unconstitutional in *Hale et al. v. Belgrade Co., Ltd.*, et al., 74 M 308, 240 P 371. Section re-written as it originally appeared before amendment. Cal. C. Civ. Proc. Sec. 953.

true copies of certain designated papers is insufficient. *Featherman v. Granite County*, 28 M 462, 466, 72 P 972.

A certificate of the clerk omitting the word "properly" and inserting the date of the filing of the undertaking is sufficient, it appearing that the undertaking has been filed in time. *Davidson v. Wampler*, 29 M 61, 65, 74 P 82.

This section authorizes the clerk or attorneys to certify that the copies provided for in the last three preceding sections are correct copies, but it does not authorize either to convey to the supreme court, in a certificate, the information that the copies furnished on appeal are copies of the papers actually used as the basis of the order from which the appeal was taken. This information can be furnished only by a bill of exceptions, settled by a certificate of the judge in the usual way. *Latimer v. Nelson*, 47 M 545, 546, 133 P 680.

Unless appellant procures an order from the supreme court or a justice thereof, under this section, permitting an abbreviated record to be filed by omitting any part of the judgment-roll, the record on appeal from an order overruling a motion for new trial must contain the complete judgment-roll, and, therefore, the judgment. *Minneapolis T. M. Co. v. Stanford M. Co.*, 59 M 359, 361, 197 P 993; *Easton v. Western Life & Casualty Co.*, 59, M 434, 435, 197 P 252.

Operation and Effect

Without a certificate of the clerk or of the attorneys "that an undertaking on appeal, in due form, has been properly filed, or the stipulation of the parties waiving an undertaking," the appeal ought to be dismissed on motion. *State ex rel. Pierson v. Millis*, 19 M 444, 447, 48 P 773; *Murphy v. Northern Pacific Ry. Co.*, 22 M 577, 579, 57 P 278.

Where a record on appeal contains a certificate of the trial court's clerk, to the effect that "an undertaking in due form has been properly filed," an undertaking may be shown to be void for uncertainty by filing a certified copy of the same in the supreme court, where such copy does not tend to contradict the record as to any matter of fact. *Washoe Copper Co. v. Hickey*, 23 M 319, 322, 58 P 866.

Where the statute requires the entire record of the court below to be certified to the supreme court, a certificate which only states that the transcript contains

References

Cited or applied as section 1739, Code of Civil Procedure, before amendment, in *Rumney Land & Cattle Co. v. Detroit & Montana Cattle Co.*, 19 M 557, 559, 49 P 395; *Murray v. Hauser*, 21 M 120, 130, 53 P 99; *Nolan v. Montana Central Ry. Co.*, 24 M 327, 328, 61 P 880; *Conklin v. Cullen*, 25 M 214, 216, 64 P 502; *Beach v. Spokane Ranch & Water Co.*, 25 M 367, 373,

65 P 106; *Shadville v. Barker*, 26 M 45, 49, 50, 66 P 496, 761; *Cornish v. Floyd-Jones*, 26 M 153, 156, 66 P 838; *Cornell v. Matthews*, 28 M 457, 459, 72 P 975; *Emerson v. McNair*, 28 M 578, 580, 73 P 121; *Powell v. May*, 29 M 71, 72, 74 P 80; as amended, in *Manuel v. Scott*, 37 M 29, 31, 94 P 487; as section 7115, Revised Codes, in *First Nat. Bank v. Gebo*, 46 M 263, 267, 127 P 463.

9747. When an appeal may be dismissed. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; provided, however, no appeal can be dismissed for insufficiency of, or other objection to the undertaking thereon, even though the same may be void, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon a motion to dismiss the appeal; and provided, further, that no appeal can be dismissed for any objections to the record or the brief of the appellant, if the cause of such objection is removed by perfecting the record or brief to the satisfaction of the court, or a justice thereof, before the hearing of a motion to dismiss. All objections to the record and brief of appellant shall be deemed waived unless a motion to dismiss is made because thereof, except such as will prevent a fair hearing, consideration, and decision of the appeal on its merits; and as to any such objection the court may, in its discretion, permit a compliance with the provision of the law or rule of court violated, within such time and upon such terms as may be just.

History: En. Sec. 1740, C. Civ. Proc. 1895; re-en. Sec. 7116, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1909; re-en. Sec. 9747, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 954.

Effect of Approval of Undertaking by Justice of Supreme Court

An approval of an undertaking on appeal by a justice of the supreme court is a determination that the surety is financially good and sufficient. *King v. Elling*, 24 M 470, 483, 62 P 783.

Not Applicable to Cases Where no Undertaking Was Filed

Statutes of this character refer only to cases in which an insufficient undertaking has been filed in the trial court, and do not embrace a case where no undertaking whatever has been filed within the time limited by law. *Hahn v. James*, 26 M 50, 52, 66 P 463.

Operation in General

An objection to an undertaking as only a joint one is not available where, before the hearing of the motion to dismiss, each appellant has filed a due and proper undertaking. *Hayes v. Union Mercantile Co.*, 27 M 264, 268, 70 P 975.

If the original undertaking on appeal is void, the filing of a substituted undertaking, though approved as required, does not preserve the appeal; but it does so if the undertaking is not wholly void;

and this construction applies to a defective undertaking, under section 9761, on appeal to the district court. *Marlowe v. Michigan Stove Co.*, 48 M 342, 345, 137 P 539.

Waiver by Failure to Move Dismissal

Under this section, providing that all objections to the record on appeal shall be deemed waived unless a motion to dismiss is made, an assignment of error that the trial judge settled the stenographer's transcript after he went out of office will not be entertained where the hearing on appeal was had by both parties on the theory that the transcript was correct, and where no motion to dismiss had been made. *Sevanin v. Chicago etc. Ry. Co.*, 62 M 546, 553, 205 P 825.

Under this section, and subdivision 3 of rule XIV of the rules, of the supreme court, a motion to strike from the record on appeal the transcript of the evidence on the ground that it had not been settled in a bill of exceptions properly certified, not made until the day of argument, will be denied, such objection being deemed waived by failure to interpose a motion to dismiss within at least ten days before the time set for hearing of the case. *Lonecar v. National Union Fire Ins. Co.*, 84 M 141, 148, 274 P 844.

When Appellant Cannot Prevent a Dismissal

If an appeal undertaking is adjudged void for ambiguity, and the statutory time

for perfecting appeals has expired, appellant cannot then prevent a dismissal by filing a valid bond. *Creek v. Bozeman Water Works Co.*, 22 M 328, 330, 56 P 362.

Where appellant failed to file a new undertaking, she could not prevent a dismissal of the appeal on the ground of excusable neglect, on her affidavit that she had no notice of the motion to dismiss the appeal, and that of her attorney that he notified appellant's husband that she should procure a new undertaking, and, because of the husband's promise to inform her, the attorney made no further effort in the matter. *Hill v. Cassidy*, 24 M 108, 112, 60 P 811.

Where a motion to dismiss for failure to file sufficient bond on appeal has been

submitted, the court cannot permit the filing of a sufficient bond, and reinstatement of the appeal thereby. *Baker v. Butte City Water Co.*, 24 M 113, 116, 60 P 817.

References

Cited or applied as section 1740, Code of Civil Procedure, before amendment, in *Coleman v. Perry*, 24 M 237, 238, 61 P 129; *Emerson v. McNair*, 28 M 578, 582, 73 P 121; *Pirrie v. Moule*, 33 M 1, 3, 81 P 390; *Faust v. Rustler Min. & Mill. Co.*, 34 M 368, 369, 86 P 421; *Manuel v. Scott*, 37 M 29, 31, 94 P 487; *Atkinson v. Roosevelt County et al.*, 71 M 165, 175, 227 P 811; *O'Donnell v. City of Butte*, 72 M 449, 455, 235 P 707; *City of Bozeman v. Nelson*, 73 M 147, 162, 237 P 528.

9748. Effect of dismissal. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

History: En. Sec. 426, p. 156, L. 1877; re-en. Sec. 426, 1st Div. Rev. Stat. 1879; re-en. Sec. 439, 1st Div. Comp. Stat. 1887; re-en. Sec. 1741, C. Civ. Proc. 1895; re-en. Sec. 7117, Rev. C. 1907; re-en. Sec. 9748, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 955.

Operation and Effect

The absolute dismissal of an appeal by the supreme court affirms the judgment of the district court. *Owsley v. Warfield*, 7 M 264, 265, 17 P 74.

An appeal by plaintiff in an action against a county may be dismissed for

failure to serve the attorney-general with a copy of the transcript and appellant's brief, and such dismissal, unless done without prejudice, will be in effect an affirmance of the judgment. *McIntosh Hardware Co. v. Flathead County*, 32 M 254, 256, 80 P 239.

The dismissal of an appeal operates to affirm the decree of the district court. *Carlson v. City of Helena*, 43 M 1, 5, 114 P 110.

References

Great Northern Railway v. Galbreath Co., 271 U. S. 96.

9749. Supplementing defective record. In all cases of insufficiency or other defects in the transcript or papers on appeal, the appellant or other party in interest may be allowed to supplement or correct the same on such terms and subject to such costs and penalties as the court may determine; in case any certificate required to be made by the district court, or a judge thereof, or the clerk thereof, be found defective, the same may be corrected by an amendment or by the filing of a new certificate with the same effect as if such certificate had been made or filed in due form in the first instance, leave being first obtained from the supreme court.

History: En. Sec. 14, Ch. 225, L. 1921; re-en. Sec. 9749, R. C. M. 1921.

References

Clack v. Clack et al., 98 M 552, 41 P 2d 32.

9750. What the court may review on an appeal from a judgment. Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

History: En. Sec. 427, p. 156, L. 1877; re-en. Sec. 427, 1st Div. Rev. Stat. 1879; re-en. Sec. 440, 1st Div. Comp. Stat. 1887; re-en. Sec. 1742, C. Civ. Proc. 1895;

re-en. Sec. 9750, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 956.

NOTE.—This section did not appear in the Revised Codes of 1907.

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Not Applicable to Review of Order Granting a New Trial

The provision of this section that upon appeal from a judgment the court may review the decision of the court or any intermediate order excepted to, has no application on appeal from an order granting a new trial. *Parsons v. Rice*, 81 M 509, 515, 264 P 396.

Orders Appealable Are Not Reviewable on Appeal from a Judgment

The supreme court cannot, on appeal from the judgment, review an order from which an appeal could have been taken. *Great Falls Meat Co. v. Jenkins*, 33 M 417, 423, 84 P 74.

An order denying a motion to dissolve a temporary injunction is an appealable order, and if not appealed from, the correctness of the order may not, under this section, be reviewed on appeal from the judgment in the action in which the order was made. *Little Horn State Bank v. Gross et al.*, 89 M 472, 476, 300 P 277.

What May be Reviewed on Appeal from a Judgment

Refusal in the district court of a change of venue on the ground of residence is a judicial act, which may be reviewed on an appeal from the final judgment. *State ex rel. Independent Pub. Co. v. Smith*, 23 M 329, 332, 58 P 867. See also *State ex rel. Woodward v. District Court*, 53 M 358, 359, 163 P 1149.

If a particular order is not enumerated in the statute among those from which an independent appeal may be taken, it must be reviewed on appeal from the judgment. *Finlen v. Heinze*, 27 M 107, 115, 69 P 829, 70 P 517; *Raymond v. Raymond*, 32 M 170, 171, 79 P 1056.

While the statute does not provide for an independent appeal from an order denying a postponement of a trial, such an order may be reviewed upon appeal if an exception to it is properly preserved. *State ex rel. Shores v. District Court*, 27 M 349, 352, 71 P 159.

An intermediate order substituting a claimant of property for defendant in a claim and delivery action may be reviewed on appeal from the final judgment, on exception reserved, and certiorari will not lie to have the order annulled as in excess of jurisdiction. *State ex rel. Weinstein Co. v. District Court*, 28 M 445, 450, 72 P 867.

An order of the district court correcting the verdict in a civil action may be reviewed on appeal from the judgment. *Frank v. Symons*, 35 M 56, 63, 88 P 561.

On appeal from an order denying an injunction pendente lite where the only question presented is whether in denying it the court erred, matters of pleading and practice subsequent to settlement of bill of exceptions, or rulings upon questions of law, will not be determined, they being reviewable on appeal from the final judgment, under this section. *National Bank of Montana v. Bingham*, 83 M 21, 32 et seq., 269 P 162.

References

Cited or applied as section 1742, Code of Civil Procedure, in *Butte Consolidated Min. Co. v. Frank*, 24 M 506, 510, 62 P 922; *Bordeaux v. Bordeaux*, 32 M 159, 161, 80 P 6; *Blessing v. Angell et al.*, 66 M 482, 483, 214 P 71; *O'Donnell v. City of Butte*, 72 M 449, 454, 235 P 707; *Bullard v. Zimmerman et al.*, 82 M 434, 446, 268 P 512; *Ringling v. Biering et al.*, 83 M 391, 394, 272 P 688.

9751. Ruling against respondent may be reviewed. Whenever the record on appeal shall contain a bill of exceptions or statement of the case properly settled, setting forth any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause, together with the objection and exception of such respondent properly made, and reserved, settled, and allowed in such bill of exceptions or statement, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections and exceptions thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record. And no cause shall be reversed upon appeal by reason of any error committed by the trial court against the appellant, where the record shows that the same result would have been attained had such trial court not committed an error or errors against the respondent.

History: En. Sec. 2, Ch. 35, L. 1907; Sec. 7118, Rev. C. 1907; re-en. Sec. 9751, R. C. M. 1921.

Cross Appeal When Necessary

Where respondent desires a review of rulings of the trial court upon a cause of

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91 P (2d) 420

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98 P (2d) 330

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139 P (2d) 488

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162 P. 2d 215

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192 P.(2d) 318

action separate and distinct from that which the appellant seeks to have reviewed on his appeal, he must prosecute a cross-appeal, even though the causes were tried in the same action, this section authorizing review of cross-assignments of error not being intended to do away with the necessity of a cross-appeal under such conditions. *Cook v. MacGinniss*, 72 M 280, 291 et seq., 233 P 129; *In re Silver's Estate*, 98 M 141, 38 P 2d 277.

Exceptions of Both Parties Admissible

By virtue of this section and of section 9394, the exceptions of both parties may be incorporated in the record, and the prevailing party is always in a position to inform the supreme court that he has not been permitted to introduce all of his evidence. *State ex rel. La France Copper Co. v. District Court*, 40 M 206, 210, 105 P 721.

Where the plaintiff, on appeal from a judgment in his favor, complains that it is for an insufficient amount, but the defendant correctly insists that the complaint is insufficient to support any judgment, the supreme court will reverse the judgment with directions to sustain the demurrer to the complaint. *Manhattan Co. v. White*, 48 M 565, 567, 140 P 90.

Since the enactment of Chapter 35, Laws of 1907 (section 9394 and this section), all matters affecting the substantial rights of both plaintiff and defendant with relation to any order, ruling or proceeding had in the trial court "at any stage of the trial" of the cause may, under proper exception, be included in the bill of exceptions prepared by the appellant under the codes, whether during the actual trial, on a preliminary matter, on motion for a new trial or an appeal from the judgment. *Watts v. Bellings Bench Water Assn.*, 78 M 199, 207 et seq., 253 P 260.

Necessity that Reviewable Proceeding Be Incorporated in a Bill of Exceptions

Though an order sustaining a motion to strike out parts of the defendant's answer is made a part of the record on appeal, the action of the court is not subject to review where the original pleading against which the motion was directed is not identified by being embodied in a bill of exceptions properly settled. *Bordeaux v. Bordeaux*, 43 M 102, 106, 115 P 25.

To make an order or ruling of the trial court against the respondent reviewable by the supreme court under a cross-assignment of error (this section), the order of ruling must be presented by bill of exceptions or statement of the case properly settled; hence where the record on appeal consisted of the judgment-roll only, the alleged error was not reviewable. *Thomp-*

son v. Twodot Fertilizer Co. et al., 71 M 486, 494, 230 P 588.

Operation in General

This section requires the supreme court to review the errors made, not only against the appellant, but also those made in his favor, if they are made to appear in the record by bill of exceptions, and prohibits the reversal of the judgment upon any error complained of by the appellant, if, but for the error against the respondent, the result of the trial would have been the same. *In re Murphy's Estate*, 43 M 353, 375, 116 P 1004.

The rule that an order granting a new trial will be upheld, if any ground of the motion supports such order, is applicable only where the order is a general one, not disclosing the particular ground upon which the court acted, or where counsel have invoked the provisions of this section for the compensation of errors. *Harrington v. Butte Miner Co.*, 48 M 550, 553, 139 P 451.

The supreme court will dispose of a case according to the substantial rights of the parties, as shown by the record. *Manhattan Co. v. White*, 48 M 565, 568, 140 P 90.

On a plaintiff's appeal from a judgment for the plaintiff, the defendant cannot complain where he has not appealed nor even, by cross-assignment in his brief, asked that the judgment be modified. *Williams v. Johnson*, 50 M 7, 21, 144 P 768.

This section has no application to a case wherein the verdict in claim and delivery fails to find that there was an unlawful taking or detention. It has application only to cases in which the respondent makes cross-assignments upon errors on rulings adverse to him and preserved in a bill of exceptions, in order to enable the supreme court to determine whether those complained of by the appellant were compensated or rendered harmless by reason of them. *Olcott v. Gebo*, 54 M 35, 37, 166 P 300.

The supreme court will not, when the record discloses that the jury disregarded a specific instruction, inquire whether the instruction is correct, but will direct a new trial on that ground, except when the evidence was sufficient to have justified the verdict, in which case the appellant would be entitled, under this section, to have the judgment affirmed. *De Young v. Benepe*, 55 M 306, 312, 176 P 609.

Under this section authorizing review of cross-assignments of error made by the successful party, the supreme court will affirm the judgment if error committed against the appellant is compensated by that committed against respondent. *Hale et al. v. Belgrade Co., Ltd., et al.*, 75 M 99, 111, 242 P 425.

Since the enactment of this section, the supreme court is required on appeal to review not only the errors assigned by appellant, but the cross-assignment made by respondent if made to appear in the record by bill of exceptions, and under the doctrine of compensatory error thereby established, the court cannot reverse the judgment for error committed against appellant if the same result would have been attained had the trial court not committed errors against respondent. *Nitsche v. Security Benefit Assn. et al.*, 78 M 532, 545, 255 P 1052.

It is only where alleged errors assigned by respondent under his cross-assignment of error compensate appellant for errors committed against him that the supreme court is required to affirm the judgment, under this section. *Murray et al. v. Creese et al.*, 80 M 453, 458, 260 P 1051.

Scope and Purpose

This section, authorizing review of cross-assignments of error on appeal, has application only to cases in which the respondent makes cross-assignments upon errors in rulings adverse to him and preserved in a bill of exceptions, its purpose being to enable the supreme court to determine whether those complained of by the appellant were compensated or rendered harmless by reason of those complained of by respondent. *Cook v MacGinniss*, 72 M 280, 291 et seq., 233 P 129; *In re Silver's Estate*, 98 M 141, 38 P 2d 277.

The purpose of this section, authorizing cross-assignments by respondent upon error in rulings adverse to him, preserved in the bill of exceptions, is to enable the supreme court to determine whether errors complained of by appellant were compensated or rendered harmless by those urged by respondent; hence, where the complaint consisted of two causes of action each re-

lating to separate transactions independent of each other, cross-assignments relating to the trial of the one could not compensate or render harmless error committed in the trial of the other, and therefore such assignments were not available to respondent. *J. M. Hamilton Co. v. Battson*, 99 M 583, 594, 44 P 2d 1064.

When Supreme Court, May Consider Compensatory Error

A new trial should never be granted when it is apparent that the result reached would not be changed on a retrial, and in passing on an appeal from an order granting a new trial the supreme court may consider an assignment of error that if the trial court had not committed error against respondent during the trial a cause would be presented in which a new trial should not have been granted, under the doctrine of compensatory error. (This section.) *Parsons v. Rice*, 81 M 509, 515, 264 P 396.

References

Cited or applied as chapter 35, Laws of 1907, in *Kennedy v. Dickie*, 36 M 196, 200, 92 P 528; as Laws of 1907, p. 66, in *Carwile v. Jones*, 38 M 590, 594, 101 P 153; as section 7118, Revised Codes, in *Montana Livestock Co. v. Stewart*, 58 M 221, 226, 190 P 985; *State ex rel. Rankin v. Martin*, 68 M 392, 403, 219 P 632; *Wallace et al. v. Goldberg et al.*, 72 M 234, 242, 231 P 56; *McDaniel v. Hager-Stevenson Oil Co.*, 75 M 356, 359, 243 P 582; *Alley v. Butte & Western Min. Co.*, 77 M 477, 497, 251 P 517; *State v. Smart*, 81 M 145, 155, 262 P 158; *Wells-Dickey Co. v. Embody*, 82 M 150, 156, 266 P 869; *Loncar v. National Union Fire Ins. Co.*, 84 M 141, 150, 274 P 344; *Thornton et al. v. Wallace*, 85 M 27, 30, 277 P 417; *Orem v. Hansen Packing Co.*, 91 M 222, 229, 7 P 2d 546; *Apple v. Edwards et al.*, 92 M 524, 16 P 2d 700.

9752. Remedial powers of an appellate court. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on an appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

History: Ap. p. Sec. 260, p. 96, *Bannack Stat.*; re-en. Sec. 378, p. 108, *Cod. Stat.* 1871; amd. Sec. 428, p. 156, *L.* 1877; re-en. Sec. 441, 1st Div. *Comp. Stat.* 1887;

amd. Sec. 1743, *C. Civ. Proc.* 1895; re-en. Sec. 7119, *Rev. C.* 1907; re-en. Sec. 9752, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 957.

Operation and Effect

The district court improperly vacated an order appointing a receiver in a mortgage foreclosure suit and directed the clerk of court to pay over to defendant the moneys collected during the receivership. With knowledge that the order was subject to review and possible reversal, the moneys were at once obtained from the clerk. Held on reversal of the order, that under this section the supreme court may either compel restitution by its mandate or direct the district court to do so, or the plaintiff mortgagee may maintain a separate action for that purpose. *Burgess v. Lasby et al.*, 94 M 534.

Under this section, the supreme court may order restitution in a proper case or direct the district court to do so; hence where a city officer was wrongfully ousted from office in quo warranto proceedings, the appellate court on reversal of the judgment may remand the cause with direction that the books and papers of the office be turned over to the successful appellant. *State ex rel. Kurth et al. v. Grinde et al.*, 96 M 608, 613, 32 P 2d 15.

References

Anderson v. Border et al., 87 M 4, 11, 285 P 174.

9753. Remittitur must be certified to the clerk of the district court.

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171 P.(2d) 999

When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment-roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the supreme court on the docket against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal.

History: Ap. p. Sec. 273, p. 100, *Bannack Stat.*; en. Sec. 342, p. 204, L. 1867; re-en. Sec. 391, p. 112, *Cod. Stat.* 1871; re-en. Sec. 430, p. 157, L. 1877; re-en. Sec. 430, 1st Div. Rev. Stat. 1879; re-en. Sec. 443, 1st Div. Comp. Stat. 1887; re-en. Sec. 1744, C. Civ. Proc. 1895; re-en. Sec. 7120, Rev. C. 1907; re-en. Sec. 9753, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 958.

Operation and Effect

The duty which this section imposes upon the clerk of the district court, in requiring him to enter on his docket the judgment of the supreme court rendered in any cause before it on appeal, is a purely ministerial one. *State ex rel. Dolenty v. District Court*, 42 M 170, 172, 111 P 731.

Id. Since the duty of entering a judgment rendered by the supreme court in disposing of an appeal rests upon the clerk of the district court from which the appeal was taken, such court, or its judge, may

not be compelled by mandamus to perform the act thus imposed by law upon the clerk.

The practice of the clerk of the trial court of signing and recording a formal judgment, on receipt of a remittitur by the clerk of the supreme court, is proper, in the absence of any other legislative direction. *State ex rel. Dolenty v. Reece*, 43 M 291, 292, 115 P 681.

Id. A mandate of the supreme court, reversing a judgment and remanding the case, with directions to enter judgment, must be interpreted in the light of the statutes governing the entry of a judgment after appeal, and the direction to enter judgment as directed must be construed as addressed to the clerk of the trial court.

References

State v. District Court et al., 77 M 594, 251 P 1061; *Lasby et al. v. Burgess*, 93 M 349, 353, 18 P 2d 1104.

CHAPTER 81

APPEALS TO DISTRICT COURT

Section 9754. Appeal from judgment of justice's or police court.

9755. Must be tried anew.

9756. Transmission of papers to appellate court.

9757. Undertaking on appeal.

9758. Effect of appeal.

9759. Stay of proceedings on filing undertaking.
 9750. Stay of proceedings on filing undertaking.
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 52 P (2d) 158
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9754. Appeal from judgment of justice's or police court. Any party dissatisfied with the judgment rendered in a civil action in a police or justice's court may appeal therefrom to the district court of the county at any time within thirty days after the rendition of the judgment. The appeal is taken by serving a copy of the notice of appeal on the adverse party or his attorney, and by filing the original notice of appeal with the justice or judge. The order of serving and filing is immaterial.

History: En. Sec. 637, p. 169, *Bannack Stat.*; re-en. Sec. 742, p. 185, *Cod. Stat.* 1871; re-en. Sec. 802, 1st Div. Rev. Stat. 1879; re-en. Sec. 822, 1st Div. Comp. Stat. 1887; amd. Sec. 1760, *C. Civ. Proc.* 1895; re-en. Sec. 7121, *Rev. C.* 1907; amd. Sec. 1, Ch. 4, L. 1911; re-en. Sec. 9754, *E. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 974.

"Adverse Party"

An adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal; but it does not follow that one who is neither a necessary nor a proper party to the action must be considered adverse merely because he appear as such upon the record. *Anderson v. Red Metal Min. Co.*, 36 M 312, 323, 93 P 44.

Where, in an action before a justice of the peace, brought by an assignee on an account, the debtor interpleaded, besides one other, the assignor, who admitted the assignment and disclaimed any interest in the subject-matter of the controversy, the latter was not an adverse party, within the meaning of this section, upon whom it was necessary to serve notice of an appeal to the district court. *Anderson v. Red Metal Min. Co.*, 36 M 312, 323, 93 P 44. See also *Mettler v. Adamson*, 38 M 198, 203, 99 P 441.

Appeal Can Be Had Only From Judgment

The only appeal from a justice's court provided for by this code is an appeal from a judgment, and there is no appeal to the district court from an order made in a justice's court before or after judgment. *State ex rel. Cobban v. District Court*, 30 M 93, 95, 75 P 862; *Burch v. Roberson*, 47 M 456, 457, 132 P 1132; *Thien v. Wiltse*, 49 M 189, 192, 141 P 146.

An appeal lies to the district court, from a judgment of the justice's court, setting aside an order of dismissal; for this reason, such order cannot be reviewed on certiorari. *State ex rel. Beadle v. Smith*, 42 M 492, 495, 113 P 294.

Effect of Failure to File Notice Within Thirty Days

Where it appears that appellant, without any excuse for his delay, did not file the transcript with the district court until thirty-two days after judgment, and thirty-one days after giving notice of his appeal, an order dismissing the appeal was properly granted, and was not an abuse of discretion. *Meyers v. Gregans*, 20 M 450, 452, 52 P 83.

Operation in General

The appeal from a justice's court to the district court is taken by serving a copy of the notice of appeal on the adverse party or his attorney, and by filing the original notice of appeal with the justice or judge. The order in which these acts are done is not important. *State ex rel. Hackshaw v. District Court*, 48 M 477, 479, 138 P 1100.

Presumption that a Notice Filed Was Properly Served

In the absence of any showing to the contrary, it is to be presumed that a notice filed with the justice was properly served. *Morin v. Wells*, 30 M 76, 79, 75 P 688.

Under this section, an appeal from a justice of the peace court to the district court is perfected by service of the notice of appeal upon the adverse party or his attorney and the filing thereof with the justice, proof of service not being made a jurisdictional requirement; therefore dismissal of such an appeal because the record did not show that service had been made upon the adverse party was error. *Farmers & Miners State Bk. v. Probst*, 76 M 284, 286, 246 P 249.

Purpose of Notice of Appeal

The purpose of the notice of appeal is to give to the adverse party information of the fact that the cause has been removed to the appellate court, so that he may appear and protect his rights in the future proceedings to be had therein. *State ex rel. Rosenstein v. District Court*, 41 M 100, 102, 108 P 580; *Davidson v. O'Donnell*, 41 M 308, 311, 110 P 645;

Jenkins v. Carroll, 42 M 302, 313, 112 P 1064; Valadon v. Lohman, 46 M 144, 147, 127 P 88; Marlowe v. Michigan Stove Co., 48 M 342, 344, 137 P 539.

The notice of appeal has a purpose to fulfill. It performs the office of a summons; and, if it fails to inform the adverse party of what he is to meet, as, where the date of the judgment is not given, so that the judgment can be identified, the notice of appeal is insufficient to give the district court jurisdiction. State ex rel. Rosenstein v. District Court, 41 M 100, 103, 108 P 580. See also Valadon v. Lohman, 46 M 144, 147, 127 P 88; Stephens v. Conley, 48 M 352, 360, 138 P 189.

Scope of Review on Appeal

Only such questions as were raised and presented in the justice's court can be tried on appeal in the district court. Clark v. Great Northern Ry. Co., 30 M 458, 464, 76 P 1003.

Statutory Procedure Must Be Strictly Followed

Appeals from justice of the peace to district courts are matters of statutory regulation, and the provisions of the law relative to the method to be pursued in taking such appeals must be strictly followed in order to devert the former of,

and invest the latter with, jurisdiction. State ex rel. Hall v. District Court, 34 M 112, 120, 85 P 872.

Appeals are statutory, and the appellant must proceed as the statute requires, particularly with respect to appeals from such bodies as a board of county commissioners. In re Searles, 46 M 322, 324, 127 P 902; Thien v. Wiltse, 49 M 189, 194, 141 P 146.

What Notice Shall Contain

The notice of appeal must describe the particular judgment or order appealed from by reference to the court that rendered it, to the parties litigant, and to the date and amount or character of the judgment, in terms sufficiently specific to identify it, without resort to extrinsic evidence. State ex rel. Rosenstein v. District Court, 41 M 100, 103, 108 P 580. See also Valadon v. Lohman, 46 M 144, 147, 127 P 88; Stephens v. Conley, 48 M 352, 360, 138 P 189.

References

Cited or applied as section 1760, Code of Civil Procedure, before amendment, in State ex rel. Shanahan v. Lindsay, 22 M 398, 400, 56 P 827; State ex rel. Allen v. Napton, 24 M 450, 455, 62 P 686; Threlkeld v. O'Neal, 26 M 209, 211, 66 P 940.

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54 P (2d) 564-566
102 Mont. 5
55 P (2d) 962

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65 P (2d) 612

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106 P.(2d) 350

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111 P.(2d) 306

9755. Must be tried anew. All appeals from justices' or police courts must be tried anew in the district court, on the papers filed in the justice's or police court, unless the court, for good cause shown, and on such terms as may be just, allow other or amended pleadings to be filed in such action. The court may order new or amended pleadings to be filed. Each party has the benefit of all legal objections made in the justice's or police court. When a judgment is reversed or set aside on a question of law arising in the justice's or police court, the district court must either try the case anew or render a judgment. There is no appeal from a judgment by default rendered in a justice's or police court, except on questions of law which appear on the face of the papers or proceedings, and except in cases when the justice's or police court has abused its discretion in setting aside or refusing to set aside a default or judgment. If the judgment by default is set aside, the district court must allow pleadings to be filed and try the case.

History: En. Sec. 641, p. 170, Ban-nack Stat.; re-en. Sec. 746, p. 186, Cod. Stat. 1871; re-en. Sec. 806, 1st Div. Rev. Stat. 1879; re-en. Sec. 826, 1st Div. Comp. Stat. 1887; amd. Sec. 1761, C. Civ. Proc. 1895; re-en. Sec. 7121, Rev. C. 1907; re-en. Sec. 9755, R. C. M. 1921.

Applicable to Criminal Cases

The rule of practice under this section applies in criminal cases. In re Graye, 36 M 394, 397, 93 P 66.

District Court Tries Case De Novo

The district court does not, on appeal from a justice's court, sit as a court of review, but tries the cause de novo. State ex rel. Gleim v. Evans, 13 M 239, 245, 33 P 1010; Missoula Electric Light Co. v. Morgan, 13 M 394, 396, 34 P 488; State v. Deslauries, 13 M 398, 399, 34 P 490; State ex rel. Seres v. District Court, 19 M 501, 504, 48 P 1104; Duane v. Molinak, 31 M 343, 345, 78 P 588; State v. O'Brien, 35 M 482, 491, 90 P 514; In re Graye, 36 M 394,

397, 93 P 66; *Jenkins v. Carroll*, 42 M 302, 312, 112 P 1064; *Thien v. Wiltse*, 49 M 189, 194, 141 P 146.

On appeal from a justice's court in a misdemeanor case, the cause must be tried *de novo* in the district court on the papers and files in the former, unless the latter court allows other or amended pleadings, and each party has the benefit of all legal objections made in the justice's court. *State v. Benson*, 91 M 109, 111, 5 P 2d 1045.

Irregularities Attending Judgment Waived by Appeal

Since the district court does not, on appeal from a justice's court, sit as a court of review, but tries the cause *de novo*, any irregularities attending the rendition of the judgment in a case in which the justice had jurisdiction are waived by taking the appeal. *State v. O'Brien*, 35 M 482, 491, 90 P 514; *In re Graye*, 36 M 394, 401, 93 P 66; *Hosoda v. Neville*, 45 M 310, 313, 123 P 20.

Right of Appellant to Dismiss After Appeal

Upon the removal of a cause to the district court, it stands for trial *de novo*; and, in view of section 9757, it is questionable whether the appeal, after it has been perfected, can be withdrawn or dismissed by the appellant. *Valadon v. Lohman*, 46 M 144, 148, 127 P 88.

Scope of Review

Only such questions as were raised and presented in the justice of the peace court can be tried in the district court. *State ex rel. Shanahan v. Lindsay*, 22 M 398, 401, 56 P 827; *Clark v. Great Northern Ry. Co.*, 30 M 458, 464, 76 P 1003.

This section has to do only with the extent of the relief which may be granted by the district court. It does not, in terms, nor by implication, allow an appeal to the district court from an order made in the justice's court, either before or after judgment. *State ex rel. Cobban v. District Court*, 30 M 93, 95, 75 P 862.

Only such questions as were raised and presented in the justice's court can be tried on appeal in the district court, and where there was no showing that a motion

was made in the justice's court to set aside the judgment and dismiss the cause, but the record showed that the case was tried on issues of fact raised by the answer, it was proper for the district court, on appeal from a judgment for plaintiff, to overrule a motion to dismiss the cause, and to try the issues of fact which had been raised before the justice. *Clark v. Great Northern Ry. Co.*, 30 M 458, 464, 76 P 1003.

The district court on appeal sits as a justice of the peace court, and with no greater jurisdiction, and either party may have reviewed any question of law or fact which was raised before the justice and presented to the district court. *State ex rel. Grissom v. Justice Court*, 31 M 258, 264, 78 P 498.

Setting Aside a Default—Extent of Review

A judgment by default will be affirmed, on appeal, where no motion was made in the justice's court to set aside the default, or other appropriate relief sought; the complaint being sufficient for the court in which it was originally filed. *Gage v. Maryatt*, 9 M 265, 266, 23 P 337.

Where a justice refuses to set aside a judgment by default, an appeal lies, and it is for the court to determine on the papers filed in the justice court as to whether the discretion of the justice has been abused. *State ex rel. Shanahan v. Lindsay*, 22 M 398, 400, 56 P 827; *State ex rel. Reynolds v. Laurendeau*, 27 M 522, 524, 71 P 754.

Where a justice overruled a motion to vacate a default judgment, this section authorized an appeal, and the judgment could not be reviewed by certiorari. *State ex rel. Reynolds v. Laurendeau*, 27 M 522, 524, 71 P 754.

References

Cited or applied as section 1761, Code of Civil Procedure, in *Finlen v. Heinze*, 32 M 354, 380, 80 P 918; as section 7122, Revised Codes, in *State ex rel. Beadle v. Smith*, 42 M 492, 495, 113 P 294; *State ex rel. Chicago etc. Ry. Co. v. Gibb*, 58 M 518, 519, 193 P 1114; *Barrett v. Shipley*, 63 M 152, 156, 206 P 430.

9756. Transmission of papers to appellate court. Upon receiving the notice of appeal, and filing an undertaking as required in the next section, the justice or judge must, within ten days, upon the payment of the fees therefor, transmit to the clerk of the district court a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the district court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or

refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney.

History: Ap. p. Sec. 639, p. 170, Ban-
nack Stat.; re-en. Sec. 744, p. 186, Cod.
Stat. 1871; re-en. Sec. 804, 1st Div. Rev.
Stat. 1879; re-en. Sec. 824, 1st Div. Comp.
Stat. 1887; en. Sec. 1762, C. Civ. Proc.
1895; re-en. Sec. 7123, Rev. C. 1907; re-en.
Sec. 9756, R. C. M. 1921. Cal. C. Civ.
Proc. Sec. 977.

Operation and Effect

A justice of the peace is not obliged to make out papers on appeal until his fees have been paid or tendered. *Meyers v. Gregans*, 20 M 450, 452, 52 P 83.

One who appeals from a justice's to the district court, and has paid the justice his fee for transmitting the transcript of the cause to the district court, may, if without fault himself, upon failure of the justice to do within ten days after perfection of the appeal, compel the

performance of such duty, and, in a flagrant case, the court may impose a fine for dereliction on the part of the justice. *Bush v. Baker*, 46 M 535, 547, 129 P 550.

Id. Prompt action is required of the appellant, in so far as he is responsible for the filing of the papers. He is subject to the penalty of having his appeal dismissed, if, without excuse, he is guilty of laches. He cannot hold the appeal in abeyance and prevent the adverse party from bringing the case to a hearing in the district court.

References

Cited or applied as section 1762, Code of Civil Procedure, in *State ex rel. Cobban v. District Court*, 30 M 93, 95, 75 P 862; as section 7123, Revised Codes, in *State ex rel. Hackshaw v. District Court*, 48 M 477, 479, 138 P 1100.

9757. Undertaking on appeal. An appeal from a justice's or police court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money, or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the district court. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the district court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the district court, not exceeding a sum to be fixed by the justice of the court from which the appeal is to be taken, and which sum must be specified in the undertaking. A deposit of the amount of the judgment, including all costs, appealed from, or of the value of the property, includ-

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ing all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking, and, in such cases, the justice or judge must transmit the money to the clerk of the district court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or a judge of the district court of the county in which such action has been tried, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

History: Ap. p. Sec. 638, p. 169, Ban-nack Stat.; re-en. Sec. 743, p. 185, Cod. Stat. 1871; re-en. Sec. 803, 1st Div. Rev. Stat. 1879; re-en. Sec. 823, 1st Div. Comp. Stat. 1887; amd. Sec. 1763, C. Civ. Proc. 1895; en. Sec. 1, Ch. 186, L. 1907; Sec. 7124, Rev. C. 1907; re-en. Sec. 9757, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 978.

Contents of Undertaking

On appeal from a money judgment from a justice's to the district court, the appellant must file an undertaking agreeing to pay the amount of the judgment appealed from together with all the costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs which may be recovered against him in the district court. State ex rel. Gregory v. District Court, 86 M 396, 398 et seq., 284 P 537.

Id. On appeal from a judgment directing the delivery of possession of real property, the undertaking on appeal must be conditioned that the appellant will pay any judgment and costs that may be recovered against him in the district court, not exceeding a sum to be fixed by the justice, and specified in the undertaking (and where a stay is desired the undertaking must set forth that during the possession of the property by appellant he will not commit, or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment recovered against him in the district court, he will pay the value of the use and occupation of the property for the time of the appeal until the delivery of possession thereof). (This section.)

Distinction Between Taking and Perfecting an Appeal

There is a clear distinction between the taking and the perfecting of an appeal. An appeal is taken when a notice of appeal is served and filed. The filing of an undertaking perfects the appeal, but it is not a part of the taking in the statutory sense. Thien v. Wiltse, 49 M 189, 193, 141 P 146.

Effect of Failure to Perfect Appeal

Unless an appeal from a justice's court is taken within the time, and effectuated in accordance with the regulations, prescribed in this code, the district court has no jurisdiction of the appeal except to dismiss it. State ex rel. Cobban v. District Court, 30 M 93, 95, 75 P 862.

The appeal is taken by filing and serving the notice of appeal, but it is ineffectual for any purpose unless the required undertaking is filed. State ex rel. Rosenstein v. District Court, 41 M 100, 102, 108 P 580.

Effect of Additional Conditions in Bond Which is Otherwise Perfect

An undertaking on appeal to the district court which meets all the requirements of this section, relative to amount and conditions, is not rendered invalid by the insertion of additional conditions not in anywise affecting the liability of the sureties under the statute. Marlowe v. Michigan Stove Co., 48 M 342, 344, 137 P 539.

Impliedly Authorizes District Court to Tax Costs

This section impliedly authorized the district court to tax against the unsuccessful party in that court the costs incurred in the trial of the cause in the justice's court, where they were included in the cost bill, although the justice of the peace had failed to make entry of costs on his docket. Duckett v. Biggs, 57 M 443, 188 P 938.

Notice Touching Qualifications of Sureties

The notice required to be given the adverse party is not notice of the filing of a new undertaking, but notice of the time and place when and where the sureties will be examined touching their qualifications. State ex rel. Allen v. Napton, 24 M 450, 456, 62 P 686.

Requirement of the Statute Relative to Justification of the Sureties is Directory

An exception to the sureties does not divest the jurisdiction of the district

court of the appeal; the requirement of the statute concerning the justification of the sureties is directory, for appellee's benefit, and he may waive his privilege of excepting to the sureties, or may except to the sureties and afterward withdraw such exception; the statute is mandatory only where the appellee insists that the sureties justify within five days. *Morin v. Wells*, 30 M 76, 80, 75 P 688.

Right to Require Sureties to Justify May be Waived

The right to require sureties on an undertaking on appeal from a justice's to the district court to justify, is personal to the exceptant, and may therefore be waived by him. *Bush v. Baker*, 46 M 535, 545, 129 P 550.

Id. Where counsel for the successful party to an action in a justice's court had orally agreed that, owing to illness of opposing counsel, justification of the sureties on an undertaking on appeal to the district court should be deemed sufficient, even though not made strictly within the time prescribed by this section, and where, after the sureties had been examined and the undertaking approved, no objection was offered, he will be held to have waived any irregularity in this respect.

Right to Stipulate for Extension of Time

Where appellee excepted to the sufficiency of the sureties, and they failed to justify within the statutory period, counsel for the parties had the right to stipulate for an extension of time within which the sureties might justify or a new undertaking be furnished. *Morin v. Wells*, 30 M 76, 81, 75 P 688.

9758. Effect of appeal. If the party in whose favor the judgment is rendered appeals, the undertaking must be in the sum of one hundred dollars, and conditioned that he will pay all costs that may be awarded against him, and obey any order of court made in the action. If the party appealing fails to reduce the judgment against him, or to enlarge the judgment in his favor appealed from, ten dollars or more, or reverse the same in the district court, he shall not recover any costs of appeal. The sureties on the undertaking mentioned in this and the preceding sections must justify as provided in section 9825.

History: Ap. p. Sec. 640, p. 170, *Banack Stat.*; re-en. Sec. 745, p. 186, *Cod. Stat.* 1871; re-en. Sec. 805, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 825, 1st Div. *Comp. Stat.* 1887; en. Sec. 1764, *C. Civ. Proc.* 1895; re-en. Sec. 7125, *Rev. C.* 1907; re-en. Sec. 9758, *R. C. M.* 1921.

9759. Stay of proceedings on filing undertaking. If an execution be issued, on the filing of the undertaking the justice or judge must direct the officer to stay all proceedings on the same. Such officer must, upon the payment of his fees for services rendered on the execution, thereupon

Steps of Appeal

To make an appeal from a justice's court effective, a notice of appeal, as provided in section 9754, as well as an undertaking, provided for in this section, must be filed with the justice; and, within ten days after receiving the notice and the undertaking, the justice must, as required by section 9756, transmit all the papers to the clerk of the district court. *State ex rel. Hackshaw v. District Court*, 48 M 477, 480, 138 P 1100.

An appeal from a justice's court presents three defined stages. First, the taking of the appeal, which occurs when notice of the proper character is properly filed and served; second, the perfecting of the appeal or rendering it effectual, which occurs upon the filing of the undertaking; third, the hearing, which occurs when the trial de novo is had in the district court. *Thien v. Wiltse*, 49 M 189, 193, 194, 141 P 146.

References

Cited or applied as section 1763, *Code of Civil Procedure*, before amendment, in *Threlkeld v. O'Neal*, 26 M 209, 211, 66 P 940; *State ex rel. Prescott v. District Court*, 27 M 179, 180, 70 P 516; *State ex rel. Hodgdon v. District Court*, 33 M 119, 122, 82 P 663; *In re Thresher*, 33 M 441, 446, 84 P 876; *State ex rel. Hall v. District Court*, 34 M 112, 117, 85 P 872; *O'Neill v. State Savings Bank*, 34 M 521, 524, 87 P 970; as section 7124, *Revised Codes*, in *Jenkins v. Carroll*, 42 M 302, 310, 112 P 1064; *Valadon v. Lohman*, 46 M 144, 148, 127 P 88; *Kasun v. Todevich*, 71 M 315, 318, 229 P 714.

References

Cited or applied as section 1764, *Code of Civil Procedure*, in *State ex rel. Cobban v. District Court*, 30 M 93, 95, 75 P 862.

relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees on the execution be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

History: En. Sec. 642, p. 170, Ban-
nack Stat.; re-en. Sec. 747, p. 186, Cod.
Stat. 1871; re-en. Sec. 807, 1st Div. Rev.
Stat. 1879; re-en. Sec. 827, 1st Div. Comp.

Stat. 1887; amd. Sec. 1765, C. Civ. Proc.
1895; re-en. Sec. 7126, Rev. C. 1907; re-en.
Sec. 9759, R. C. M. 1921. Cal. C. Civ. Proc.
Sec. 979.

9760. Procedure on appeal—dismissal—costs—damages for appealing for delay—effect and enforcement of judgment. When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the district court. The provisions of this code as to trials in the district courts are applicable to trials on appeal in the district court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the district court may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent. of the judgment appealed from. Judgments rendered in the district court on appeal shall have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the district court.

History: En. Sec. 1766, C. Civ. Proc.
1895; re-en. Sec. 7127, Rev. C. 1907; re-en.
Sec. 9760, R. C. M. 1921. Cal. C. Civ. Proc.
Sec. 980.

Operation and Effect

If any of the necessary steps in taking an appeal from a justice's court to the district court are omitted, the district court is without jurisdiction to entertain the appeal. Such appeals, though provided for by the constitution, are subject to statutory regulation, and the mode prescribed for taking them is exclusive. *Jenkins v. Carroll*, 42 M 302, 311, 112 P 1064.

Id. Until the notice of appeal is filed and served as prescribed, and the undertaking given, and, if required, the sureties thereon, or others in their stead, justify after notice and within five days, the district court does not acquire jurisdiction of the subject-matter or of the parties.

Id. On appeal from a justice's court, the trial is *de novo*, but the district court, though proceeding with the trial as in other cases, acquires its jurisdiction by

appeal under the statute, and its jurisdiction must affirmatively appear.

The power, discretionary in its nature, lodged by this section in the district court, to dismiss an appeal from a justice's court for delay in bringing it to a hearing, should not be exercised where there is a reasonable excuse for the delay, and where it is apparent that the adverse party has not suffered prejudice by reason of the delay. *Bush v. Baker*, 46 M 535, 547, 129 P 550.

Id. The district court abused the discretionary power given it by this section, in dismissing on motion an appeal from a justice's court for alleged lack of diligence in prosecuting it, where counsel for appellant, by reason of illness, was prevented from attending to matters of business, respondent having suffered no detriment or inconvenience from the delay, but, rather, by allowing the case to rest for over three months, without any effort to have it brought to trial, tacitly acquiesced in the delinquency of the appellant.

9761. Defective undertaking. No appeal shall be dismissed for insufficiency of the undertaking thereon, or for any defect or irregularity therein, if a good and sufficient undertaking be filed in the district court at or before the hearing of the motion to dismiss the appeal, which undertaking must be approved by the district judge.

History: En. Sec. 1767, C. Civ. Proc.
1895; re-en. Sec. 7128, Rev. C. 1907; re-en.
Sec. 9761, R. C. M. 1921.

Operation and Effect

The rule that where the original undertaking on appeal to the supreme court is

not wholly void, but merely defective and therefore amendable, the filing of a substituted one preserves the appeal if approved by a justice of the supreme court under section 9747 is applicable to substituted undertakings on appeals to district courts, filed and approved as provided by this section. *Marlowe v. Michigan Stove Co.*, 48 M 342, 345, 137 P 539.

The filing of the undertaking is no part of the taking of the appeal. The appeal

may be preserved, notwithstanding the undertaking is defective or irregular, if a good one is substituted at or before the hearing of the motion to dismiss. *Thien v. Wiltse*, 49 M 189, 193, 141 P 146.

References

Cited or applied as section 7128, Revised Codes, in *State ex rel. Hackshaw v. District Court*, 48 M 477, 480, 138 P 1100.

CHAPTER 82

PROCEEDINGS AGAINST JOINT DEBTORS

Section 9762. Parties not summoned in action on joint contract may be summoned after judgment.

9763. Summons in that case—what to contain, and how served.

9764. Affidavit to accompany summons.

9765. Answer—when filed and what it may contain.

9766. What constitute the pleadings in the case.

9767. Issues, how tried—verdict, what to be.

9768. Joint debtor may compromise.

9769. Effect of discharge of debtor—contribution.

9762. Parties not summoned in action on joint contract may be summoned after judgment. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section 9121, those who are not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

History: Except for slight changes not materially affecting the meaning, this section was en. Sec. 291, p. 104, *Bannack Stat.*; re-en. Sec. 346, p. 205, L. 1867; re-en. Sec. 420, p. 119, *Cod. Stat. 1871*; re-en. Sec. 446, p. 161, L. 1877; re-en. Sec. 446, 1st Div. Rev. Stat. 1879; re-en. Sec. 459, 1st Div. Comp. Stat. 1887; re-en. Sec. 1780,

C. Civ. Proc. 1895; re-en. Sec. 7129, Rev. C. 1907; re-en. Sec. 9762, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 989.*

References

Cited or applied as section 7129, Revised Codes, in *McCarthy v. State Bank of Townsend*, 54 M 319, 328, 170 P 15.

9763. Summons in that case—what to contain, and how served. The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time as the original summons. It is not necessary to file a new complaint.

History: Except for slight changes not materially affecting the meaning, this section was en. Sec. 292, p. 104, *Bannack Stat.*; re-en. Sec. 347, p. 205, L. 1867; re-en. Sec. 421, p. 119, *Cod. Stat. 1871*; re-en. Sec. 447, p. 161, L. 1877; re-en. Sec. 447, 1st

Div. Rev. Stat. 1879; re-en. Sec. 460, 1st Div. Comp. Stat. 1887; re-en. Sec. 1781, C. Civ. Proc. 1895; re-en. Sec. 7130, Rev. C. 1907; re-en. Sec. 9763, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 990.*

9764. Affidavit to accompany summons. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

History: Except for slight changes not materially affecting the meaning, this section was en. Sec. 293, p. 104, Bannack Stat.; re-en. Sec. 348, p. 205, L. 1867; re-en. Sec. 422, p. 119, Cod. Stat. 1871; re-en. Sec. 448, p. 161, L. 1877; re-en. Sec. 448,

1st Div. Rev. Stat. 1879; re-en. Sec. 461, 1st Div. Comp. Stat. 1887; re-en. Sec. 1782, C. Civ. Proc. 1895; re-en. Sec. 7131, Rev. C. 1907; re-en. Sec. 9764, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 991.

9765. Answer—when filed and what it may contain. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations.

History: Except for slight changes not materially affecting the meaning, this section was en. Sec. 294, p. 105, Bannack Stat.; re-en. Sec. 349, p. 205, L. 1867; re-en. Sec. 423, p. 119, Cod. Stat. 1871; re-en. Sec. 449, p. 161, L. 1877; re-en. Sec.

449, 1st Div. Rev. Stat. 1879; re-en. Sec. 462, 1st Div. Comp. Stat. 1887; re-en. Sec. 1783, C. Civ. Proc. 1895; re-en. Sec. 7132, Rev. C. 1907; re-en. Sec. 9765, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 992.

9766. What constitute the pleadings in the case. If the defendant, in his answer, deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations.

History: Except for slight changes not materially affecting the meaning, this section was en. Sec. 295, p. 105, Bannack Stat.; re-en. Sec. 350, p. 205, L. 1867; re-en. Sec. 424, p. 119, Cod. Stat. 1871; re-en. Sec. 450, p. 161, L. 1877; re-en. Sec.

450, 1st Div. Rev. Stat. 1879; re-en. Sec. 463, 1st Div. Comp. Stat. 1887; re-en. Sec. 1784, C. Civ. Proc. 1895; re-en. Sec. 7133, Rev. C. 1907; re-en. Sec. 9766, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 993.

9767. Issues, how tried—verdict, what to be. The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

History: Except for slight changes not materially affecting the meaning, this section was en. Sec. 296, p. 105, Bannack Stat.; re-en. Sec. 351, p. 205, L. 1867; re-en. Sec. 425, p. 119, Cod. Stat. 1871; re-en. Sec. 451, p. 161, L. 1877; re-en. Sec. 451, 1st

Div. Rev. Stat. 1879; re-en. Sec. 464, 1st Div. Comp. Stat. 1887; re-en. Sec. 1785, C. Civ. Proc. 1895; re-en. Sec. 7134, Rev. C. 1907; re-en. Sec. 9767, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 994.

9768. Joint debtor may compromise. Any joint debtor, including a partner, may compromise with a creditor, and a discharge to him by such creditor is as effectual as if made to all debtors, but such discharge does not relieve the other joint debtors. Any creditor can release a judgment in his favor against any one or more joint debtors, and such release does not discharge the others.

History: En. Sec. 1786, C. Civ. Proc. 1895; re-en. Sec. 7135, Rev. C. 1907; re-en. Sec. 9768, R. C. M. 1921.

References

Barbarich v. Chicago etc. Ry. Co. et al, 92 M 1, 11, 9 P 2d 797.

9769. Effect of discharge of debtor—contribution. The discharge of such joint debtor operates as a payment to the creditor equal to the proportionate interest of the debtor discharged. But the discharge of such debtor does not prevent his codebtors from enforcing the right of contribution in case they are compelled to pay the whole of the debt.

History: En. Sec. 1787, C. Civ. Proc. 1895; re-en. Sec. 7136, Rev. C. 1907; re-en. Sec. 9769, R. C. M. 1921.

CHAPTER 83

OFFER OF DEFENDANT TO COMPROMISE

Section 9770. Proceedings on offer of the defendant to compromise after suit brought.

9770. Proceedings on offer of the defendant to compromise after suit brought. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but he must pay the defendant's costs from the time of the offer.

History: En. Sec. 312, p. 108, Bannack Stat.; re-en. Sec. 368, p. 209, L. 1867; re-en. Sec. 442, p. 123, Cod. Stat. 1871; re-en. Sec. 458, p. 163, L. 1877; re-en. Sec. 458, 1st Div. Rev. Stat. 1879; re-en. Sec. 471, 1st Div. Comp. Stat. 1887; re-en. Sec. 1800, C. Civ. Proc. 1895; re-en. Sec. 7137, Rev. C. 1907; re-en. Sec. 9770, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 997.

Operation and Effect

Tender or payment after suit brought, to be effectual to prevent further costs, must be of the sum due, with costs accrued up to that time, and interest, if interest be due. *Pape v. Chauvin-Fant Furniture Co.*, 25 M 417, 420, 65 P 424.

References

Barbarich v. Chicago etc. Ry. Co. et al., 92 M 1, 11, 9 P 2d 797.

CHAPTER 84

INSPECTION OF WRITINGS

Section 9771. A party may demand inspection and copy of a book, paper, etc.

9771. A party may demand inspection and copy of a book, paper, etc. Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be as he alleges them to be; and the court may also punish the party refusing for a contempt. This

section is not to be construed to prevent a party from compelling another to produce books, documents, or papers, when he is examined as a witness.

History: En. Sec. 363, p. 119, Bannack Stat.; re-en. Sec. 421, p. 220, L. 1867; re-en. Sec. 495, p. 136, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 9, p. 11, L. 1881; re-en. Sec. 553, 1st Div. Comp. Stat. 1887; re-en. Sec. 1810, C. Civ. Proc. 1895; re-en. Sec. 7138, Rev. C. 1907; re-en. Sec. 9771, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1000.

Insufficient Affidavit

Where the affidavit in support of an application for an order for the examination of defendant's books and papers contained no statement that an action was pending in the court, and failed to apprise the court of the nature of the action and relief sought, the application could not be granted. *State ex rel. B. & M. Co. v. District Court*, 27 M 441, 445, 71 P 602; *State ex rel. Mendenhall v. District Court*, 29 M 363, 367, 74 P 1078.

The court, before making an order of inspection, must determine from the moving papers that an action is pending, and that the writings subject to be inspected contain competent evidence, material to the issues, or necessary to enable the moving party to prepare for trial; and hence the moving papers must affirmatively show that such action is in fact pending. *State ex rel. Mendenhall v. District Court*, 29 M 363, 368, 74 P 1078.

Id. The court must determine, from the facts set forth in the moving papers, whether any necessity exists for the order; and affidavits which do not set forth any facts, but merely affiant's conclusion that such inspection is necessary are insufficient.

Not Prerequisite to Show That Evidence Could be Obtained From Other Sources

Where, on an application for inspection of books and papers, it appeared that the evidence sought was desired for use in a pending action, and that it was in defendant's possession, and related to the merits of the action stated by plaintiff, it was not a prerequisite to the granting of such application that plaintiff should also show that the evidence could not be obtained from other sources. *State ex rel. Boston & M. Co. v. District Court*, 30 M 206, 216, 76 P 206.

Order Without Limitation of Time is Invalid

An order for the examination of defendant's books and papers, containing no limitation on the time within which inspection shall be made, is void. *State ex rel. B. & M. Co. v. District Court*, 27 M 441, 447, 71 P 602.

Id. Where the court makes an order for the examination of a defendant's books and papers without a proper showing, or makes an order which embraces the inspection of papers which, under the circumstances, could contain no evidence relevant to the issue, or fails to limit the time within which the inspection should be made, it exceeds its jurisdiction, and certiorari will lie.

This section clearly requires that the court shall not only fix the time at which the inspection shall begin, but also the time within which it shall be completed. Its words are "within a specified time," indicating that the inspection must not be extended over a longer time than may be reasonably necessary under the facts of the particular case, to be fixed by the court, and not left to the discretion of the moving party. *State ex rel. Boston & M. Co. v. District Court*, 30 M 206, 216, 76 P 206.

Relief Could be Had Even Without Statute

In the absence of any statute, the district court, in the exercise of its inherent powers as a court of equity, could, upon a sufficient showing, make an order for discovery which would furnish plaintiff all the relief which he can obtain under this section. The legislative enactment added nothing to the power of the court as a court of equity, but, on the contrary, apparently sought to confer on law courts the authority long exercised by courts of equity independent of statutory authority. *State ex rel. B. & M. Co. v. District Court*, 27 M 441, 445, 71 P 602.

Scope of Examination

Where an order directed defendant to permit plaintiff to inspect original letters in defendant's possession, a further provision that plaintiff should also be entitled to examine "letter-press copies of such letters" was erroneous. *State ex rel. Boston & M. Co. v. District Court*, 30 M 206, 217, 76 P 206.

Id. Where, in an action to have defendant declared a constructive trustee of a certain interest in mining property, plaintiff claimed that he had been deprived of the same by reason of a fraudulent conspiracy by defendant and certain others, by means of which defendant acquired title to the property, an order for inspection of defendant's books and papers with reference to such property should have been limited to such of the correspondence between defendant's executive officers and its agents through whom the purchase of the property was made as related to the acquisition of the title to such property.

The provision of this section, that the court may order a litigant to permit his opponent to inspect entries of account, papers, etc., in his possession or under his control, relating to the merits of the action, assuming it to be applicable to criminal cases by section 11977, refers only to such matters as might be introduced in evidence, and not to ex parte statements of a prosecuting witness touching the facts and circumstances surrounding the commission of a crime, reduced to writing by and in possession of the county attorney. *State v. Hall*, 55 M 182, 184, 175 P 267.

Id. The ex parte statement of a prosecuting witness cannot be introduced in a criminal case as substantial evidence; and, however helpful it may be to the defendant, he is not entitled to it; hence, the public prosecutor is not required and cannot be compelled, under this section, to furnish a copy of such statement, or to permit an

inspection of it, assuming that the provisions of that section are made applicable to criminal cases by section 11977.

What Must be Shown to Demand Inspection

Under this section, in order to warrant compulsory inspection of papers, it must appear that an action is pending, and that the mover is a party; that the evidence sought is in the possession or control of the adverse party; and that it relates to the merits of the action, if the mover is the plaintiff, or to the defense, if the mover is the defendant. *State ex rel. B. & M. Co. v. District Court*, 30 M 206, 214, 76 P 206.

References

Cited or applied as section 1810, Code of Civil Procedure, in *Martin v. Heinze*, 31 M 68, 74, 77 P 427; *May v. Northern Pacific Ry. Co.*, 32 M 522, 535, 81 P 328.

CHAPTER 85

MOTIONS AND ORDERS

- Section 9772. Order and motion defined.
 9773. Motions and orders—absence of judge.
 9774. Notice of motion—at what time to be given.
 9775. Transfer of motions and order to show cause.
 9776. Order made out of court, etc.
 9777. Order for payment of money—how enforced.

9772. Order and motion defined. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

History: En. Sec. 417, p. 128, Bannack Stat.; re-en. Sec. 486, p. 231, L. 1867; re-en. Sec. 566, p. 151, Cod. Stat. 1871; re-en. Sec. 469, p. 166, L. 1877; re-en. Sec. 469, 1st Div. Rev. Stat. 1879; re-en. Sec. 482, 1st Div. Comp. Stat. 1887; re-en. Sec. 1820, C. Civ. Proc. 1895; re-en. Sec. 7139, Rev. C. 1907; re-en. Sec. 9772, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1003.

"Motion"

A motion, being an application for an order, is not made by the filing of an application in writing alone, but by the moving of the court to grant the order. *Wallace v. Lewis*, 9 M 399, 403, 24 P 22. See also *Peters v. Vawter*, 10 M 201, 208, 25 P 438.

A motion is but an application for an order, is not a pleading, does not require an answer and is not subject to the general rules which regulate pleadings; if it fairly apprises the court of the grounds upon which relief is sought it is sufficient. *Hall v. Hall*, 70 M 460, 466, 226 P 469; *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 346, 19 P 2d 223.

"Order"

This section does not apply to an order granting leave to file an information, or render indispensable the making and entering of such an order in writing before the defendant is arrested. *State v. Bowser*, 21 M 133, 138, 53 P 179.

When Notice of Motion Should be Served on Adverse Party

Though the codes do not prescribe all the instances in which notice of a motion must be given, the general rule is that whenever no more particular rule is applicable, a party interested in resisting the relief sought by motion is entitled to notice and an opportunity to be heard. *Vande Veegaete v. Vande Veegaete*, 79 M 68, 72, 255 P 348.

References

Cited or applied as section 566, p. 151, Codified Statutes 1871, in *Clark v. Goner*, 2 M 538; as section 1820, Code of Civil Procedure, in *Forrester v. Boston & M. C. C. & S. M. Co.*, 29 M 397, 408, 74 P 1088; *State ex rel. Carleton v. District Court*, 33 M 138, 149, 82 P 789; *State ex rel. Davis*

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v. District Court et al., 72 M 56, 60, 231 P 395; O'Hanion v. Great Northern Ry. Co., 76 M 128, 136, 245 P 518; State High-

way Commission v. Speidel, 87 M 221, 224, 286 P 413; In re Bielenberg's Estate, 98 M 546, 40 P 2d 49.

9773. Motions and orders—absence of judge. Motions must be made in the county in which the action is brought, or in any adjoining county in the same district. In case of the absence of the judge of the district from his district, or in an action pending in which such judge is disqualified to act, such motion may be made before the judge of any adjoining district; provided there is another judge in the same district who is not disqualified to act, in which case such motion shall be made before another judge in the same district. Orders made out of court may be made by the judge of the court in any part of the state.

History: Ap. p. Sec. 418, p. 128, Ban-nack Stat.; re-en. Sec. 487, p. 231, L. 1867; amd. Sec. 567, p. 151, Cod. Stat. 1871; amd. Sec. 470, p. 166, L. 1877; re-en. Sec. 470, 1st Div. Rev. Stat. 1879; re-en. Sec. 483, 1st Div. Comp. Stat. 1887; re-en. Sec. 1821, C. Civ. Proc. 1895; re-en. Sec. 7140, Rev. C. 1907; re-en. Sec. 9773, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1004.

Operation and Effect

This section only provides for the presentation of such motions as the judge may entertain at chambers, and does not authorize a judge of an adjoining district to hear a motion which he could not hear at chambers if he were personally present in the district in which the parties reside. Eustance v. Francis, 52 M 295, 299, 157 P 573.

Id. If a judge is disqualified and another judge has been designated to try and determine the case, it seems to be proper practice for the parties, by stipulation, to submit to him for decision at chambers, in his own district, the issues of law arising therein; and also to stipulate that the judge may make up his findings and decision in a cause, after returning to his own district, and transmit them to the clerk for filing and entry of judgment; such a stipulation would doubtless estop the parties from questioning the validity of the result.

References

Cited or applied as section 1821, Code of Civil Procedure, before amendment, in Farleigh v. Kelly, 24 M 369, 372, 62 P 495, 685; as section 7140, Revised Codes, in State ex rel. Mannix v. District Court, 51 M 310, 318, 152 P 753.

9774. Notice of motion—at what time to be given. When a written notice of a motion is necessary, it must be given five days before the appointed time for the hearing, if both parties reside in the county where the court is held; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time.

History: Ap. p. Sec. 419, p. 129, Ban-nack Stat.; re-en. Sec. 488, p. 231, L. 1867; re-en. Sec. 568, p. 151, Cod. Stat. 1871; re-en. Sec. 471, p. 166, L. 1877; re-en. Sec. 471, 1st Div. Rev. Stat. 1879; re-en. Sec. 484, 1st Div. Comp. Stat. 1887; en. Sec. 1822, C. Civ. Proc. 1895; re-en. Sec. 7141, Rev. C. 1907; re-en. Sec. 9774, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1005.

Operation and Effect

One who appears generally to resist a motion to amend a complaint after judgment rendered, and does not resist such motion on the merits, is presumed to have submitted himself to the jurisdiction of the court for all purposes of the motion,

and is estopped to claim that he did not have sufficient notice. Eadie v. Eadie, 44 M 391, 393, 120 P 239.

The notice mentioned in this section is a notice of motion. The section is not applicable to the trial of an issue raised by a petition for distribution of an estate and written objections thereto set for hearing. In re Estate of Peterson, 49 M 96, 97, 140 P 237.

Where defendant in a mortgage foreclosure suit moved to vacate an order appointing a receiver to collect the rents and profits on jurisdictional and nonjurisdictional grounds, instead of appearing specially and objecting to the jurisdiction

of the court over his person because of lack of notice, he will be held to have made a general appearance, thus curing the want of notice in the first instance. *Beale v. Lingquist et al.*, 92 M 480, 485, 15 P 2d 927.

References

Cited or applied as section 1822, Code of Civil Procedure, in *Washoe Copper Co. v. Hickey*, 23 M 319, 321, 58 P 866; *Brazell v. Cohn*, 32 M 556, 563, 81 P 339; *State ex rel. Jenkins v. District Court*, 32 M 595, 598, 81 P 351; as section 7141, Revised Codes, in *Masterson v. Hubert*, 54 M 613, 616, 173 P 421; *Helena Adjustment Co. v. Predivich*, 98 M 162, 37 P 2d 651.

9775. Transfer of motions and order to show cause. When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge.

History: En. Sec. 420, p. 129, Bannack Stat.; re-en. Sec. 489, p. 231, L. 1867; re-en. Sec. 569, p. 152, Cod. Stat. 1871; re-en. Sec. 472, p. 166, L. 1877; re-en. Sec. 472, 1st Div. Rev. Stat. 1879; re-en. Sec. 485, 1st

Div. Comp. Stat. 1887; amd. Sec. 1823, C. Civ. Proc. 1895; re-en. Sec. 7142, Rev. C. 1907; re-en. Sec. 9775, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1006.

9776. Order made out of court, etc. An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or it may be vacated or modified on notice, in the manner in which other motions are made.

History: En. Sec. 249, p. 94, Bannack Stat.; re-en. Sec. 318, p. 199, L. 1867; re-en. Sec. 367, p. 107, Cod. Stat. 1871; re-en. Sec. 406, p. 149, L. 1877; re-en. Sec. 406, 1st Div. Rev. Stat. 1879; re-en. Sec.

419, 1st Div. Comp. Stat. 1887; re-en. Sec. 1824, C. Civ. Proc. 1895; re-en. Sec. 7143, Rev. C. 1907; re-en. Sec. 9776, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 937.

9777. Order for payment of money—how enforced. Whenever an order for the payment of a sum of money is made by a court or judge, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

History: En. Sec. 473, p. 166, L. 1877; re-en. Sec. 473, 1st Div. Rev. Stat. 1879; re-en. Sec. 486, 1st Div. Comp. Stat. 1887; re-en. Sec. 1825, C. Civ. Proc. 1895; re-en. Sec. 7144, Rev. C. 1907; re-en. Sec. 9777, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1007.

Operation and Effect

A decree for separate maintenance recovered by a married woman may be enforced by execution. *Raymond v. Blancgrass*, 36 M 449, 458, 93 P 648.

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CHAPTER 86

NOTICES AND FILING AND SERVICE OF PAPERS

Section 9778. Notices and papers—how served.

9779. When and how served.

9780. Service by mail, when.

9781. Service by mail, how.

9782. Appearance—notices after appearance.

9783. Service on nonresidents—where a party has an attorney, service shall be on such attorney.

9784. Preceding provisions not to apply to proceeding to bring party into contempt.

9785. Service by telegraph.

9778. Notices and papers—how served. Notices must be in writing, and notices and other papers may be served upon the party or attorney

in the manner prescribed in this chapter, when not otherwise provided by this code.

History: En. Sec. 474, p. 166, L. 1877; re-en. Sec. 474, 1st Div. Rev. Stat. 1879; re-en. Sec. 487, 1st Div. Comp. Stat. 1887; re-en. Sec. 1830, C. Civ. Proc. 1895; re-en. Sec. 7145, Rev. C. 1907; re-en. Sec. 9778, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1010.

References

Cited or applied as section 7145, Revised Codes, in State ex rel. Cohn v. District Court, 38 M 119, 123, 99 P 139; Eadie v. Eadie, 44 M 391, 393, 120 P 239; State ex rel. Davis v. District Court et al., 72 M 56, 59, 231 P 395; O'Hanion v. Great Northern Ry. Co., 76 M 128, 137, 245 P 518; Miles v. Miles, 76 M 375, 383, 247 P 328; State ex rel. O'Neil v. District Court et al., 96 M 393, 401, 30 P 2d 815.

9779. When and how served. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the postoffice, directed to such attorney.

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the afternoon, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the postoffice, directed to such party.

History: En. Sec. 491, p. 232, L. 1867; re-en. Sec. 571, p. 152, Cod. Stat. 1871; re-en. Sec. 475, p. 167, L. 1877; re-en. Sec. 475, 1st Div. Rev. Stat. 1879; re-en. Sec. 488, 1st Div. Comp. Stat. 1887; re-en. Sec. 1831, C. Civ. Proc. 1895; re-en. Sec. 7146, Rev. C. 1907; re-en. Sec. 9779, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1011.

Operation and Effect

The objection that a bill of exceptions was not served in the manner provided by law is waived by presenting amendments to the proposed bill. The purpose of the statute is to insure that the person upon whom service is sought shall actually receive, if possible, the document to be served; and when a party appears and presents and has allowed his amendments to a proposed bill of exceptions, he is not in a position to say that he has never actually received a copy of the same. *Fordham v. Northern Pacific Ry. Co.*, 30 M 421, 427, 76 P 1040.

Constructive service of a statement on motion for a new trial, by delivery thereof to a person who, although at one time a stenographer in the office of the attorney

upon whom service was attempted to be made, was not then in his office or in charge of it, but employed elsewhere, was insufficient. *Nord v. Boston & Montana Consol. C. & S. Min. Co.*, 33 M 464, 470, 84 P 1116, 89 P 647.

Id. If constructive service of a paper is sought to be made upon an attorney, during his absence from his office, by delivery to his clerk, it must be under this section by leaving it with the clerk "therein" and not by leaving it with the clerk elsewhere.

Service of a notice upon an attorney can be made through the mail, only in the event that his place of residence is not known; hence, where the location of both the office and residence of an attorney was known to opposing counsel, their notice to him, through the mail, of the entry of a judgment, was insufficient. *State ex rel. Cohn v. District Court*, 38 M 119, 123, 99 P 139. See also *Best Mfg. Co. v. Hut-ton*, 49 M 78, 87, 141 P 653.

References

State ex rel. Bullard v. District Court, 86 M 358, 364, 284 P 125.

9780. Service by mail, when. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail.

History: En. Sec. 492, p. 232, L. 1867; re-en. Sec. 572, p. 152, Cod. Stat. 1871; re-en. Sec. 476, p. 167, L. 1877; re-en. Sec. 476, 1st Div. Rev. Stat. 1879; re-en. Sec. 489, 1st Div. Comp. Stat. 1887; re-en. Sec. 1832, C. Civ. Proc. 1895; re-en. Sec. 7147, Rev. C. 1907; re-en. Sec. 9780, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1012.

Quaere: Whether an affidavit of service of notice of intention to move for a

new trial is sufficient, which does not show that the person making the service and the one upon whom it is made reside or have their offices at different places. *Curn v. Perkins*, 40 M 588, 591, 107 P 901.

References

Cited or applied as section 7147, Revised Codes, in *Beller v. Le Boeuf*, 50 M 192, 195, 145 P 945; *Helena Adjustment Co. v. Predovich*, 98 M 162, 37 P 2d 651.

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9781. Service by mail, how. In case of service by mail, the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address. The service in any case is deemed complete at the end of forty days from the date of its deposit in the postoffice.

History: Ap. p. Sec. 493, p. 232, L. 1867; re-en. Sec. 573, p. 153, Cod. Stat. 1871; re-en. Sec. 477, p. 167, L. 1877; re-en. Sec. 477, 1st Div. Rev. Stat. 1879; re-en. Sec. 490, 1st Div. Comp. Stat. 1887; en. Sec. 1833, C. Civ. Proc. 1895; re-en. Sec. 7148, Rev. C. 1907; re-en. Sec. 9781, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1013.

Operation and Effect

The time of filing an undertaking on appeal is not extended by the provisions of this section in a case in which the appellee resides at a distance and service of the notice of appeal is made through the mails. *Johnson County Sav. Bank v. Joe Klaffki Co.*, 26 M 384, 386, 68 P 410.

Under section 9780 and this section, permitting the service of notices and pleadings by mail, where a party proposes to treat a pleading or notice served as a nullity because of a defect in the service, the irregularity will be deemed waived un-

less the pleading or notice be promptly returned. Held, that where defendants, seeking a change of place of trial, served the moving papers upon plaintiff by mail but the postage thereon was insufficient, the plaintiff by paying what was due thereon and retaining the inclosures instead of returning them promptly, waived all objection to the defect of service, and the court properly denied his motion to strike the papers from the files. *Helena Adjustment Co. v. Predovich*, 98 M 162, 168, 37 P 2d 651.

References

Cited or applied as section 7148, Revised Codes, in *Curn v. Perkins*, 40 M 588, 591, 107 P 901; *State ex rel. Floyd v. District Court*, 41 M 357, 368, 109 P 438; *Beller v. Le Boeuf*, 50 M 192, 195, 145 P 945; *Batchoff v. Butte Pacific Copper Co.*, 60 M 179, 186, 198 P 132.

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9782. Appearance—notice after appearance. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, or has such appearance entered in open court. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

History: En. Sec. 494, p. 232, L. 1867; re-en. Sec. 574, p. 152, Cod. Stat. 1871; re-en. Sec. 478, p. 167, L. 1877; re-en. Sec. 478, 1st Div. Rev. Stat. 1879; re-en. Sec. 491, 1st Div. Comp. Stat. 1887; amd. Sec. 1834, C. Civ. Proc. 1895; re-en. Sec. 7149, Rev. C. 1907; re-en. Sec. 9782, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1014.

Not Applicable to a Case Where an Amended Complaint is Filed

The provision of this section, that where a defendant has not appeared, service of notice or papers need not be made upon him, etc., does not apply to a case where an amended complaint is filed before the time for appearance has expired, and before any appearance has been made. *Ben Kress Nursery Co. v. Oregon Nursery Co.*, 45 M 494, 496, 124 P 475.

Notice When Presumed

While defendants were entitled to notice and an opportunity to be heard on a motion for a new trial, it will be presumed, in the absence of a showing of lack of notice, that the proceedings were regular and that they had notice. *Lish v. Martin*, 55 M 582, 584, 179 P 826.

Operation and Effect

Under this section and the next succeeding one, the defendant in an action, or his attorney, if he has appeared by attorney, is entitled to notice of all subsequent proceedings; in the absence of a general appearance, he is not entitled to such notice. *Barrick v. Porter*, 56 M 247, 249, 184 P 217.

Where defendants, judgment creditors, in an action to foreclose a trust deed in which a receiver had been appointed, filed an answer a demurrer to which was sustained, they being given twenty days in which to further answer, declined to plead further and did not appeal from the judgment, they were not entitled to notice of subsequent proceedings had some three months thereafter by way of applications for the authorization of the issuance of receiver's certificates in payment of receiver's and attorney's fees, since a party who permits himself to get into default after general appearance is as effectively out of court, as respects his right to notice of subsequent proceedings, as though he had failed to enter appearance in the

first instance. *Marlowe v. Missoula Gas Co. et al.*, 68 M 372, 375, 219 P 1111.

When defendant in a foreclosure proceeding has appeared and is in possession of the premises he is entitled to notice of application for writ of assistance by the purchaser at foreclosure sale; but where he defaults, he is not entitled to such notice under this section, which provides that after default service of notice of subsequent proceedings need not be made upon him. *State v. District Court et al.*, 71 M 89, 95, 227 P 579.

"Subsequent Proceedings"

The entry of judgment is one of the "subsequent proceedings," mentioned in this section, of which a defeated party or his attorney is entitled to notice. *State ex rel. Cohn v. District Court*, 38 M 119, 123, 99 P 139.

When a Motion to Dissolve an Injunction Constitutes an Appearance

Where a defendant files nothing but a motion to dissolve a temporary injunction granted, until the time for answering has expired, his default is properly entered without notice, conceding such motion to be an appearance. The summons having notified him that default would be taken, unless, within twenty days after service, he took steps to prevent it, and he having taken no action to arrest the running of the time, it is unnecessary to notify him again. *Donlan v. Thompson Falls C. & M. Co.*, 42 M 257, 265, 112 P 445.

When a Request for Time Constitutes a General Appearance

Where defendants, after a denial of their motion to dismiss the action, asked for and were granted time in which to answer to the merits, their request for time constituted a general appearance, the effect and scope of which could not be limited by a statement of counsel that he desired the record to show that his appearance was special. *State ex rel. Mackey v. District Court*, 40 M 359, 363, 106 P 1098. See also *State ex rel. Lane v. District Court*, 51 M 503, 506, 154 P 200.

References

Cited or applied as section 1834, Code of Civil Procedure, in *State ex rel. Jenkins v. District Court*, 32 M 595, 598, 81 P 351; *Paramount Publix Corp. v. Boucher et al.*, 93 M 340, 346, 19 P 2d 223.

9783. Service on nonresidents—where a party has an attorney, service shall be on such attorney. When a plaintiff or a defendant, who has appeared, resides out of this state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of

papers, when required, must be upon the attorney instead of the party, except of subpoenas, or writs, and other process issued in the suit, and of papers to bring him into contempt.

History: En. Sec. 495, p. 232, L. 1867; re-en. Sec. 575, p. 153, Cod. Stat. 1871; re-en. Sec. 479, p. 168, L. 1877; re-en. Sec. 479, 1st Div. Rev. Stat. 1879; re-en. Sec. 492, 1st Div. Comp. Stat. 1887; re-en. Sec. 1835, C. Civ. Proc. 1895; re-en. Sec. 7150, Rev. C. 1907; re-en. Sec. 9783, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1015.

References

Cited or applied as section 7150, Revised Codes, in *Barriek v. Porter*, 56 M 247, 249, 184 P 217; *Caterpillar Tractor Co. v. Johnson*, 99 M 269, 43 P 2d 670.

9784. Preceding provisions not to apply to proceeding to bring party into contempt. The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

History: En. Sec. 480, p. 168, L. 1877; re-en. Sec. 480, 1st Div. Rev. Stat. 1879; re-en. Sec. 493, 1st Div. Comp. Stat. 1887; re-en. Sec. 1836, C. Civ. Proc. 1895; re-en. Sec. 7151, Rev. C. 1907; re-en. Sec. 9784, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1016.

9785. Service by telegraph. Any summons, writ, or order, in any civil action or proceeding, and all other papers requiring service, may be transmitted by telegraph or telephone for such service in any place, and the telegraphic or telephonic copy of such writ or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect in all respects, as the original thereof might be delivered to him; and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph or telephone office from which it is sent. In sending it, either the original or certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph or telephone bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph or telephone a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic or telephonic copy by the letters "L. S." or by the word "seal."

History: En. Sec. 1837, C. Civ. Proc. 1895; re-en. Sec. 7152, Rev. C. 1907; re-en. Sec. 9785, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1017.

References

Cited or applied as section 7152, Revised Codes, in *State ex rel. Cohn v. District Court*, 38 M 119, 123, 99 P 139.

CHAPTER 87

COSTS AND DISBURSEMENTS—COST BILL—SUITS IN FORMA PAUPERIS

- Section 9786.** Compensation of attorneys—costs to parties.
9787. When allowed, of course, to the plaintiff.
9788. Defendant's costs must be allowed, of course, in certain cases.
9789. Costs—when in the discretion of the court.
9790. When the several defendants are not united in interest, costs may be severed.
9791. Costs of appeal discretionary with the court, in certain cases, and when.
9792. Referees' fees.

- 9793. Continuance, costs may be imposed as condition of.
- 9794. Costs when a tender is made before suit brought.
- 9795. Costs in actions by or against an administrator, etc.
- 9796. Costs in a review other than by appeal.
- 9797. Costs of demurrer or motion.
- 9798. Counsel fees on foreclosure of mortgage.
- 9799. Filing costs and attorney's fees to be recovered on foreclosure of liens.
- 9799.1. Filing fees and attorneys' fees in foreclosure of threshermen's liens.
- 9800. Counsel fees for claims for salary and wages.
- 9801. Attorney's fees need not be included in cost-bill.
- 9802. What are costs and disbursements.
- 9803. Bill of costs.
- 9804. No cost-bill in justice's court.
- 9805. Costs on appeal—how claimed.
- 9806. Interest and costs included in judgment.
- 9807. Security from nonresident plaintiff.
- 9808. If security not given, action dismissed.
- 9809. Poor person may sue without costs.
- 9810. State, municipalities, subdivisions and officers, fees and costs of.
- 9811. Prepayment of fees.
- 9812. Clerk or sheriff may have execution for costs.
- 9813. Officer's fees must be itemized.
- 9814. Costs when state a party.
- 9815. Costs when county a party.

9786. Compensation of attorneys—costs to parties. The measure and mode of compensation of attorneys and counselors-at-law is left to agreement, express or implied, of the parties, except that in probate proceedings the court may fix and allow the compensation of attorneys representing administrators, executors, guardians, and trustees, and agents appointed by the court. But parties to actions or proceedings are entitled to costs and disbursements as hereinafter provided.

History: En. Sec. 469, p. 228, L. 1867; re-en. Sec. 545, p. 147, Cod. Stat. 1871; re-en. Sec. 481, p. 168, L. 1877; re-en. Sec. 481, 1st Div. Rev. Stat. 1879; re-en. Sec. 494, 1st Div. Comp. Stat. 1887; amd. Sec. 1850, C. Civ. Proc. 1895; re-en. Sec. 7153, Rev. C. 1907; amd. Sec. 1, Ch. 45, L. 1919; re-en. Sec. 9786, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1021.

Attorney's Fees Incurred by Devisee Not Recoverable

Attorneys' fees incurred by a devisee under a will to defend a contest thereof are not allowable as costs and disbursements within the purview of this section et seq., nor under sections 10047 and 10372, out of the assets of the estate. In re Baxter's Estate, 94 M 257, 268, 22 P 2d 182.

Compensation for Extra Services in Connection With an Estate

An attorney who makes claim to compensation for extra services has the burden of showing that the allowance of fees by the court under its rules does not provide adequate compensation for all services rendered the estate, particularly so where the services for which compensation was allowed required a minimum of effort and time and the claim for extra compensation was not advanced, by way of

amended petition, until after the administratrix had dispensed with the attorney's services. In re Culver's Estate, 91 M 475, 478, 8 P 2d 662.

Constitutionality

Held, that this section, authorizing the district court sitting in probate to fix and allow the compensation of attorneys representing executors, administrators, etc., is not unconstitutional, as denying a jury trial. In re McLure's Estate, 68 M 556, 565, 220 P 527.

Contract for Fees Made After the Commencement of Action

While under section 8993 and this section, an attorney may contract with his client freely as to his compensation before the fiduciary relation commences, as respects such a contract made after the relation began he has the burden of showing that the contract was fair and reasonable and entered into freely by the client, and that the latter fully knew and understood its provisions; in the absence of such allegations the complaint is insufficient. Coleman v. Sisson, 71 M 435, 442, 230 P 582.

Court May Allow Attorney's Fees Prior to Final Settlement

The statute not providing otherwise, there appears no valid reason why where

an estate is in condition to be closed, the district court may not allow the fees of the estate's attorney after his dismissal from further service and before final settlement, for the services rendered by him prior to his discharge. In re Culver's Estate, 91 M 475, 8 P 2d 662.

Heirs Entitled to Notice Before Fixing Compensation

Persons interested in an estate are entitled to notice before the court fixes the compensation of the administrator or his attorney's fees so they may object if they desire to do so; therefore where such fees were not included in the administrator's final account of the hearing of which the heirs had notice, but were fixed without notice to them, the court committed error. In re Jennings' Estate, 74 M 468, 475, 241 P 655.

Provision Giving Industrial Accident Board Power to Fix Attorneys' Fees Held Inoperative

Held, that the provision giving the Industrial Accident Board power to fix attorneys' fees is inoperative, and that the parties under this section and section 8993 of the Revised Codes were free to contract as to fees. In re Maury et al., 97 M 316, 34 P 2d 380.

Right of Court to Fix in Probate Proceedings

Held, under this section, providing that in probate proceedings the court may fix and allow the compensation of attorneys representing executors and administrators, the jurisdiction of the court was enlarged to the extent of empowering it to determine and fix the amount due an attorney for services rendered an administrator and order that the amount so fixed be set apart out of the funds of the estate for his use, the effect of the amendment being to constitute the attorney a "person interested in the estate" and to make his claim for reasonable compensation a legal debt against the estate to be paid as a part of the necessary expenses of administration. In re McLure's Estate, 68 M 556, 565, 220 P 527.

References

Cited or applied as section 1850, Code of Civil Procedure, before amendment, in State ex rel. Baker v. District Court, 24 M 425, 426, 62 P 688; as section 7153, Revised Codes, before amendment, in Haley v. Hollenback, 53 M 494, 499, 165 P 459; In re Connolly's Estate, 73 M 35, 42 et seq., 235 P 408; State v. Daems, 97 M 486, 497, 37 P 2d 322; In re Bielenberg's Estate, 98 M 546, 40 P 2d 49.

9787. When allowed, of course, to the plaintiff. Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property, or damages thereto.
2. In an action to recover the possession of personal property, where the value of the property exceeds fifty dollars; such value shall be determined by the jury, court, or referee by whom the action is tried.
3. In an action for the recovery of money or damages, exclusive of interest, when plaintiff recovers over fifty dollars.
4. In a special proceeding.
5. In an action which involves the title or possession, or right of possession, of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or quo warranto proceedings.
6. In an action to foreclose a lien or pledge, or to prevent or abate a nuisance, or for an injunction.

History: Ap. p. Sec. 401, p. 126, Ban-nack Stat.; re-en. Sec. 470, p. 229, L. 1867; re-en. Sec. 546, p. 147, Cod. Stat. 1871; re-en. Sec. 482, p. 168, L. 1877; re-en. Sec. 482, 1st Div. Rev. Stat. 1879; amd. Sec. 10, p. 11, L. 1881; re-en. Sec. 495, 1st Div. Comp. Stat. 1887; en. Sec. 1851, C. Civ. Proc. 1895; re-en. Sec. 7154, Rev. C. 1907; re-en. Sec. 9787, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1022.

Costs Not Allowable When Verdict Is Less Than Fifty Dollars

In an action by the purchaser of land at foreclosure sale to recover from a tenant in possession the reasonable value of its use and occupation, in which the recovery was less than fifty dollars, plaintiff was not, under subdivision 3 of this section, entitled to his costs. Patterson et al. v. Law et al., 78 M 221, 224, 254 P 412.

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Costs Recoverable for Damages to Realty Even Though Under Fifty Dollars

In an action for damages for trespass committed by defendant in pasturing his sheep upon plaintiff's land, plaintiff was entitled to recover his costs irrespective of the amount of the verdict in his favor, under subdivision 1 of this section. *Kiehl v. Holliday*, 77 M 451, 454, 251 P 527.

Operation in General

Where defendant paid \$1,095 after suit brought, and in a stipulation admitted a balance due plaintiff of \$6.64, but made no offer to allow judgment for that amount, it was error to refuse plaintiff a judgment for costs on his obtaining judgment for the \$6.64. *Pape v. Chauvin-Fant Furniture Co.*, 25 M 417, 420, 65 P 424.

The power to allow costs is purely statutory, and unless some statutory authority exists for their allowance, an allowance thereof is erroneous. *Colusa Parrot M. & S. Co. v. Barnard*, 28 M 11, 16, 72 P 45.

Costs eo nomine being the creatures of statute, they are not recoverable unless provided for therein, courts being without discretion to allow them where not so provided for. *Jones et al. v. Great Northern Ry. Co.*, 68 M 231, 242, 217 P 673.

Special Proceeding

A habeas corpus proceeding is a special proceeding in the nature of an action, the disposition of the writ is a judgment, and the relator a plaintiff, within the meaning of a statute allowing costs to the plaintiff upon a judgment in his favor in special proceedings in the nature of an action. *State ex rel. Newell v. Newell*, 13 M 302, 304, 34 P 28; *State ex rel. Shannon v. Reynolds*, 13 M 423, 34 P 613; *State ex rel. Brandegee v. Clements*, 52 M 57, 60, 155 P 271.

Under this section and section 9788 one who successfully prosecutes a writ, pro-

hibiting a justice of the peace from proceeding further in an action in which the justice has unlawfully issued a search-warrant, is entitled to his costs. In such cases the prevailing party is entitled to his costs as a matter of course. *State ex rel. Streit v. Justice Court*, 45 M 375, 382, 123 P 405.

Relator in an application to the supreme court for writ of supervisory control running to the district court is entitled to his costs, upon a judgment in his favor. *State ex rel. Loundagin v. Tattan*, 56 M 211, 214, 181 P 984.

Successful Litigant Entitled to All Costs Whether Incurred in One or More Trials

Under this section, a successful litigant may recover all costs from his adversary, whether incurred in one or more trials of the cause; therefore, where plaintiff, though successful on the first trial secured a retrial on the ground of inadequacy of the verdict and had judgment, the court properly awarded him costs incident to both trials. *Brunnabend v. Tibbles*, 76 M 288, 300 et seq., 246 P 536.

References

Cited or applied as section 1851, Code of Civil Procedure, in *State ex rel. Baker v. District Court*, 24 M 425, 426, 62 P 688; *State ex rel. Healy v. District Court*, 26 M 224, 226, 67 P 114, 68 P 470; *Spencer v. Mungus*, 28 M 357, 358, 72 P 663; *State ex rel. Shea v. Cocking et al.*, 66 M 169, 179, 213 P 594; *State v. Rouleau et al.*, 68 M 529, 543, 219 P 1096; *First State Bank v. Larsen*, 72 M 400, 406, 233 P 960; *Helena Adjustment Co. v. Claflin*, 75 M 317, 326, 243 P 1063; *Zunchich v. Security Building etc. Assn.*, 85 M 341, 349 et seq., 278 P 1011; *Aronow v. Hill et al.*, 87 M 153, 163, 286 P 140.

9788. Defendant's costs must be allowed, of course, in certain cases.

Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in the next preceding section, and in special proceedings.

History: En. Sec. 472, p. 229, L. 1867; re-en. Sec. 548, p. 148, Cod. Stat. 1871; re-en. Sec. 484, p. 169, L. 1877; re-en. Sec. 484, 1st Div. Rev. Stat. 1879; re-en. Sec. 497, 1st Div. Comp. Stat. 1887; amd. Sec. 1853, C. Civ. Proc. 1895; re-en. Sec. 7155, Rev. C. 1907; re-en. Sec. 9788, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1024.

Applicable Only to Cases Wherein Defendant Recovers Judgment and Plaintiff Is Altogether Unsuccessful

Held, that in the absence of statutory authorization therefor, costs may not be apportioned between plaintiff and defend-

ant where the former had judgment on one of his causes of action and the latter had judgment on the other, this section allowing defendant costs applying only to an action wherein he recovers judgment and plaintiff is altogether unsuccessful. *Jones et al. v. Great Northern Ry. Co.*, 68 M 231, 242, 217 P 673.

Costs Allowed Defendant for Verdict of \$35 on Counterclaim

Costs were properly allowed defendant on his recovering thirty-five dollars under a counterclaim. *Spencer v. Mungus*, 28 M 357, 359, 72 P 663.

Costs in Special Proceeding

Costs will be allowed in the supreme court to defendant where a special proceeding is dismissed, though the judgment awards no costs, and judgment for costs will be entered on application. *State ex rel. Baker v. District Court*, 24 M 425, 426, 62 P 688. See also *State ex rel. Healy v. District Court*, 26 M 224, 226, 67 P 114, 68 P 470.

Dismissed Defendant Entitled to Costs

Construing the several provisions of the statute relating to costs together, held that where plaintiff at the time the cause was called for trial dismissed the action against one of the defendants sued with others, a severance of the action as to that defendant took place, and he was entitled to the costs necessarily incurred by him in preparing for trial, summoning witnesses, etc., the same as if he had been made the sole defendant in the first instance. *Patterson et al. v. Law et al.*, 78 M 221, 224, 254 P 412.

Judgment of Costs to Party Successful As to Practically All He Claimed Proper

Where in an action to quiet plaintiff's rights in forty-six tracts of oil and gas lands under a prospecting permit issued by the federal government, defendant claimed title to twenty-seven of the tracts, the judgment, which decreed that plaintiff

was entitled to twenty-one thereof but made no disposition of the other twenty-five, was in effect one against plaintiff as to the latter number and in favor of defendant as to them, he failing only as to two tracts claimed by him, and the court did not err in rendering judgment for defendant for his costs (this section and the preceding). *Aronow v. Hill et al.*, 87 M 153, 163, 286 P 140.

When Costs Are Recoverable From the State

A proceeding for the forfeiture of intoxicating liquors and property used in violation of the prohibition law and seized under section 11106, which proceeding is neither a criminal nor a civil action but is special in its nature, and in which the claimant was made a party defendant, costs may be awarded the claimant against the state when it is the losing party. *State v. Rouleau et al.*, 68 M 529, 543, 219 P 1096.

References

Cited or applied as section 7155, Revised Codes, in *State ex rel. Streit v. Justice Court*, 45 M 375, 382, 123 P 405; *Austby v. Yellowstone Valley Mtg. Co.*, 63 M 444, 450, 207 P 631; *Brunnabend v. Tibbles*, 76 M 288, 300, 246 P 536; *Zunchich v. Security Building etc. Assn.*, 85 M 341, 349 et seq., 278 P 1011.

9789. Costs—when in the discretion of the court. In other actions than those above mentioned, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than fifty dollars, nor in an action to recover the possession of personal property, when the value of the property is not more than fifty dollars.

History: Ap. p. Sec. 404, p. 127, *Bannack Stat.*; en. Sec. 473, p. 229, L. 1867; re-en. Sec. 549, p. 148, *Cod. Stat.* 1871; re-en. Sec. 485, p. 169, L. 1877; re-en. Sec. 485, 1st Div. Rev. Stat. 1879; amd. Sec. 11, p. 11, L. 1881; re-en. Sec. 498, 1st Div. Comp. Stat. 1887; amd. Sec. 1853, C. Civ. Proc. 1895; re-en. Sec. 7156, Rev. C. 1907; re-en. Sec. 9789, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1025.

Operation and Effect

It may be within the power of the legislature to lodge the whole matter of costs in the discretion of the courts, but until it does so they have no discretion in adjudging them, except in the class of cases mentioned in this section and section 9791. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 324, 70 P 1114.

This section, though not in terms authorizing the district court to impose terms

as a condition to the granting of a new trial, held sufficiently broad to vest that court with such discretionary power. *Brunnabend v. Tibbles*, 76 M 288, 297 et seq., 246 P 536.

Costs eo nomine were not recoverable by either party at the common law; they are the creatures of statute and in adjudging them courts must be guided by the sections of the Codes awarding them, they being without discretion in the matter except in the class of cases referred to in this section and section 9791. *Albrecht v. Albrecht*, 83 M 37, 48, 269 P 158.

Id. In equity cases the awarding of costs rests within the discretion of the trial court, and if it appears from the existence of the circumstances sufficient to overcome the prima facie right of the prevailing party to his costs that it would be inequitable to compel the losing one to

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pay them, it may impose them upon the former; therefore, where a decree of divorce was awarded to plaintiff husband and it was shown that the wife was without means, awarding of costs to her may not be said to have amounted to an abuse of discretion on the part of the court.

Under this section, authorizing the district court to allow or decline to allow costs in its discretion in cases other than those falling within the provisions of sections 9787 and 9788, held, that the court abused its discretion in awarding costs to one of two claimants to a fund, against a stakeholder who had paid it into court to await judgment as to which of the two

claimants was the true owner; held further, that the successful claimant and defendant stakeholder were each entitled to their costs as against the unsuccessful claimant, plaintiff. *Zunchich v. Security Building etc. Assn.*, 85 M 341, 349 et seq., 278 P 1011.

References

Cited or applied as section 1853, Code of Civil Procedure, in *Colusa Parrot M. & S. Co. v. Barnard*, 28 M 11, 17, 72 P 45; *Spencer v. Mungus*, 28 M 357, 359, 72 P 663; as section 7156, Revised Codes, in *Heilman v. Loughrin et al.*, 57 M 380, 188 P 370; *Jones et al. v. Great Northern Ry. Co.*, 68 M 231, 242, 217 P 673.

9790. When the several defendants are not united in interest, costs may be severed. When there are several defendants in the actions mentioned in section 9787, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

History: En. Sec. 474, p. 229, L. 1867; re-en. Sec. 550, p. 148, Cod. Stat. 1871; re-en. Sec. 486, p. 169, L. 1877; re-en. Sec. 486, 1st Div. Rev. Stat. 1879; re-en. Sec. 499, 1st Div. Comp. Stat. 1887; re-en. Sec. 1854, C. Civ. Proc. 1895; re-en. Sec. 7157, Rev. C. 1907; re-en. Sec. 9790, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1026.

Operation and Effect

Construing the several provisions of the statutes relating to costs together, held that where plaintiff at the time the cause was called for trial dismissed the action against one of the defendants sued with

others, a severance of the action as to that defendant took place and he was entitled to the costs necessarily incurred by him in preparing for trial, summoning witnesses, etc., the same as if he had been made the sole defendant in the first instance. *Patterson et al. v. Law et al.*, 78 M 221, 224, 254 P 412.

References

Jones et al. v. Great Northern Ry. Co., 68 M 231, 242, 217 P 673; *Zunchich v. Security Building etc. Assn.*, 85 M 341, 350, 278 P 1011.

9791. Costs of appeal discretionary with the court, in certain cases, and when. In the following cases, the costs of appeal are in the discretion of the court:

1. When a new trial is ordered.
2. When a judgment is modified.

In all other cases the successful party shall recover from the other party his costs.

History: En. Sec. 406, p. 127, Bannack Stat.; amd. Sec. 475, p. 229, L. 1867; re-en. Sec. 551, p. 148, Cod. Stat. 1871; re-en. Sec. 487, p. 169, L. 1877; re-en. Sec. 487, 1st Div. Rev. Stat. 1879; re-en. Sec. 500, 1st Div. Comp. Stat. 1887; amd. Sec. 1855, C. Civ. Proc. 1895; re-en. Sec. 7158, Rev. C. 1907; re-en. Sec. 9791, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1027.

District Court Must Enforce Order of Costs Handed Down by Supreme Court

The disposition of costs on an appeal is, under this section and section 10372, within the discretion of the supreme court;

and, if such court directs the costs to be charged against the respondents, and such order has become final when the remittitur issues, the district court has no jurisdiction over that order except to enforce it; it has no power to change or modify the order. In *Re Williams' Estate*, 52 M 366, 368, 157 P 963.

Effect of Failure of Appellant to Move Correction of Apparent Error in Trial Court

Where appellant made no effort in the trial court to have an apparent error in an award of damages corrected on motion

for a new trial on the ground of the insufficiency of the evidence to justify the verdict, and the judgment is modified on appeal to the extent of such erroneous award, the respondent will be awarded his costs on appeal notwithstanding such modification. *Ramsbacher v. Hohman*, 80 M 480, 491, 261 P 273.

Where appellant by proper motion in the district court could have obtained the relief granted him on appeal by way of modification of the judgment, the respondent will be awarded his costs on appeal as upon full affirmance of the judgment. *In re Fort Shaw Irr. Dist.*, 81 M 170, 185, 261 P 962.

Padding of Transcript so as to Cause Printing Thereof, Cost of Printing Not Recoverable by Successful Party

Where appellant inserts matter in the transcript on appeal not properly part of it, or duplicates papers when an appropriate reference would have answered the purpose, and by so doing causes the transcript to exceed one hundred pages, thus calling for the printing thereof, cost of printing, otherwise recoverable, disallowed on reversal of judgment, under this section, making allowance of costs on appeal discretionary where a new trial is granted. *Linney v. Chicago etc. R. R. Co.*, 94 M 229, 238, 21 P 2d 1101.

9792. Referees' fees. The fees of referees are eight dollars to each for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

History: En. Sec. 476, p. 229, L. 1867; re-en. Sec. 552, p. 148, Cod. Stat. 1871; re-en. Sec. 488, p. 169, L. 1877; re-en. Sec. 488, 1st Div. Rev. Stat. 1879; re-en. Sec. 501, 1st Div. Comp. Stat. 1887; re-en. Sec. 1856, C. Civ. Proc. 1895; re-en. Sec. 7159, Rev. C. 1907; re-en. Sec. 9792, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1028.

9793. Continuance, costs may be imposed as condition of. When an application is made to the court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

History: En. Sec. 408, p. 127, Bannack Stat.; re-en. Sec. 477, p. 229, L. 1867; re-en. Sec. 553, p. 148, Cod. Stat. 1871; re-en. Sec. 490, p. 170, L. 1877; re-en. Sec. 490, 1st Div. Rev. Stat. 1879; re-en. Sec. 503, 1st Div. Comp. Stat. 1887; re-en. Sec. 1857, C. Civ. Proc. 1895; re-en. Sec. 7160, Rev. C. 1907; re-en. Sec. 9793, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1029.

Scope of Section

Costs eo nomine were not recoverable by either party at the common law; they are the creatures of statute and in adjudging them courts must be guided by the sections of the Codes awarding them, they being without discretion in the matter except in the class of cases referred to in section 9789 and this section. *Albrecht v. Albrecht*, 83 M 37, 48, 269 P 158.

When Successful Party Is Entitled to Costs

The successful party is entitled to his costs on appeal, whether or not a formal order to that effect is made by the supreme court, if he files a memorandum of his costs with the clerk of the district court within thirty days after the remittitur is filed with that officer; failure to do so deprives him of his right to have them included in the judgment in his favor on a subsequent trial. *First State Bank v. Larsen*, 72 M 400, 406, 233 P 960.

References

Cited or applied as section 1855, Code of Civil Procedure in *Baker v. Butte City Water Co.*, 24 M 113, 115, 60 P 817; *State ex rel. Baker v. District Court*, 24 M 425, 426, 62 P 688; *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 324, 70 P 1114.

Operation and Effect

This section will not be so construed as to allow a referee to obtain an exorbitant amount under color of a contract, and in such case the compensation will be reduced to the statutory allowance. *In re Haldorn*, 10 M 281, 282, 25 P 438.

Operation and Effect

This section, when construed with section 9332, confers jurisdiction upon the trial court to impose costs as a condition for a continuance, upon the ground of absence of evidence as well as other grounds. *State ex rel. Congdon v. District Court*, 10 M 456, 460, 26 P 182.

References

Murray et al. v. Creese et al., 80 M 453, 463, 260 P 1051.

9794. Costs when a tender is made before suit brought. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

History: En. Sec. 409, p. 127, Bannack Stat.; amd. Sec. 478, p. 229, L. 1867; re-en. Sec. 554, p. 148, Cod. Stat. 1871; re-en. Sec. 491, p. 170, L. 1877; re-en. Sec. 491, 1st Div. Rev. Stat. 1879; re-en. Sec. 504, 1st Div. Comp. Stat. 1887; re-en. Sec. 1858, C. Civ. Proc. 1895; re-en. Sec. 7161, Rev. C. 1907; re-en. Sec. 9794, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1030.

Operation and Effect

Where defendant, in an action for services rendered, alleged in his answer that before commencement of suit he had ten-

dered to plaintiff the amount to which he was entitled and the jury awarded to plaintiff the amount so tendered, but defendant had failed to deposit in court the sum tendered as required by this section the latter was not, and plaintiff was, entitled to costs. *Lewis v. Pennock*, 68 M 448, 450, 219 P 631; *Stagg v. Broadway Garage Co.*, 87 M 254, 257, 286 P 415.

References

Harrington et al. v. Moore Land Co., 59 M 421, 423, 196 P 975.

9795. Costs in actions by or against an administrator, etc. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs may be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

History: En. Sec. 410, p. 127, Bannack Stat.; re-en. Sec. 479, p. 230, L. 1867; re-en. Sec. 555, p. 148, Cod. Stat. 1871; re-en. Sec. 492, p. 170, L. 1877; re-en. Sec. 492, 1st Div. Rev. Stat. 1879; re-en. Sec. 505, 1st Div. Comp. Stat. 1887; re-en. Sec. 1859, C. Civ. Proc. 1895; re-en. Sec. 7162, Rev. C. 1907; re-en. Sec. 9795, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1031.

Operation and Effect

Where, on an appeal from an order allowing an administrator's annual account, it appeared that he, jointly with another, had prosecuted a number of appeals to the supreme court, all but one of which were decided adversely to him, but that in all of them there was sufficient doubt as to his duty in the premises to justify his desire for a final decision by the appellate court, it will not be held, in the absence of proof making his dereliction apparent, that he acted in bad faith in taking the appeals, and the action of the court in

allowing him credit for such reasonable and necessary costs as were actually incurred by him in taking the appeals will be sustained. In *re Davis' Estate*, 35 M 273, 282, 88 P 957.

Where the supreme court in the disposition of an appeal from an order settling an administrator's account remands the cause with directions to require that officer to file a further account and orders, as it may do under section 10372, that the costs incident to the appeal shall be paid by the administrator personally, the jurisdiction of the district court is limited to the enforcement of the order, except that it may determine disputed questions of costs, or on final settlement of the account allow such portion of the costs incurred as a charge against the estate as justice may require. (Provisions of this section held inapplicable to proceedings of the above nature.) In *re Jennings' Estate*, 79 M 73, 78, 254 P 1067.

9796. Costs in a review other than by appeal. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by ap-

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peal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

History: En. Sec. 411, p. 127, Bannack Stat.; re-en. Sec. 480, p. 229, L. 1867; re-en. Sec. 556, p. 149, Cod. Stat. 1871; re-en. Sec. 493, p. 170, L. 1877; re-en. Sec. 493, 1st Div. Rev. Stat. 1879; re-en. Sec. 506, 1st Div. Comp. Stat. 1887; re-en. Sec. 1860, C. Civ. Proc. 1895; re-en. Sec. 7163, Rev. C. 1907; re-en. Sec. 9796, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1032.

Operation and Effect

One who invokes the writ of habeas corpus, without meritorious cause, may be properly taxed with the costs of the proceedings under this section. *State ex rel. Shannon v. Reynolds*, 13 M 423, 34 P 613.

9797. Costs of demurrer or motion. In all cases where a demurrer or motion is sustained or overruled, the losing party must pay to the other ten dollars as costs. If a demurrer or motion be withdrawn before the hearing, it shall be deemed overruled.

History: En. Sec. 1861, C. Civ. Proc. 1895; re-en. Sec. 7164, Rev. C. 1907; re-en. Sec. 9797, R. C. M. 1921.

Operation and Effect

This section, by providing that the losing party upon all motions must pay the other ten dollars "as costs," precludes the

Where, on habeas corpus, and certiorari, in aid thereof to review an order of commitment in a contempt proceeding, relator asked that the evidence be certified up, defendant, on dismissal at the cost of relator, is entitled to costs for the expense of transcribing the evidence into long-hand. *In re Boyle*, 26 M 365, 368, 68 P 409, 68 P 471.

References

Cited or applied as section 1860, Code of Civil Procedure, in *State ex rel. Baker v. District Court*, 24 M 425, 426, 62 P 688; *State ex rel. Healy v. District Court*, 26 M 224, 226, 67 P 114, 68 P 470.

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court from allowing any other costs. *Colusa Parrot M. & S. Co. v. Barnard*, 28 M 11, 17, 72 P 45.

References

Cited or applied as section 1861, Code of Civil Procedure, in *Caplice Commercial Co. v. Cassidy*, 25 M 81, 82, 63 P 799.

9798. Counsel fees on foreclosure of mortgage. In an action to foreclose a mortgage or pledge, the court must allow as a part of the costs a reasonable attorney's fee, which shall be fixed by the court, any stipulation in the mortgage or any agreement between the parties to the contrary notwithstanding.

History: En. Sec. 1862, C. Civ. Proc. 1895; re-en. Sec. 7165, Rev. C. 1907; re-en. Sec. 9798, R. C. M. 1921.

Operation and Effect

Under this section, the district court must allow a reasonable attorney's fee in a foreclosure action, and with its determination in that respect the parties have nothing to do; hence allegations in the pleadings with reference thereto present no issues of fact and are surplusage. *Bohan v. Harris et al.*, 71 M 495, 500, 230 P 586.

Id. In fixing an attorney's fee in a foreclosure proceeding the district court may consider the practice of the court and its own knowledge of the usual compensation for such services, and while it also may call to its aid attorneys as expert witnesses, it is not required to make its decision in accordance with their testimony.

Where a chattel mortgage provides that in case of default in payment of the note securing it, the mortgagee may have the property sold and out of the proceeds retain a reasonable attorney's fee, the only method of recovering it is by sale, and therefore the mortgagor may not assert that the fee intended was one to be fixed by the court in its discretion on institution of foreclosure proceedings. *Nett v. Stockgrowers' Finance Corp. et al.*, 84 M 116, 127, 274 P 497.

References

Cited or applied as section 7165, Revised Codes, in *Bovee v. Helland*, 52 M 151, 154, 156 P 416; *Gardiner v. Eclipse Grocery Co.*, 72 M 540, 551, 234 P 490; *O'Sullivan v. Burling et al.*, 91 M 244, 248, 6 P 2d 1103; *In re Maury et al.*, 97 M 316, 325, 34 P 2d 380.

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9799. Filing costs and attorney's fees to be recovered on foreclosure of liens. In an action to foreclose any of the liens provided for by sections 8318 to 8350 and sections 8375 to 8377, the court must allow as costs the money paid for filing and recording the lien, and a reasonable attorney's fee in the district and supreme courts, and such costs and attorneys fees must be allowed to each claimant whose lien is established, and such reasonable attorney's fees must be allowed to the defendant against whose property a lien is claimed, if such lien be not established.

History: En. Sec. 1863, C. Civ. Proc. 1895; re-en. Sec. 7166, Rev. C. 1907; amd. Sec. 1, Ch. 100, L. 1921; re-en. Sec. 9799, R. C. M. 1921; amd. Sec. 1, Ch. 69, L. 1925; amd. Sec. 1, Ch. 19, L. 1929.

Constitutionality

The above section, before amendment in 1921, was held unconstitutional, in part, in *Mills v. Olsen*, 43 M 129, 115 P 33.

Operation and Effect

Before amendment, it was held to be error in a suit to foreclose a mechanics' lien, to allow items charged for the prep-

aration and verification of the lien and for an abstract of title to the property. *Neuman v. Grant*, 36 M 77, 81, 92 P 43.

References

Cited or applied as section 1863, Code of Civil Procedure, in *Hill v. Cassidy*, 24 M 108, 113, 60 P 811; as section 7166, Revised Codes, in *Mills v. Olsen*, 43 M 129, 139, 115 P 33; *Bovee v. Helland*, 52 M 151, 155, 156 P 416; *Doty v. Reece*, 53 M 404, 408, 164 P 542; *Dewey Lumber Co. v. McQuirk et al.*, 96 M 294, 301, 30 P 2d 475.

9799.1. Filing fees and attorney's fees in foreclosure of threshermen's liens. In an action to foreclose a threshermen's lien upon grain or crops as provided in sections 8366 to 8374 of the Civil Code, the court must allow as costs the money paid for filing and recording the lien, and a reasonable attorney's fee in the district and supreme courts, and such costs and attorney's fee must be allowed to each claimant whose lien is established, and such reasonable attorney's fee must be allowed to the defendant against whose property a lien is claimed if such claim be not established.

History: En. Sec. 1, Ch. 27, L. 1923.

9800. Counsel fees for claims for salary and wages. In an action to establish a claim for salary or wages under the provisions of sections 8351 to 8358 of the Civil Code, the court must allow as costs a reasonable attorney's fee to each claimant who establishes his claim as provided in section 8351.

History: En. Sec. 1864, C. Civ. Proc. 1895; re-en. Sec. 7167, Rev. C. 1907; re-en. Sec. 9800, R. C. M. 1921.

Operation and Effect

There is no statutory provision for the allowance of an attorney's fee in the ordinary action for wages or salary, this section providing for the allowance of such fee as costs on establishment of claims for wages under the provisions of sections

8351-8358, having reference only to claims of employees against an employer who makes an assignment for the benefit of creditors. *McBride v. School District No. 2*, 88 M 110, 117, 290 P 252.

References

Cited or applied as section 7167, Revised Codes, in *Bovee v. Helland*, 52 M 151, 154, 156 P 416.

9801. Attorney's fees need not be included in cost-bill. The attorney's fees mentioned in the next four preceding sections need not be included in the cost-bill if they are made a part of the judgment.

History: En. Sec. 1865, C. Civ. Proc. 1895; re-en. Sec. 7168, Rev. C. 1907; re-en. Sec. 9801, R. C. M. 1921.

9802. What are costs and disbursements. A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows: The legal fees of witnesses, including mileage, or referees and other officers; the expenses of taking depositions; the legal fees for publication when publication is directed; the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial; the legal fees paid stenographers for per diem or for copies; the reasonable expenses of printing papers for a hearing when required by a rule of court; the reasonable expenses of making transcript for the supreme court; the reasonable expenses for making a map or maps if required, and necessary to be used on trial or hearing; and such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law.

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History: En. Sec. 1866, C. Civ. Proc. 1895; re-en. Sec. 7169, Rev. C. 1907; re-en. Sec. 9802, R. C. M. 1921.

What Are Allowable Costs

Cost of Copies of Stenographers' Notes—Exceptions

The cost of copies of stenographers' notes of the testimony, used in the preparation of bills of exceptions, is a proper item of disbursements under this section, which the successful party may recover, even though such copies were procured from day to day during the progress of the trial, and prior to final decision. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 33 M 400, 402, 84 P 706.

In the phrase occurring in this section, "the legal fees paid stenographers for per diem or for copies," the per diem refers to the fee required to be paid by each party at the beginning of the trial, while the word "copies" refers, not to the copies ordered by the parties from day to day, to be used only as an aid in the examination of witnesses, but to such as are furnished for the purpose of making up bills of exceptions, either during or after the close of the trial, or statements on motion for new trial. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 33 M 400, 402, 84 P 706.

Cost of Transcript

On the dismissal, at cost of relator, of a writ to review an order in a contempt proceeding, defendant is entitled to the fee paid by him for the judgment and minute entries included in his return, and the expense of making the transcript, excepting certain pages consisting merely of recitals by defendant. *State ex rel. Healy v. District Court*, 26 M 224, 227, 67 P 114, 68 P 470. See also *In re Boyle*, 26 M 365, 368, 68 P 409, 471.

Expenses Necessary for Procuring an Order for Survey

A finding that an inspection and survey was necessary to enable a party to properly present his case was an adjudication of costs attendant on procuring the order for the survey. *King v. Allen*, 29 M 5, 10, 73 P 1107.

Expenses Paid for Models, Surveys, etc.

Expenses paid for models, for surveys, for development work done in preparation for trial of an action to determine adverse claims to mining property, cannot be taxed as costs. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 323, 70 P 1114.

Maps

Where a map of the premises in question is reasonably necessary to explain the situation, the reasonable cost of making the map may be taxed as a disbursement. The original verified memorandum of the cost of the map is prima facie evidence that the amount charged was necessarily expended; and the burden is on the party objecting to the taxation thereof to overcome the same. *Kelly v. City of Butte*, 44 M 115, 123, 119 P 171.

Mileage and Fees of Witnesses

A party to whom costs were awarded was entitled to mileage for witnesses who appeared and testified, irrespective of whether they were legally subpoenaed. *McGlaulin v. Wormser*, 28 M 177, 182, 72 P 428; *Lynes v. Northern Pacific Ry. Co.*, 43 M 317, 330, 117 P 81.

Fees paid a witness testifying on the hearing for an order of inspection and survey, fees paid a witness at the hearing of an order to show cause, fees for summoning such witness, and the expense of preparing a map, are prima facie proper

items of costs. *King v. Allen*, 29 M 5, 8, 73 P 1107.

The mileage of his witnesses which a successful party to an action may recover, under this section and section 4936, is not limited to travel from and to their place of residence; whether the mileage shall be computed from the place of residence will depend upon the circumstances of each case. *Lynes v. Northern Pac. Ry. Co.*, 43 M 317, 330, 117 P 81.

The mileage of witnesses in civil actions allowed litigants under this section is limited to travel within the state. *Chilcott v. Rea*, 52 M 134, 141, 155 P 1114.

Where a nonsuit is granted, and defendant thus relieved of the necessity of placing his witnesses upon the stand, he is nevertheless entitled to their fees and mileage, under this section, as disbursements necessarily incurred in procuring their attendance. *Berry v. City of Helena*, 56 M 122, 129, 182 P 117.

A material witness who resided outside the county in which the case was tried at a distance greater than thirty miles and voluntarily attended the trial at the request of the prevailing party, and who after his arrival on the day set for trial had to wait for about a week before he was required to testify, on account of congestion of court business, was entitled to per diem for the whole time he was in attendance and not only for the day on which he gave his testimony, as well as to mileage, the service of a subpoena not being a prerequisite to their allowance. *Helena Adjustment Co. v. Claflin*, 75 M 317, 326, 243 P 1063.

The mere fact that witnesses of defendant entitled to his costs on dismissal of an action as to him failed to observe a rule of court requiring witnesses to make affidavit of attendance showing the per diem and mileage to which they were entitled did not affect his right to recover his necessary disbursements to them: *Patterson et al. v. Law et al.*, 78 M 221, 226, 254 P 412.

Printing Briefs

The expense of printing briefs in the supreme court is chargeable as part of the costs. *Ryan v. Maxey*, 17 M 164, 165, 42 P 760; *Waite v. Vinson*, 18 M 410, 45 P 552; *State ex rel. King v. District Court*, 25 M 1, 4, 63 P 402.

The cost of printing briefs in a special proceeding in the supreme court, which was dismissed, will be allowed defendant on his application. *State ex rel. Baker v. District Court*, 24 M 425, 427, 62 P 689.

Stenographic Fees—Exception

The fee paid stenographers for transcribing their notes into longhand is chargeable as part of the costs, but fees paid stenog-

raphers in taking dictation of briefs for the supreme court and typewriting them are not taxable to the defeated party. *State ex rel. King v. District Court*, 25 M 1, 3, 63 P 402.

The provision of this section, authorizing the taxation of legal fees paid stenographers for per diem or for copies, as disbursements, is limited to fees paid official stenographers, and does not authorize the taxation of such disbursements paid to private stenographers who attended the trial of an action in the place of the official stenographer by the consent of the parties and of the court. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 325, 70 P 1114.

What Are Not Allowable Costs

Attorney's Fees—Exception

Since this section is exclusive, except so far as certain cases are taken out of its operation by special statutes, and does not mention an attorney's fee as one of the items which may be recovered as costs in ordinary actions, it is not recoverable as costs, independently of rule of court or stipulation of parties. *Bovee v. Helland*, 52 M 151, 154, 156 P 416.

Id. A stipulation in a promissory note, allowing recovery of attorney's fees in case action has to be brought to enforce collection, is a provision for special damages, recoverable, in addition to the principal sum claimed, upon appropriate allegation and proof; it affords no basis for an item in the plaintiff's memorandum of costs.

In an action to recover wages due, the plaintiff, if successful, is entitled to a reasonable attorney's fee as a part of the costs (Sec. 3089) without being required to either plead or prove such item. *Gardiner v. Eclipse Grocery Co.*, 72 M 540, 550, 234 P 490.

This section, enumerating the items which may be recovered as costs in an ordinary action, is exclusive except as to cases taken out of its operation by special statute, and in the absence of such statute, stipulation of the parties or rule of court, attorney's fees are not so recoverable. *McBride v. School District No. 2*, 88 M 110, 117, 290 P 252.

Cost of Taking a Party's Deposition for Himself

The cost of taking a party's deposition for himself is not properly taxable as costs against the other party. *Isman v. Altenbrand*, 42 M 188, 199, 111 P 849.

Expense of Taking Jury to View the Scene

In an action to impose upon a railroad company the duty of paying for live stock

killed on its track, the expense of taking the jury out to view the scene of the occurrence is not taxable as costs, in the absence of a custom or rule of court authorizing it. *Dewell v. Northern Pacific Ry. Co.*, 54 M 350, 359, 170 P 752.

Expenses of Filing an Adverse Claim, etc.

Disbursements for filing an adverse claim to a mining location in the land office for surveying, the making of a plat, and for an abstract of title for use in the land office, were not taxable as costs under this section. *Mares v. Dillon*, 30 M 144, 147, 75 P 969.

9803. Bill of costs. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file and serve a notice of a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers.

History: Ap. p. Sec. 412, p. 128, *Ban-nack Stat.*; amd. Sec. 481, p. 230, L. 1867; re-en. Sec. 557, p. 149, *Cod. Stat.* 1871; amd. Sec. 1, p. 39, Ex. L. 1873; amd. Sec. 9, p. 51, L. 1874; amd. Secs. 449-497, p. 171, L. 1877; re-en. Secs. 494-491, 1st Div. *Rev. Stat.* 1879; re-en. Secs. 507-510, 1st Div. *Comp. Stat.* 1887; en. Sec. 1867, *C. Civ. Proc.* 1895; re-en. Sec. 7170, *Rev. C.* 1907; re-en. Sec. 9803, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 1033.

Date From Which Five Days is Com-puted

The five days must be computed from the date upon which the court's written findings and conclusions of law were filed, and not from the day on which the court orally announced its decision. *McDonnell v. Huffine*, 44 M 411, 428, 120 P 792.

Where counsel for the successful party on the day judgment was rendered had knowledge thereof but did not file his memorandum of costs until seven days thereafter, the trial court erred in refusing to strike it from the files, the provision of this section that the memorandum shall be filed with the clerk within five days

Operation in General

Only such items of disbursements as are provided by this section may be recovered by the successful party. Disbursements necessarily made to secure the review of a case are a part of the costs taxable. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 33 M 400, 402, 84 P 706.

References

Cited or applied as section 1866, *Code of Civil Procedure*, in *State ex rel. Donovan v. Ledwidge*, 27 M 197, 203, 70 P 511; in *Chessman v. Hale*, 31 M 577, 592, 79 P 254; *Great Falls Meat Co. v. Jenkins*, 33 M 417, 423, 84 P 74; as section 7169, *Revised Codes*, in *Neary v. Northern Pacific Ry. Co.*, 41 M 480, 507, 110 P 226; *Barrick v. Porter*, 56 M 247, 249, 184 P 217.

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after "notice" of the decision meaning after knowledge thereof and not after service of formal notice. *Miles v. Miles*, 76 M 375, 382, 383, 247 P 328.

Where, after the clerk of the district court had entered a valid judgment as directed by the supreme court on appeal, the party entitled to costs, deeming the judgment invalid, obtained a second judgment signed by the judge, the latter judgment was unauthorized and hence did not extend the time for filing the cost bill. *Lasby et al. v. Burgess*, 93 M 349, 351, 18 P 2d 1104.

"Decision" Defined

The "decision" is the findings of fact and conclusions of law, signed by the court and filed with the clerk. *McDonnell v. Huffine*, 44 M 411, 428, 120 P 792.

This section, providing that the successful party who claims his costs must within five days after "notice of the decision of the court" serve upon the adverse party a memorandum of costs, means a notice of such a decision as amounts to a rendition of judgment. *Shull v. Lewis & Clark County*, 93 M 408, 419, 19 P 2d 901.

Effect of Failure to Claim Costs

Where the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached, and the court has no power in the premises than to strike out and disallow them on motion of the adverse party. *State ex rel. Riddell v. District Court*, 33 M 529, 533, 85 P 367.

A litigant who does not claim his costs as provided in this section is not entitled to them. A court cannot award costs without a showing that this section has been complied with. *Butte Northern Copper Co. v. Radmilovich*, 39 M 157, 164, 101 P 1078.

Effect of Failure to Serve and File Within Five Days

Where plaintiff did not serve a memorandum of costs until eight days after a decision in his favor, and the records did not show that he did not have notice of the decision until within five days prior to such service, defendant's motion to strike out the memorandum should be sustained. *Reins v. King*, 27 M 511, 514, 71 P 763.

Where a memorandum of costs was served and filed upon the same day, the serving and filing will be treated as contemporaneous acts, and held proof against the contention that under this section filing must precede service. *Berry v. City of Helena*, 56 M 122, 129, 182 P 117.

Where plaintiff did not file with the clerk and serve upon defendant his claim for costs in a verified bill, as he was required to do under this section, he was not entitled to recover them, even though defendant, because of the fact that he made no appearance other than by taking part in a hearing on an order to show cause why an injunction should not issue in a water right suit, may not have been entitled to notice of proceedings had thereafter. *Barrick v. Porter*, 56 M 247, 249, 184 P 217.

Where costs were allowed plaintiff without service on defendant of the memorandum required by this section, error in this regard cannot be reviewed in the absence of a bill of exceptions preserving the proceedings. *McAboy v. Junk*, 68 M 198, 204, 216 P 1111.

The recovery of costs, as such, is regulated by statute, and the method therein pointed out must be followed in order to claim them; hence where plaintiff had judgment but failed to file his memorandum and serve a copy thereof on his opponent within five days after the decision of the court was made, as required in this section, he was not entitled to them. *First State Bank v. Larsen*, 72 M 400, 405, 406, 233 P 960.

Manner of Giving Notice Immaterial

The party against whom court costs are claimed, must have notice of the filing of the memorandum with the clerk of court; the notice need not be given in any prescribed way; it may be given by a service of the copy of the memorandum filed, showing the date of filing or by letter transmitting the memorandum stating the date when the original was filed with the clerk; however, such party may waive notice. *State ex rel. Bullard v. District Court*, 86 M 358, 360 et seq., 284 P 125.

Operation in General

The recovery of costs as such is regulated by statute, and the method therein pointed out for their collection must be pursued. *Orr v. Haskell*, 2 M 350, 354; *State ex rel. Riddell v. District Court*, 33 M 529, 533, 85 P 367.

Costs are recoverable only by virtue of the statute, and in order to recover them the party making the claim must comply with its provisions; therefore, failure to file the memorandum required by this section operates as a waiver and justifies the court in striking the cost-bill. *Gervais v. Rolfe*, 57 M 209, 187 P 899.

Order of Service or Filing Immaterial

Held, on application for writ of supervisory control to annul an order of the district court striking from the files a memorandum of costs on appeal because the claimant had served it before filing, that construing this section, relating to cost-bills in the district court, and section 9805, referring to such bills on appeal but making no provision for service, together, for the purpose of arriving at procedural directions, the order of service is immaterial and that therefore the court erred in striking the memorandum from the files. (*Berry v. City of Helena*, 56 M 122, so far as holding that filing must precede service, disapproved.) *State ex rel. Bullard v. District Court*, 86 M 358, 360 et seq., 284 P 125.

Remedy Where Item of Costs Has Been Omitted

After an allowance by the district court for necessary costs and disbursements has been made to a party, and a particular item inadvertently or intentionally omitted from the judgment, the proper remedy is an application to the court at the time to have the omission corrected, or an appeal from the judgment to have the error thus committed reviewed, otherwise he becomes bound by the judgment. *State ex rel. B. & M. Min. Co. v. District Court*, 32 M 20, 24, 79 P 410.

Requisites of Verification

An affidavit to a memorandum of costs made by one of defendant's attorneys,

stating that the memorandum was true and correct, and the items were reasonable, and necessarily incurred in defense of the cause, to the best of his knowledge and belief, substantially complies with this section. *Hoskins v. Northern Pacific Ry. Co.*, 39 M 394, 404, 102 P 988.

Service of Memorandum of Costs Should be Made

Though the statute does not require service of the memorandum of costs on the adverse party, by analogy such service should be made, and disputes settled as provided by this section. *State ex rel. Hurley v. District Court*, 27 M 40, 43, 69 P 244.

The provisions of this section, with reference to service upon the adverse party of memorandum of the items of costs and disbursements claimed by the party in

whose favor judgment is rendered, are applicable to proceedings under section 9805. *State ex rel. Riddell v. District Court*, 33 M 529, 532, 85 P 367.

References

Cited or applied as section 1867, Code of Civil Procedure, in *State ex rel. Baker v. District Court*, 24 M 425, 62 P 688; *Pape v. Chauvin-Fant Furniture Co.*, 25 M 417, 419, 65 P 424; *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 27 M 288, 322, 70 P 1114; *King v. Allen*, 29 M 5, 7, 73 P 1107; *Great Falls Meat Co. v. Jenkins*, 33 M 417, 424, 84 P 74; *Jones et al. v. Great Northern Ry. Co.*, 68 M 231, 234, 217 P 673; *Hoppin v. Long*, 74 M 558, 572, 241 P 636; *Kiehl v. Holliday*, 77 M 451, 454, 251 P 527; *Patterson et al. v. Law et al.*, 78 M 221, 223, 254 P 412.

9804. No cost-bill in justice's court. In a justice's or police court no cost-bill need be filed, but the justice or judge must tax the same, and make an itemized statement of all the costs incurred by each party in his docket. In such courts the fees paid to jurors must be taxed against the unsuccessful party.

History: En. Sec. 1868, C. Civ. Proc. 1895; re-en. Sec. 7171, Rev. C. 1907; re-en. Sec. 9804, R. C. M. 1921.

References

Cited or applied as section 7171, Revised Codes, in *Duckett v. Biggs*, 57 M 443, 188 P 938; *Helena Adjustment Co. v. Claflin*, 75 M 317, 326, 243 P 1063.

9805. Costs on appeal—how claimed. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed in section 9803, and thereafter he may have an execution therefor as upon a judgment.

History: En. Sec. 499, p. 172, L. 1877; re-en. Sec. 499, 1st Div. Rev. Stat. 1879; re-en. Sec. 512, 1st Div. Comp. Stat. 1887; re-en. Sec. 1869, C. Civ. Proc. 1895; re-en. Sec. 7172, Rev. C. 1907; re-en. Sec. 9805, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 1034.*

Effect of Failure to File Within Thirty Days With Clerk

The successful party is entitled to his costs on appeal, whether or not a formal order to that effect is made by the supreme court, if he files a memorandum of his costs with the clerk of the district court within thirty days after the remittitur is filed with that officer; failure to do so deprives him of his right to have them included in the judgment in his favor on a subsequent trial. *First State Bank v. Larsen*, 72 M 400, 406, 233 P 960.

Effect of Failure to Move Seasonably to Strike Erroneous Cost Items

Where a party to whom the costs of an appeal were awarded, erroneously included in the memorandum thereof, filed and served pursuant to this section, items of costs on the trial below, the adverse party, by failing to make a seasonable motion to strike out such items, and by moving to quash on other grounds the execution issued on such memorandum, waived objection to the erroneous items. *State ex rel. Hurley v. District Court*, 27 M 40, 43, 69 P 244.

Execution May be Had

When a party to whom costs are awarded has complied with the statute, the clerk must issue execution for his costs whenever he demands it. *State ex rel. Hurley v. District Court*, 27 M 40, 42, 69 P 244.

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Nature of Cost Memorandum After Filing

Subject to a motion to strike out disputed items, the filing of the memorandum has the same effect as a formal entry of judgment, and the trial court had no further function to perform after execution thereon than it has in case of an execution on a final judgment. *State ex rel. Hurley v. District Court*, 27 M 40, 43, 69 P 244.

Section 9803 Applicable

The provisions of section 9803, are applicable to costs awarded by an appellate court under this section. *State ex rel. Riddell v. District Court*, 33 M 529, 532, 85 P 367.

Operation in General

The filing of a cost-bill in the district

court upon remittitur from the supreme court has the effect of the entry of a judgment for the amount of the award in favor of the prevailing party. *State ex rel. Coffey v. District Court*, 74 M 355, 358, 240 P 667.

One claiming his costs awarded by the supreme court on appeal must, under this section, deliver his memorandum, verified as provided by section 9803, to the clerk of the district court within thirty days after the remittitur has been filed. *Lasby et al. v. Burgess*, 93 M 349, 352, 18 P 2d 1104.

References

State ex rel. Bullard v. District Court, 86 M 358, 360 et seq., 284 P 125.

9806. Interest and costs included in judgment. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

History: En. Sec. 482, p. 230, L. 1867; re-en. Sec. 558, p. 149, Cod. Stat. 1871; re-en. Sec. 500, p. 172, L. 1877; re-en. Sec. 500, 1st Div. Rev. Stat. 1879; re-en. Sec. 513, 1st Div. Comp. Stat. 1887; re-en. Sec. 1870, C. Civ. Proc. 1895; re-en. Sec. 7173, Rev. C. 1907; re-en. Sec. 9806, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1035.

Operation and Effect

The clerk of the district court, in carrying out the provisions of this section, relative to the insertion of costs in the judgment where the same have been taxed or ascertained, acts in a ministerial capacity. *Orr v. Haskell*, 2 M 350, 353; *Butte Northern Copper Co. v. Radmilovich*, 39 M 157, 163, 164, 101 P 1078.

This section may very well be construed as applying to judgments rendered or ordered by an appellate court. At any rate,

it should be so applied as to make it the duty of the clerk below, in the absence of specific directions as to interest, to include in the judgment interest from the date of the order of the supreme court to the time of entry of the judgment. *State ex rel. Dolenty v. Reece*, 43 M 291, 293, 115 P 681.

When a debt becomes merged in a judgment there can be no question of the right to enter the judgment for the amount thereof and accrued interest, the whole to bear interest thereafter at eight per cent. per annum. *Gallatin Valley Electric Ry. v. Neible et al.*, 57 M 27, 186 P 689.

References

Lasby et al. v. Burgess, 93 M 349, 354, 18 P 2d 1104; *Eskestrand v. Wunder*, 94 M 57, 66, 20 P 2d 622.

9807. Security from nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge,

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upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

History: En. Sec. 414, p. 128, Bannack Stat.; amd. Sec. 483, p. 230, L. 1867; re-en. Sec. 559, p. 149, Cod. Stat. 1871; re-en. Sec. 501, p. 172, L. 1877; re-en. Sec. 501, 1st Div. Rev. Stat. 1879; re-en. Sec. 514, 1st Div. Comp. Stat. 1887; re-en. Sec. 1871, C. Civ. Proc. 1895; re-en. Sec. 7174, Rev. C. 1907; re-en. Sec. 9807, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1036.

Operation and Effect

This section and the following section clearly contemplate that the right to demand security for costs from a nonresident is merely a privilege, which the defendant may insist upon; but the demand, if made, must be made upon notice given to the plaintiff. *Brazell v. Cohn*, 32 M 556, 562, 81 P 339.

Id. Where defendant did not apply for an order requiring plaintiff, a nonresident of the state, to give security for costs until the day on which the cause was set

for trial, and where no previous notice of such demand had been given, the district court was justified in denying a stay until the cost bond was given, on the ground that the application was made too late.

The provision of this section that on defendant's motion a nonresident plaintiff may be required to give security for costs confers a personal privilege upon the former which may be waived, and was waived by defendant's failure to make the motion until after the cause had been remanded by the supreme court for a new trial. *State ex rel. Chilcott v. District Court*, 68 M 57, 59, 216 P 790.

Demand upon a foreign corporation for security for costs made by one of two defendants pursuant to this section did not operate to stay proceedings between plaintiff and the nondemanding defendant. *Middle States O. Corp. v. Tanner-Jones Co.*, 73 M 180, 182, 235 P 770.

9808. If security not given, action dismissed. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

History: En. Sec. 485, p. 230, L. 1867; re-en. Sec. 561, p. 149, Cod. Stat. 1871; re-en. Sec. 502, p. 173, L. 1877; re-en. Sec. 502, 1st Div. Rev. Stat. 1879; re-en. Sec. 515, 1st Div. Comp. Stat. 1887; re-en. Sec. 1872, C. Civ. Proc. 1895; re-en. Sec. 7175, Rev. C. 1907; re-en. Sec. 9808, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1037.

References

Cited or applied as section 1872, Code of Civil Procedure, in *Brazell v. Cohn*, 32 M 556, 562, 81 P 339; *State ex rel. Chilcott v. District Court*, 68 M 57, 59, 216 P 790.

9809. Poor person may sue without costs. Any person may commence and prosecute an action in any of the courts of this state who will file an affidavit stating that he has a good cause of action, that he is unable to pay the costs, or procure security to secure the same; then it is hereby made the duty of the officers of the courts to issue all writs and serve the same, and perform all services in the action, without demanding or receiving their fees in advance.

History: En. Sec. 2, p. 71, L. 1869; re-en. Sec. 563, p. 150, Cod. Stat. 1871; amd. Sec. 1, p. 40, Ex. L. 1873; amd. Sec. 503, p. 173, L. 1877; re-en. Sec. 503, 1st Div.

Rev. Stat. 1879; re-en. Sec. 516, 1st Div. Comp. Stat. 1887; re-en. Sec. 1873, C. Civ. Proc. 1895; re-en. Sec. 7176, Rev. C. 1907; re-en. Sec. 9809, R. C. M. 1921.

9810. State, municipalities, subdivisions and officers, fees and costs of. The state or a county or a municipality, or any subdivision thereof, or any officer when prosecuting or defending an action on behalf of the state or county, or a municipality, or subdivision thereof, is not required to pay or deposit any fee or amount to or with any officer during the prosecution or defense of an action. No officer so prosecuting or defending shall be

taxed with costs or damages, but such costs or damages, if any, shall be taxed to the state or county, or municipality, as the case may be.

History: Ap. p. Sec. 564, p. 150, Cod. Stat. 1871; re-en. Sec. 504, p. 173, L. 1877; re-en. Sec. 504, 1st Div. Rev. Stat. 1879; re-en. Sec. 517, 1st Div. Comp. Stat. 1887; en. Sec. 1874, C. Civ. Proc. 1895; re-en. Sec. 7177, Rev. C. 1907; re-en. Sec. 9810, R. C. M. 1921; amd. Sec. 1, Ch. 9, L. 1925.

Operation and Effect

Where the attorney-general, conducting a proceeding on behalf of the state, demanded of the court stenographer a transcript of his notes taken therein, it was the stenographer's ministerial duty to deliver them without demanding his fees in advance. State ex rel. Donovan v. Ledwidge, 27 M 197, 203, 70 P 511.

In view of this section, which contemplates that, whenever a public officer sues or is being sued in his official capacity, he cannot be held personally responsible for the costs, but that the state or subdivision thereof represented by him shall bear the burden, it would seem that the county represented by respondent judge in a special proceeding before the supreme court is properly chargeable with the costs upon judgment in favor of relator. State ex rel. Loundagin v. Tattan, 56 M 211, 215, 181 P 984.

A proceeding for the forfeiture of intoxicating liquors and property used in violation of the prohibition law and seized under section 11106, which proceeding is neither a criminal nor a civil action but

is special in its nature, costs may be awarded the claimant against the state when it is the losing party. State v. Rouleau et al., 68 M 529, 543, 544, 219 P 1096.

Held, that this section, providing that no state, county or municipal officer prosecuting or defending an action in behalf of either shall be taxed with costs or damages but that such costs or damages shall be taxed against the state, county or municipality, as the case may be, is applicable generally to all forms of action, other than mandamus, and that as to the latter, section 9858, being a special statute, is controlling. State ex rel. O'Connor v. McCarthy, 86 M 100, 104 et seq., 282 P 1045.

Id. Held, that there is no difference between an officer who appears "in behalf" of the state, a county or municipality (this section), and one who "represents" such a body in a court action (section 9858); hence in either event he is exempt from personal liability for damages or costs in an action prosecuted or defended by him in his official capacity under the former, or in a mandamus proceeding resulting adversely to him under the latter section.

References

State ex rel. Shea v. Cocking et al., 66 M 169, 178, 213 P 594.

9811. Prepayment of fees. Each party to a civil action is required to pay the fees fixed by law for the performance of any service or duty by any officer of such court, at the instance of such party at the time such service is rendered, except in the case hereinbefore mentioned; and no such officer is required to perform such service or duty unless the fees fixed therefor are, on demand, first paid or tendered.

History: En. Sec. 565, p. 150, Cod. Stat. 1871; re-en. Sec. 505, p. 173, L. 1877; re-en. Sec. 505, 1st Div. Rev. Stat. 1879; re-en. Sec. 518, 1st Div. Comp. Stat. 1887; re-en. Sec. 1875, C. Civ. Proc. 1895; re-en. Sec. 7178, Rev. C. 1907; re-en. Sec. 9811, R. C. M. 1921.

9812. Clerk or sheriff may have execution for costs. In all cases, after final judgment, the clerk or sheriff may make out a bill of costs against the party incurring them, and if not paid within twenty days after demand, execution may issue in the name of the parties to the action for the benefit of the clerk or sheriff.

History: Ap. p. Sec. 10, p. 51, L. 1874; re-en. Sec. 814, 1st Div. Rev. Stat. 1879; re-en. Sec. 520, 1st Div. Comp. Stat. 1887; en. Sec. 1876, C. Civ. Proc. 1895; re-en. Sec. 7179, Rev. C. 1907; re-en. Sec. 9812, R. C. M. 1921.

9813. Officer's fees must be itemized. No fees of any officer shall be payable until an itemized account of the same, signed by the officer, shall be presented to the person liable therefor.

History: Ap. p. Sec. 11, p. 52, L. 1874; en. Sec. 1877, C. Civ. Proc. 1895; re-en. Sec. 815, 1st Div. Rev. Stat. 1879; 7180, Rev. C. 1907; re-en. Sec. 9813, re-en. Sec. 521, 1st Div. Comp. Stat. 1887; R. C. M. 1921.

9814. Costs when state a party. When the state is a party, and costs are awarded against it, they must be paid out of the state treasury.

History: En. Sec. 1878, C. Civ. Proc. 1895; re-en. Sec. 7181, Rev. C. 1907; re-en. Sec. 9814, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1038.

Operation and Effect

A proceeding for the forfeiture of intoxicating liquors and property used in violation of the prohibition law and seized

under section 11106, which proceeding is neither a criminal nor a civil action but is special in its nature, and in which the claimant was made a party defendant, costs may be awarded the claimant against the state when it is the losing party. State v. Rouleau et al., 68 M 529, 544, 219 P 1096.

9815. Costs when county a party. When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

History: En. Sec. 1879, C. Civ. Proc. 1895; re-en. Sec. 7182, Rev. C. 1907; re-en. Sec. 9815, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1039.

References

Cited or applied as section 1879, Code of Civil Procedure, in State ex rel. Baker v. District Court, 24 M 425, 426, 62 P 688.

CHAPTER 88

GENERAL PROVISIONS

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| Section | 9816. Scire facias abolished. |
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| | 9833.1. Publication of notices, orders and papers—sufficiency. |
| | 9833.2. Validation of proceedings based on publication. |

9816. Scire facias abolished. The writ of scire facias is abolished.

History: En. Sec. 397, p. 148, L. 1877; re-en. Sec. 1890, C. Civ. Proc. 1895; re-en. Sec. 397, 1st Div. Rev. Stat. 1879; Sec. 7183, Rev. C. 1907; re-en. Sec. 9816, re-en. Sec. 410, 1st Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 802.

9817. Lost papers—how supplied. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

History: En. Sec. 1891, C. Civ. Proc. 1895; re-en. Sec. 7184, Rev. C. 1907; re-en. Sec. 9817, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1045.

9818. Papers without the title of the action, or with defective title, may be valid. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as

valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

History: En. Sec. 424, p. 129, Bannack Stat.; re-en. Sec. 502, p. 233, L. 1867; re-en. Sec. 579, p. 153, Cod. Stat. 1871; re-en. Sec. 520, p. 177, L. 1877; re-en. Sec. 520, 1st Div. Rev. Stat. 1879; re-en. Sec. 537, 1st Div. Comp. Stat. 1887; re-en. Sec. 1892, C. Civ. Proc. 1895; re-en. Sec. 7185, Rev. C. 1907; re-en. Sec. 9818, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1046.

Operation and Effect

A notice of appeal from a decision of the board of medical examiners, sufficient in other respects, is effectual, though entitled, "In the matter of the application of (the appellant) for a certificate from the board of medical examiners to practice medicine and surgery." State ex rel. Riddell v. District Court, 27 M 103, 106, 69 P 710.

If the affidavit for an attachment bears the title of the action and was filed as a

part of the record at the time the complaint was filed, it is sufficiently identified; it intelligibly refers to the action or proceeding, within the meaning of this section, although, if the plaintiff had asked leave in the court below to amend it, the amendment would have been allowed as a matter of course. Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 93, 181 P 332.

Under this section providing that the mere fact that a paper bears a defective title does not render it ineffectual if it can be said to properly refer to a particular proceeding, held that improperly designating a guardian's account as an administratrix's account did not render it inadmissible, where the account of the administratrix had been closed two years prior to rendition of her account as guardian and she certified to it as her guardian's account. McCauley v. American Surety Co. of N. Y., 81 M 161, 168, 263 P 90.

9819. Successive actions on the same contract, etc. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

History: En. Sec. 426, p. 130, Bannack Stat.; re-en. Sec. 496, p. 232, L. 1867; re-en. Sec. 20, p. 30, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 1893, C.

Civ. Proc. 1895; re-en. Sec. 7186, Rev. C. 1907; re-en. Sec. 9819, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1047.

9820. Consolidation of several actions into one. Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

History: En. Sec. 427, p. 130, Bannack Stat.; re-en. Sec. 497, p. 232, L. 1867; re-en. Sec. 21, p. 30, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 1894, C. Civ. Proc. 1895; re-en. Sec. 7187, Rev. C. 1907; re-en. Sec. 9820, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1048.

Operation and Effect

The purpose of this section is to compel a party having different causes of action against another, which might be joined in one suit, to include such causes of action in one suit, so as not to vex the defendant with several suits and place the burden of extra costs upon him. Handley v. Sprinkle, 31 M 57, 63, 77 P 296.

Id. The effect of consolidation is to join all causes of action in one suit, the complaint in which should be the same as if the plaintiff had joined all causes of action alleged in the original suits in one action, and the judgment must settle all the issues involved.

Id. The legality of the consolidation of actions will not be reviewed by the supreme court unless excepted to at the

time and brought to the supreme court by the party excepting.

This section, providing for the consolidation of actions is permissive, not mandatory; a consolidation may not be demanded as a matter of right, but rests in the discretion of the court, the exercise of which will not be interfered with or appeal unless clear abuse is shown, particularly where the consolidation was denied; however, where consolidation will expedite the court's business and the interests of litigants be furthered as well as the expense to them and the public minimized, it should be ordered. St. George v. Boucher, 84 M 158, 162, 274 P 489.

References

Cited or applied as section 1894, Code of Civil Procedure, in Mares v. Dillon, 30 M 117, 137, 75 P 963; City of Bozeman v. Nelson, 73 M 147, 162, 237 P 528; First State Bank of Shelby v. Stanton et al., 78 M 503, 255 P 1066; Gould et al. v. Lynn, 88 M 501, 502, 293 P 968; National Union Fire Ins. Co. v. Chesapeake & O. Ry. Co., 4 F. Supp. 25.

9821. Actions—when deemed pending. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

History: En. Sec. 1895, C. Civ. Proc. 1895; re-en. Sec. 7188, Rev. C. 1907; re-en. Sec. 9821, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1049.

Operation and Effect

Where a complaint shows that a former action between the same parties and for the same cause is before the supreme court undetermined on appeal, the first action is deemed to be pending, and a demurrer to the complaint is properly sustained. The action is between the same parties where it appears from the complaint that the defendant in the action is the successor in interest of the defendant in the former action. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 28 M 451, 454, 72 P 865.

Though a judgment is defined in section 9313 as the final determination of the rights of the parties, the action must be regarded as still pending, within the meaning of this section, until the happening of one or more of the events enumerated therein. *Peterson v. City of Butte*, 44 M 129, 133, 120 P 231.

Under this section, providing that an action is deemed pending from its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied, held, that the court erred in striking the defense of another action pending between the same parties upon the same cause, where defendant alleged that the judgment in that action in his favor had

not been satisfied, and it appearing from the record that the time for appealing had not passed. *McCormick et al. v. Shields*, 63 M 9, 12, 205 P 831.

Since under this section, an action is deemed pending until final determination on appeal or until the time for appealing has expired, it was error to admit in evidence a judgment-roll in a companion case which was then pending on appeal, but nonprejudicial where, independent of the judgment-roll, the proof was sufficient to show that defendant sheriff's attempted justification in seizing personal property under a mortgage was without merit. *Noe v. Matlock et al.*, 64 M 35, 38, 208 P 591.

Plaintiff in an action to quiet title procured under foreclosure proceeding is not required to allege in his complaint that the decree had become final within the meaning of this section; if it had not become final, it was the duty of defendant to so allege in the answer. *Thomson v. Nygaard*, 98 M 529, 541, 41 P 2d 1.

References

Cited or applied as section 1895, Code of Civil Procedure, in *Boston & M. C. C. & S. M. Co. v. Montana O. P. Co.*, 26 M 146, 151, 66 P 752; *Bordeaux v. Bordeaux*, 26 M 533, 534, 69 P 103; *Boucher v. Barsalou*, 27 M 99, 101, 69 P 555; *Bordeaux v. Bordeaux*, 29 M 478, 481, 75 P 359; as section 7188, Revised Codes, in *Clark v. Oregon Short Line R. R. Co.*, 38 M 177, 186, 99 P 298; *State ex rel. McKennan v. District Court*, 69 M 340, 346, 222 P 426.

9822. The clerk must keep a register of actions. The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

History: En. Sec. 499, p. 233, L. 1867; re-en. Sec. 576, p. 153, Cod. Stat. 1871; re-en. Sec. 517, p. 176, L. 1877; re-en. Sec. 517, 1st Div. Rev. Stat. 1879; re-en. Sec. 534, 1st Div. Comp. Stat. 1887; re-en. Sec. 1896, C. Civ. Proc. 1895; re-en. Sec. 7189, Rev. C. 1907; re-en. Sec. 9822, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1052.

References

Burgess v. Lasby et al., 91 M 482, 491, 9 P 2d 164.

9823. Extension of time. When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court in which the action is pending, or a judge thereof; but such extension shall not exceed ninety days without the consent of the adverse party.

History: En. Sec. 1897, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 27, L. 1903; re-en. Sec. 7190, Rev. C. 1907; re-en. Sec. 9823, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1054.

Operation and Effect

Where, by stipulation of counsel, the time for the preparation and service of a statement on motion for a new trial had been extended for ninety days, the district court had power to grant a further extension, without the consent of the adverse party, and upon good cause shown, within the limit of ninety days prescribed by this section, and service made during the time so granted by the court was timely. *Nord v. Boston & M. C. C. & S. M. Co.*, 33 M 464, 469, 84 P 1116, 89 P 647.

The constitutionality of a statute that attempts to give a court power to extend time will not be considered by the supreme court on appeal unless the necessity of passing upon that question is urgent and imperative. *Sanden v. Northern Pacific Ry. Co.*, 39 M 209, 211, 102 P 145.

The time for presenting a bill of exceptions for settlement cannot be extended for a period of time exceeding ninety days without the consent of the adverse party. *Canning v. Fried*, 48 M 560, 562, 139 P 448. See also *Kirk v. Smith*, 49 M 196, 197, 141 P 149.

Where the district court granted extensions of time for the preparation of a bill of exceptions upon motion for new trial, amounting in all to ninety-four days, without the consent of the adverse party, contrary to the express provision of this section, which limits such extensions to ninety days, it lost jurisdiction to determine the motion. *Evans v. Oregon Short Line R. R. Co.*, 51 M 107, 111, 149 P 715.

Under this section the district court may grant a party additional time within which to offer additional amendments to a proposed bill of exceptions. *Morehouse v. Northern Land Co.*, 68 M 96, 103, 216 P 792.

Under section 9390, dealing especially with bills of exceptions, their preparation and settlement, the district court has authority, on a proper showing made by affidavit, to grant an extension in excess of ninety days for preparation and service of a bill of exceptions. *Langston et al. v. Currie et al.*, 95 M 57, 69, 26 P 2d 160.

References

Cited or applied as section 1897, Code of Civil Procedure, before amendment, in *State v. Landry*, 29 M 218, 221, 74 P 418.

9824. Actions against a sheriff for official acts. If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties, and the court may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

History: En. Sec. 431, p. 130, *Bannack Stat.*; re-en. Sec. 591, p. 156, *Cod. Stat.* 1871; re-en. Sec. 516, p. 176, L. 1877; re-en. Sec. 516, 1st Div. Rev. Stat. 1879; re-en. Sec. 533, 1st Div. Comp. Stat. 1887; amd. Sec. 1898, C. Civ. Proc. 1895; re-en. Sec. 7191, Rev. C. 1907; re-en. Sec. 9824, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1055.

Operation and Effect

Where a sheriff seized property in an attachment suit, and, after holding it about two months, turned it over to his successor, who sold it, and thereupon the owners of the property sued the sheriff and his successor for its conversion, of which

action the sureties on an indemnity bond to the sheriff were duly notified, and they came in and defended the suit, judgment being rendered against the defendants, and the amount thereof being collected from the sheriff, the judgment in question was sufficient evidence of the sheriff's right to recover against the sureties the sum paid by him on the judgment. *Tuttle v. Hardenberg*, 15 M 219, 224, 38 P 1070.

References

Cited or applied as section 7191, Revised Codes, in *Gehlert v. Quinn*, 38 M 1, 4, 98 P 369.

9825. Undertaking mentioned in this code, requisites of. In all cases where an undertaking with sureties is required by the provisions of this code, the officer taking the same must require the sureties to accompany it with an affidavit that they are residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking,

over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

History: Ap. p. Sec. 433, p. 131, *Ban-nack Stat.*; re-en. Sec. 593, p. 157, *Cod. Stat.* 1871; re-en. Sec. 523, p. 177, *L.* 1877; re-en. Sec. 523, 1st Div. Rev. Stat. 1879; re-en. Sec. 540, 1st Div. Comp. Stat. 1887; en. Sec. 1899, *C. Civ. Proc.* 1895; re-en. Sec. 7192, Rev. C. 1907; re-en. Sec. 9825, *R. C. M.* 1921.

Operation and Effect

The affidavit required by this section and section 9827 to accompany an undertaking must comply substantially with the statutory provisions. *Whitcomb v. Beyerlein*, 84 M 470, 472, 276 P 430.

References

Cited or applied as section 1899, Code of Civil Procedure, in *King v. Elling*, 24 M 470, 473, 62 P 783.

9826. Corporations as sureties. In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any provision of the code, or any law of this state, any corporation with a paid up capital of not less than one hundred thousand dollars, incorporated under the laws of this state for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law, may become and shall be accepted as security or as a sole and sufficient security upon such undertaking or bond, and such corporate surety shall be subject to all liabilities and entitled to all the rights of natural persons as such sureties; provided, that whenever the liabilities of any such corporation shall exceed its assets, the state auditor shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate, showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily paper published in the town or city wherein the principal office of such corporation is, and until such deficiency is paid up such company shall not be accepted on any bond; in estimating the condition of any such company, the state auditor shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition to eighty per cent. of the capital stock, all outstanding indebtedness of the company, and the premium reserved equal to fifty per centum of the premiums charged by said company on all risks then in force.

History: En. Sec. 1, p. 70, *L.* 1893; re-en. Sec. 1900, *C. Civ. Proc.* 1895; re-en. Sec. 7193, Rev. C. 1907; re-en. Sec. 9826, *R. C. M.* 1921. *Cal. C. Civ. Proc.* Sec. 1056.

Operation and Effect

A surety company which is insolvent can execute an undertaking on appeal, in the

absence of an action for making up deficiency in its assets. The failure of a surety to an undertaking to justify on exceptions to his sufficiency, or even his insolvency, furnishes no ground for the dismissal of the appeal. *King v. Elling*, 24 M 470, 482, 62 P 783.

9827. Justification of sureties. In all cases where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each responsible and householders or freeholders

within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution. But when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount be equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section may become one of such sureties. No such corporation shall be accepted in any case as a surety whenever its liabilities exceed its assets, as ascertained in the manner provided in the preceding section.

History: En. Sec. 2, p. 70, L. 1893; re-en. Sec. 1901, C. Civ. Proc. 1895; re-en. Sec. 7195, Rev. C. 1907; re-en. Sec. 9827, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1057.

Operation and Effect

The appeal becomes effective upon the filing of an undertaking, accompanied by the required affidavits, subject to the appellee's right to test the responsibility of the sureties. *Bush v. Baker*, 46 M 535, 545, 129 P 550.

The affidavit required by this section to accompany an undertaking must comply substantially with the statutory provisions. *Whitcomb v. Beyerlein*, 84 M 470, 472, 276 P 430.

References

Cited or applied as section 1901, Code of Civil Procedure, in *King v. Elling*, 24 M 470, 474, 62 P 783; *First Nat. Bank v. Gebo*, 46 M 263, 266, 127 P 463.

9828. Oath in behalf of corporation. In all matters where a corporation is authorized to act as trustee, guardian, executor, administrator, or in any fiduciary capacity, and an oath of office is required, it shall be competent for an officer of such corporation to take the required oath for and on behalf of his corporation, and such corporation shall thereby become amenable to the laws relating to individuals in like matters, so far as such laws may be applied to a corporation.

History: En. Sec. 1, Ch. 15, L. 1905; re-en. Sec. 7194, Rev. C. 1907; re-en. Sec. 9828, R. C. M. 1921.

9829. State, counties, municipalities, officers, school trustees not required to give bonds. In any civil action or proceeding wherein the state or county or a municipal corporation, or any officer in his official capacity on behalf of the state, a county, city, or town, is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town, or any officer thereof; but on complying with the other provisions of this code the state, county, municipal corporation, or town, or any officer thereof acting in his official capacity, has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1058.

Operation and Effect

On appeal from an adverse judgment in an action against the mayor of a city in his official capacity, he is not, under this section, required to furnish an undertak-

ing. *State ex rel. Dwyer v. Duncan*, 49 M 54, 56, 140 P 95.

Under this section, the board of examiners for nurses, being a public office and its members public officers, is relieved from filing a bond on appeal from a judgment compelling it, by writ of mandate, to recommend to the governor an applicant for certification as a registered nurse.

State ex rel. Scollard v. Board of Examiners, 52 M 91, 95, 156 P 124.

Under this section a county treasurer is not required to furnish an undertaking on attachment in an action brought in his

official capacity for the benefit of the county, to recover on an indemnity bond against loss of county funds in a bank. Jenkins v. First Nat. Bank et al., 73 M 110, 115, 236 P 1085.

9830. Surety on appeal substituted to rights of judgment creditor.

Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment, in all respects as if he had recovered the same.

History: En. Sec. 1903, C. Civ. Proc. 1895; re-en. Sec. 7197, Rev. C. 1907; re-en. Sec. 9830, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1059.

9831. Deposit instead of undertaking. In all cases where an undertaking or bond with sureties is required by the provisions of this code, the plaintiff or defendant may deposit with the clerk of the court or justice of the peace or police judge, as the case may be, a sum of money equal to the amount required by the undertaking or bond, which shall be taken as security in the place thereof. At any time such deposit may be withdrawn by the party making it, upon giving the undertaking with sufficient sureties as required by law, approved by the clerk or justice or judge, upon notice to the adverse party or his attorney, who may object to the sufficiency of the sureties in the same manner as though the undertaking were filed in the first instance.

History: En. Sec. 1904, C. Civ. Proc. 1895; re-en. Sec. 7198, Rev. C. 1907; re-en. Sec. 9831, R. C. M. 1921.

References

Kirschbaum v. Mayn, 76 M 320, 329, 246 P 953.

9832. No charge for copies. In all cases where copies of pleadings, affidavits, or other papers are to be served, neither the sheriff nor clerk shall charge or receive a fee for making such copies, when the same are furnished to such officer by the party to the action or his attorney.

History: En. Sec. 1905, C. Civ. Proc. 1895; re-en. Sec. 7199, Rev. C. 1907; re-en. Sec. 9832, R. C. M. 1921.

References

Cited or applied as section 7199, Revised Codes, in Coleman v. Northern Pacific Ry. Co., 41 M 123, 125, 108 P 582.

9833. Publication of order, etc., to be made once a week. Where not otherwise expressly prescribed by law, all rules, orders, and decrees of court, summons, and notices of all kinds, whether given by any court, judge, or clerk thereof, or by any other officer, board, or commission, which by the laws of this state are required to be published in any newspaper, shall be published once a week during the time prescribed by law for publication thereof, whether such publication be made in a weekly, semiweekly, triweekly, or daily newspaper.

History: En. Sec. 1, Ch. 104, L. 1917; re-en. Sec. 9833, R. C. M. 1921.

Operation and Effect

The requirement that a thirty-day notice shall be given of a sale by a county of property bought by it at delinquent tax sale, held not satisfied by one publication

made thirty days prior to the day of sale in a newspaper published in the county, the statute (this section) prescribing that where notices are required to be published by law in a newspaper, they must be published once a week for the period specified. Snidow v. Montana Home for the Aged, 88 M 337, 342, 292 P 722.

9833.1. Publication of notices, orders and papers—sufficiency. Whenever any statute of Montana requires the publication of any notice, order or other paper or document, in any newspaper, once a week for any specified number of weeks, it shall be sufficient to so publish the same once each week for such number of times as shall equal the number of weeks so designated.

History: En. Sec. 1, Ch. 76, L. 1929.

9833.2. Validation of proceedings based on publication. Any order, finding, judgment, decree or proceeding of any nature heretofore made, done, entered or had, based upon a publication for the number of times prescribed in the foregoing section, is hereby validated insofar as its validity depends upon the number of such publications.

History: En. Sec. 2, Ch. 76, L. 1929.

CHAPTER 89

SPECIAL PROCEEDINGS—PRELIMINARY PROVISIONS

Section 9834. Parties—how designated.

9835. Judgment and order same meaning as in civil actions.

9834. Parties—how designated. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

History: En. Sec. 1930, C. Civ. Proc. 1895; re-en. Sec. 7200, Rev. C. 1907; re-en. Sec. 9834, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1063.

References

Cited or applied as section 1930, Code of Civil Procedure, in *State ex rel. Heinze v. District Court*, 28 M 227, 233, 72 P 613.

9835. Judgment and order same meaning as in civil actions. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

History: En. Sec. 1931, C. Civ. Proc. 1895; re-en. Sec. 7201, Rev. C. 1907; re-en. Sec. 9835, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1064.

Operation and Effect

Under this section, providing that the final determination of the rights of a

party to a special proceeding is a judgment, an order of the district court directing the exclusion of the lands of a protestant from a proposed extension of an irrigation district is a final judgment. In *re Bitter Root Irr. Dist.*, 67 M 436, 441, 218 P 945.

CHAPTER 90

UNIFORM DECLARATORY JUDGMENTS ACT

- Section 9835.1. Scope.
 9835.2. Power to construe, etc.
 9835.3. Before breach.
 9835.4. Declarations concerning administration of trusts and estates.
 9835.5. Enumeration not exclusive.
 9835.6. Discretionary.
 9835.7. Review.
 9835.8. Supplemental relief.
 9835.9. Jury trial.
 9835.10. Costs.
 9835.11. Parties.
 9835.12. Construction.

Ch. 90 UNIFORM DECLARATORY JUDGMENTS ACT 9835.1-9835.5

9835.1 et seq.
126 P.(2d) 1109

- 9835.13. "Person" defined.
- 9835.14. Provisions severable.
- 9835.15. Uniformity of interpretation.
- 9835.16. Short title.

9835.1 et seq.
173 P.(2d) 906
(dissent)

9835.1 et seq.
188 P.(2d) 583

9835.1. Scope. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

History: En. Sec. 1, Ch. 16, L. 1935.

NOTE.—Uniform State Law: Sections 9835.1 through 9835.16 constitute the "Uniform Declaratory Judgments Act" approved by the National Conference of Commissioners on Uniform State Laws in 1922 and adopted in the states of Arizona,

Colorado, Idaho, Indiana, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin and Wyoming and also in Porto Rico.

9835.2. Power to construe, etc. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

9835.2
188 P.(2d) 772

9835.2
173 P.(2d) 906.
908
(dissent)

History: En. Sec. 2, Ch. 16, L. 1935.

9835.3. Before breach. A contract may be construed either before or after there has been a breach thereof.

History: En. Sec. 3, Ch. 16, L. 1935.

9835.4. Declarations concerning administration of trusts and estates. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

History: En. Sec. 4, Ch. 16, L. 1935.

9835.5. Enumeration not exclusive. The enumeration in sections 9835.2, 9835.3 and 9835.4 does not limit or restrict the exercise of the general powers conferred in section 9835.1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

History: En. Sec. 5, Ch. 16, L. 1935.

9835.6
173 P.(2d) 908
(dissent)

9835.6. Discretionary. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

History: En. Sec. 6, Ch. 16, L. 1935.

9835.7. Review. All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees.

History: En. Sec. 7, Ch. 16, L. 1935.

9835.8. Supplemental relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by a declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

History: En. Sec. 8, Ch. 16, L. 1935.

9835.9. Jury trial. When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

History: En. Sec. 9, Ch. 16, L. 1935.

9835.10. Costs. In any proceeding under this act the court may make such award of costs as may seem equitable and just.

History: En. Sec. 10, Ch. 16, L. 1935.

9835.11
173 P.(2d) 906
(dissent)

9835.11. Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

History: En. Sec. 11, Ch. 16, L. 1935.

9835.12. Construction. This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and it is to be liberally construed and administered.

History: En. Sec. 12, Ch. 16, L. 1935.

9835.13. "Person" defined. The word "person" wherever used in this act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

History: En. Sec. 13, Ch. 16, L. 1935.

9835.14. Provisions severable. The several sections and provisions of this act except sections 9835.1 and 9835.2 are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative.

History: En. Sec. 14, Ch. 16, L. 1935.

9835.15. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

History: En. Sec. 15, Ch. 16, L. 1935.

9835.16. Short title. This act may be cited as the Uniform Declaratory Judgments Act.

History: En. Sec. 16, Ch. 16, L. 1935.

CHAPTER 91

WRIT OF REVIEW

- Section 9836. Writ of review defined.
9837. When and by what courts granted.
9838. Application for—how made.
9839. The writ to be directed to the inferior tribunal, etc.
9840. Contents of the writ.
9841. Proceedings in inferior court may be stayed, or not.
9842. Service of the writ.
9843. The review under the writ, extent of.
9844. A defective return of the writ may be perfected—hearing and judgment.
9845. Copy of judgment must be sent to the inferior tribunal.
9846. Judgment-roll.

9836. Writ of review defined. The writ of certiorari may be denominated the writ of review.

9836
198 P.(2d) 761

History: En. Sec. 371, p. 121, Bannack Stat.; re-en. Sec. 430, p. 222, L. 1867; re-en. Sec. 506, p. 139, Cod. Stat. 1871; re-en. Sec. 436, p. 179, L. 1877; re-en. Sec. 536, 1st Div. Rev. Stat. 1879; re-en. Sec. 554, 1st Div. Comp. Stat. 1887; re-en. Sec. 1940, C. Civ. Proc. 1895; re-en. Sec. 7202, Rev. C. 1907; re-en. Sec. 9836, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1067.

References

State ex rel. Pereira v. District Court, 83 M 349, 272 P 242.

9837. When and by what courts granted. A writ of review may be granted by the supreme court (and in proceedings for contempt, in the district court, by any justice of the supreme court), or by the district court, or any judge thereof, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

9837
65 P (2d) 612

9837
123 P.(2d) 978

9837
145 P.(2d) 528

9837
155 P. 2d 199

History: En. Sec. 372, p. 121, Bannack Stat.; re-en. Sec. 431, p. 222, L. 1867; re-en. Sec. 507, p. 139, Cod. Stat. 1871; re-en. Sec. 437, p. 179, L. 1877; re-en. Sec. 537, 1st Div. Rev. Stat. 1879; re-en. Sec. 555, 1st Div. Comp. Stat. 1887; re-en. Sec. 1941, C. Civ. Proc. 1895, and "Designation of courts authorized to grant writ" was changed by this section; re-en. as amd. Sec. 7203, Rev. C. 1907; re-en. Sec. 9837, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1068.

Applicable to Quasi-Judicial Bodies

This section applies to quasi judicial bodies as well as to courts and judicial officers strictly so called. State ex rel. Jacobson v. Board of County Commrs., 47 M 531, 535, 134 P 291.

9837
198 P.(2d) 761

"Exceeded the Jurisdiction"

Where the court had jurisdiction of the subject-matter and of the parties, its action in refusing an injunction and dismissing the action cannot be reviewed by certiorari, since the remedy can only be employed to determine whether a tribunal has exceeded its authority. The writ cannot be used for the purpose of correcting errors committed in the exercise of jurisdiction. *State ex rel. King v. District Court*, 24 M 494, 498, 62 P 820.

Since an order of adoption is not appealable and the writ of habeas corpus is inadequate for the purpose of setting aside such an order made without jurisdiction, the writ of certiorari is the proper remedy, within the rule permitting the issuance of the latter writ only where there is no appeal nor any other plain, speedy and adequate remedy. *State ex rel. Thompson v. District Court*, 75 M 147, 153, 242 P 959.

On application for a writ of certiorari directed to the district court, the question for determination is whether the court exceeded its jurisdiction in rendering the judgment complained of; the writ cannot be used to correct errors within jurisdiction. *State ex rel. Cheadle v. District Court*, 92 M 94, 10 P 2d 586.

Extent of Review

On certiorari to determine the propriety of the appointment of a receiver, the court cannot consider the weight of the evidence and the propriety of such appointment, but the review is limited to determining whether the court has regularly pursued its authority. *State ex rel. B. & M. C. C. & S. M. Co. v. District Court*, 22 M 241, 244, 56 P 281.

"Judicial Functions"

Where a board of county commissioners decides whether a petition presented to them for the submission of the removal of the county seat to the electors of the county is signed by a sufficient number to require them to submit the question to an election, it exercises judicial functions, within the meaning of this section. *State ex rel. Buck v. Board of Commrs.*, 21 M 469, 474, 54 P 939.

Not Available Where Error May be Reached by Appeal

The writ of certiorari is peculiarly inapplicable to use in aid of appellate jurisdiction, and cannot be lawfully issued in cases where error may be reached by appeal. In *re MacKnight*, 11 M 126, 133, 27 P 336.

An order for payment of counsel fees and alimony in an action for divorce being an appealable order, certiorari will not lie to review the action of the lower court

in committing defendant for contempt in refusing to obey such order. In *re Finkelstein*, 13 M 425, 427, 34 P 847.

Where it appears by the return to a writ of certiorari issued by the supreme court to a justice of the peace, that the relator had applied to the district court for a similar writ, and that the case had been heard and a judgment entered quashing the writ, the writ issued from the supreme court will be dismissed, since the relator's proper remedy is by appeal from the judgment of the district court. *State ex rel. Shing v. Lenahan*, 17 M 518, 519, 43 P 712.

Where the remedy by appeal is available, the writ of certiorari does not lie, even though such remedy is not speedy or adequate. *State ex rel. Deck v. District Court*, 64 M 110, 111, 207 P 1004; *State v. District Court et al.*, 97 M 523, 536, 37 P 2d 329.

Id. An order vacating an order setting aside a default judgment is a special order made after final judgment and as such appealable, and therefore the writ of certiorari does not lie to review the action of the court in making the order.

Under the rule that certiorari does not lie where appeal is available, held, that an order so modifying a decree of divorce as to suspend payment of alimony and awarding the custody of a minor child to the father upon remarriage of the mother was a special order made after final judgment and appealable (Sec. 9731), and that therefore the writ of review was not available to review the correctness of the order. *State v. District Court et al.*, 69 M 322, 324, 221 P 543.

The writ of certiorari may not be granted where the party aggrieved has an appeal, even though the remedy by appeal may not be speedy or adequate; hence the writ was not available to defendant in a divorce proceeding to have an order for the payment of alimony pendente lite reviewed. *State ex rel. McGrath v. District Court*, 82 M 463, 466, 267 P 803.

What Must be Shown to Obtain This Writ

That the writ of certiorari may be successfully invoked under this section, it is indispensable that it appear (1) that the inferior court, tribunal, board, or officer, the validity of whose action is questioned, has exceeded its or his jurisdiction; (2) that there is no appeal; and (3) that there is no plain, speedy, or adequate remedy other than certiorari. *State ex rel. King v. District Court*, 24 M 494, 499, 62 P 820; *State ex. Rel. Whiteside v. District Court*, 24 M 539, 553, 63 P 395; *State ex rel. Weinstein Co. v. District Court*, 28 M

445, 449, 76 P 1134; *State ex rel. Davis v. District Court*, 29 M 153, 155, 74 P 200; *State ex rel. Grissom v. Justice Court*, 31 M 258, 263, 78 P 498; *State ex rel. Furnish v. Mullendore*, 53 M 109, 112, 161 P 949; *State ex rel. Prato v. District Court*, 55 M 560, 566, 179 P 497.

If there is either an appeal, or a plain, speedy, and adequate remedy, certiorari does not lie; if the order or judgment is not appealable, but there is any plain, speedy, and adequate remedy other than certiorari, the writ does not lie; the remedy by appeal need not be speedy or adequate. *State ex rel. King v. District Court*, 24 M 494, 499, 62 P 820; *State ex rel. Davis v. District Court*, 29 M 153, 156, 74 P 200.

The remedy upon certiorari is one uniformly classed as an extraordinary remedy, and can only be resorted to in the class of cases to which it is applicable—when there is no appeal, nor any plain, speedy, or adequate remedy in the ordinary course at law. *State ex rel. Reynolds v. Laurendeau*, 27 M 522, 525, 71 P 754.

Prior to the decision in *State ex rel. King v. District Court*, 24 M 494, 62 P 820, writs of certiorari were issued by the supreme court, though the party had an appeal, where it was apparent that the appeal was not wholly adequate, or where the proceeding by certiorari was more expeditious or convenient. The construction thus given to this section was clearly erroneous, and was changed by the decision in that case. Subsequent to that decision the doctrine announced therein has been adhered to. *State ex rel. Davis v. District Court*, 29 M 153, 156, 74 P 200.

The jurisdiction of the supreme court to grant the writ of certiorari is dependent upon these indispensable prerequisites: excess of jurisdiction in the court making the order complained of, absence of the right of appeal, and lack of any plain, speedy and adequate remedy other than certiorari; absence of any one of these prerequisites defeats the writ. *State v. District Court et al.*, 83 M 400, 406, 272 P 525.

When Remedy is Not Proper

Where a witness, who was committed by a notary public, was discharged under a writ of habeas corpus issued by the district court of the district wherein the commitment was made, the supreme court has no power, under a writ of certiorari, to review the action of the district court, since the district court had authority to make the discharge, and was acting within the bounds of its appropriate jurisdiction. *State ex rel. Whiteside v. District Court*, 24 M 539, 553, 63 P 395.

Where a justice of the peace overruled a motion to vacate a default judgment, the

judgment could not be reviewed by certiorari. *State ex rel. Reynolds v. Laurendeau*, 27 M 522, 525, 71 P 754.

The power to fill a vacancy in the office of county commissioner residing in the district by a judge of the district where the vacancy occurs being ministerial and not judicial, certiorari does not lie to annul an order filling a vacancy deemed by the judge to exist in that office in a newly created county because of the alleged unconstitutionality of the act under which the office was filled by election, and because the incumbent was holding two offices regarded by him as incompatible. *State ex rel. Dowen v. District Court*, 50 M 249, 252, 146 P 467.

Error committed by a board of commissioners appointed to adjust the indebtedness between an old and a newly created county, though a function judicial in character, in taking bridges into consideration as county property, constitutes error within jurisdiction not correctible by certiorari, even though provision is not made for an appeal or some other mode of review of the board's action. *State ex rel. Furnish v. Mullendore*, 53 M 109, 112, 161 P 949.

The fact that either the state or the claimant may appeal from the judgment rendered in a proceeding under the enforcement act of 1917, relative to searches, seizures, and forfeitures of intoxicating liquors, precludes relief under this section by certiorari. *State ex rel. Prato v. District Court*, 55 M 560, 566, 179 P 497.

Held, on application for a writ of certiorari to annul an order of the Board of Railroad Commissioners directing the station facilities at a certain town to be removed to another town, relator had a sufficient remedy under section 3810, by an action in the district court to determine whether the order was just and reasonable, and that therefore certiorari did not lie. *State v. Board of Railroad Comms.*, 73 M 1, 4, 234 P 834.

The office of the writ of certiorari is merely to annul acts of an inferior tribunal board or officer which are clearly without or in excess of jurisdiction, and not to prevent, in advance, threatened wrongs; nor will it be granted for the correction of merely harmless, technical or formal errors which are not shown to have resulted prejudicially or caused substantial injustice to relator. *State ex rel. Pereira v. District Court*, 83 M 349, 272 P 242.

An appeal does not lie from a judgment of contempt, and neither may the writ of certiorari run in such a proceeding where the trial court has not acted in excess of jurisdiction. *State v. District Court et al.*, 85 M 215, 218, 278 P 122.

When Remedy is Proper

The only way open to a party to have reviewed an order of a justice of the peace committing him to jail, in default of security to keep the peace, is by means of the review allowed under the writ of certiorari. *State ex rel. Jackson v. Kenzie*, 24 M 45, 52, 60 P 589.

Certiorari lies to review the actions of boards of county commissioners taken with reference to the creation of new counties, they being required, in such proceedings, to act as quasi judicial tribunals. *State ex rel. Jacobson v. Board of County Commrs.*, 47 M 531, 536, 134 P 291.

Inasmuch as an appeal does not lie from a judgment summarily entered against the sureties on a bail bond, and there is not any other plain, speedy, and adequate remedy, certiorari lies to annul it. *State ex rel. Van v. District Court*, 54 M 577, 579, 172 P 540.

9838. Application for—how made. The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

History: En. Sec. 373, p. 121, *Bannack Stat.*; re-en. Sec. 432, p. 222, *L. 1867*; re-en. Sec. 508, p. 139, *Cod. Stat. 1871*; re-en. Sec. 438, p. 179, *L. 1877*; re-en. Sec. 538, 1st Div. *Rev. Stat. 1879*; re-en. Sec. 556, 1st Div. *Comp. Stat. 1887*; re-en. Sec. 1942, *C. Civ. Proc. 1895*; re-en. Sec. 7204, *Rev. C. 1907*; re-en. Sec. 9838, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 1069*.

Affidavit

The affidavit for a writ of review becomes functus officio when the writ is issued. It is not a pleading, and its averments cannot be traversed by any other pleading. *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 261, 146 P 539.

Where the petition, or affidavit, contains only statements of conclusions, and does not allege the facts from which those conclusions are drawn, the court is without jurisdiction to issue the writ. *State v. Jackson*, 58 M 90, 98, 190 P 295.

How to Determine Sufficiency of Petition or Affidavit for Writ

Motion to quash or demurrer is the proper method to determine the sufficiency of a petition or affidavit for a writ of certiorari. *State v. Jackson*, 58 M 96, 190 P 295.

Party Beneficially Interested

An order of the district court directing the payment by a special administrator of

Certiorari lies when jurisdiction has been exceeded and there is no appeal or other plain, speedy and adequate remedy. *State ex rel. Weisz v. District Court et al.*, 61 M 427, 202 P 387.

The writ of certiorari issues only where there is an excess of jurisdiction on the part of an inferior tribunal, board or officer, absence of the right to appeal from the act, order or judgment assailed as done or made without jurisdiction, and lack of a plain, speedy and adequate remedy other than certiorari. *State v. Board of Railroad Commrs.*, 73 M 1, 4, 234 P 834.

References

Cited or applied as section 1941, *Code of Civil Procedure*, in *State ex rel. Allen v. Napton*, 24 M 450, 455, 62 P 686; *State ex rel. Mont. C. Ry. Co. v. District Court*, 32 M 37, 45, 79 P 546; as section 7203, *Revised Codes*, in *State ex rel. Lane v. District Court*, 51 M 503, 508, 154 P 200.

an indebtedness of the estate is without jurisdiction and reviewable on certiorari, and such administrator is a party beneficially interested in an application to review such order. *State ex rel. Bartlett v. District Court*, 18 M 481, 486, 46 P 259.

This section does not require that applicant's interest shall be distinguishable from the mass of the community, when the matter is brought to be reviewed affects the people generally, and the object of the writ is to inquire into the performance of a duty owing to the public. *State ex rel. Buck v. Board of Commrs.*, 21 M 469, 473, 54 P 939. See also *Buck v. Fitzgerald*, 21 M 482, 483, 54 P 942; *Milligan v. City of Miles City*, 51 M 374, 382, 153 P 276; *Poe v. Sheridan County*, 52 M 279, 291, 157 P 185.

The fact that one is an agent or attorney of a party beneficially interested in an application for certiorari does not attract to him the beneficial interest of his principal, so as to enable him to make the application. *State ex rel. Allen v. Napton*, 24 M 450, 453, 62 P 686.

This section should be construed as meaning that the application for certiorari should be made by the party beneficially interested, but that the affidavit in support thereof might be made by any one conversant with the facts. *State ex rel. Allen v. Napton*, 24 M 450, 454, 62 P 686.

The provision of this section that the writ of certiorari will only issue at the

instance of a party beneficially interested, does not require that the applicant be a party to the action or proceeding in which the court is alleged to have acted without jurisdiction but if he is able to show that he is interested because of some

special or peculiar injury to himself in person or property, the court may in its discretion issue the writ. *State ex rel. Johnston v. District Court*, 93 M 439, 443, 19 P 2d 220.

9839. The writ to be directed to the inferior tribunal, etc. The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

9839
82 P.(2d) 598

9839
198 P.(2d) 761

History: En. Sec. 374, p. 121, *Bannack Stat.*; re-en. Sec. 433, p. 222, L. 1867; re-en. Sec. 509, p. 139, *Cod. Stat.* 1871; re-en. Sec. 439, p. 180, L. 1877; re-en. Sec. 539, 1st Div. Rev. Stat. 1879; re-en. Sec. 557, 1st Div. Comp. Stat. 1887; re-en. Sec. 1943, C. Civ. Proc. 1895; re-en. Sec. 7205, Rev. C. 1907; re-en. Sec. 9839, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1070.

Operation and Effect

Since this section makes it the duty of the clerk of the court to return the transcript required by the writ to the court out of which the writ is issued, the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the party whose fault occasioned the expense. *State ex rel. King v. District Court*, 25 M 1, 3, 63 P 402.

Where the order sought to be annulled by certiorari was made by the district

court, and not by its judge, a writ directed to the judge will be quashed, upon motion. *State ex rel. Healy v. District Court*, 26 M 224, 225, 67 P 470. See also *State ex rel. Grissom v. Justice Court*, 31 M 258, 261, 78 P 498.

As the return in certiorari running to a court must be made by its clerk, as provided in this section, an answer to the averments of relator's affidavit, filed by the judge of the court as his "return," was not such and had no place in the proceedings. *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 261, 146 P 539. See also *State v. District Court et al.*, 77 M 214, 220, 250 P 609.

References

Cited or applied as section 1943, Code of Civil Procedure, in *State ex rel. Baker v. District Court*, 24 M 425, 427, 62 P 688.

9840. Contents of the writ. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

9840
198 P.(2d) 761

History: En. Sec. 375, p. 121, *Bannack Stat.*; re-en. Sec. 434, p. 222, L. 1867; re-en. Sec. 510, p. 139, *Cod. Stat.* 1871; re-en. Sec. 440, p. 180, L. 1877; re-en. Sec. 540, 1st Div. Rev. Stat. 1879; re-en. Sec. 558, 1st Div. Comp. Stat. 1887; re-en. Sec. 1944, C. Civ. Proc. 1895; re-en. Sec. 7206, Rev. C. 1907; re-en. Sec. 9840, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1071.

NOTE.—See *State ex rel. Sell v. District Court*, 52 M 457, 158 P 1018, for reference to history of this section.

Operation and Effect

It is the duty of a court, upon whom a writ of certiorari has been duly served, to certify up the record without alteration as it is at the time that the writ was served, otherwise, without reference to any express stay, there may be contempt in not obeying the writ. In *re Harney*, 29 M 370, 372, 74 P 1080.

An appeal from a judgment of the district court on a writ of review to a justice of the peace brings up for review only such questions as appear on the judgment-roll, and other papers are not before the court. *State ex rel. Grissom v. Justice Court*, 31 M 258, 261, 78 P 498.

By its terms, the writ of review commands the party to whom it is directed to certify to the court issuing the writ "a transcript of the records and proceedings," so far as necessary to obtain the review sought. Recitals, denials, affirmative allegations, or matters not copied from the records, or matters copied from the records but not called for by the writ, are out of place in the return, and do not constitute any part of it. *State ex rel. Sell v. District Court*, 52 M 457, 458, 158 P 1018.

Upon certiorari, the judgment for a direct contempt is the only record, and a

certified copy of it constitutes the full return to be made to the appellate court in obedience to the writ, and it cannot be supplemented by evidence or by facts certified up in the return by the judge. *State ex rel. Rankin v. District Court*, 58 M 276, 291, 191 P 772.

Where a writ of certiorari is issued by the supreme court accompanied by an order staying proceedings in the matter in which issued, it is the duty of the court to which directed to certify the record as it was at the time the writ was served,

and thereafter it is without power materially to alter or add to the record as made, and if it does so, so much of its return as is altered or added to will be disregarded by the supreme court. *Ex parte Burns*, 83 M 200, 212, 271 P 439.

References

Cited or applied as section 7206, Revised Codes, in *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 261, 146 P 539; *State v. Jackson*, 58 M 90, 100, 190 P 295.

9841. Proceedings in inferior court may be stayed, or not. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court or judge; but if omitted, the power of the inferior court or officer is not suspended, or the proceedings stayed.

History: En. Sec. 376, p. 122, *Bannack Stat.*; re-en. Sec. 435, p. 223, L. 1867; re-en. Sec. 511, p. 140, *Cod. Stat. 1871*; re-en. Sec. 441, p. 180, L. 1877; re-en. Sec. 541, 1st Div. Rev. Stat. 1879; re-en. Sec. 559, 1st Div. Comp. Stat. 1887; re-en. Sec. 1945, C. Civ. Proc. 1895; re-en. Sec. 7207, Rev. C. 1907; re-en. Sec. 9841, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 1072.*

Operation and Effect

A judge of a district court is not guilty of contempt in altering an order after he has been served with a writ of review from the supreme court directing that "all proceedings under said order be stayed," the stay being by its terms limited to the enforcement of the order. In *re Harney*, 29 M 370, 372, 74 P 1080.

9842. Service of the writ. The writ must be served in the manner as a summons in civil action, except when otherwise expressly directed by the court or judge.

History: En. Sec. 377, p. 122, *Bannack Stat.*; re-en. Sec. 436, p. 223, L. 1867; re-en. Sec. 512, p. 140, *Cod. Stat. 1871*; re-en. Sec. 442, p. 180, L. 1877; re-en. Sec. 542, 1st Div. Rev. Stat. 1879; re-en. Sec. 560, 1st

Div. Comp. Stat. 1887; re-en. Sec. 1946, C. Civ. Proc. 1895; re-en. Sec. 7208, Rev. C. 1907; re-en. Sec. 9842, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 1073.*

9843. The review under the writ, extent of. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

History: En. Sec. 378, p. 122, *Bannack Stat.*; re-en. Sec. 437, p. 223, L. 1867; re-en. Sec. 513, p. 140, *Cod. Stat. 1871*; re-en. Sec. 443, p. 181, L. 1877; re-en. Sec. 543, 1st Div. Rev. Stat. 1879; re-en. Sec. 561, 1st Div. Comp. Stat. 1887; re-en. Sec. 1947, C. Civ. Proc. 1895; re-en. Sec. 7209, Rev. C. 1907; re-en. Sec. 9843, R. C. M. 1921. *Cal. C. Civ. Proc. Sec. 1074.*

Reviewable Questions Must Appear on the Face of the Record

The only questions that can be presented for determination to the reviewing court must appear affirmatively from the face of the record. *State ex rel. First Trust & Sav. Bank v. District Court*, 50 M 259, 261, 146 P 539.

Scope of Review

Upon an application to review the action of a district judge, the supreme court is limited in its inquiry to the questions as to whether the application is properly made, and, if so, whether the district judge exceeded his jurisdiction. *State ex rel. Murphy v. District Court*, 10 M 401, 405, 25 P 1053; *State ex rel. Congdon v. District Court*, 10 M 456, 459, 26 P 182; *In re Ming*, 15 M 79, 90, 38 P 228; *State ex rel. Independent Dist. Tel. Co. v. District Court*, 15 M 324, 331, 39 P 316; *State ex rel. King v. District Court*, 24 M 494, 498, 62 P 820.

The affidavit for a writ of certiorari was insufficient where the petition for the

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removal of a county seat bore the required number of names, and recited that the signers were qualified, since, in the absence of an objection and of fraud, which did not appear, it indicated that the board of commissioners had regularly pursued its authority, and by this section the review on a writ of certiorari was to determine whether they had or not. *State ex rel. Buck v. Board of Comms.*, 21 M 469, 475, 54 P 939.

The writ cannot be used to correct errors committed in the exercise of jurisdiction. *State ex rel. Griffiths v. Mayor of City of Butte*, 57 M 368, 188 P 367.

The office of the writ of certiorari is merely to annul acts of an inferior tribunal, board, or officer which are clearly without or in excess of jurisdiction, and not to prevent, in advance, threatened wrongs; nor will it be granted for the correction of merely harmless, technical or formal errors which are not shown to have resulted prejudicially or caused substantial injustice to relator. *State ex rel. Pereira v. District Court*, 83 M 349, 351, 272 P 242.

A judgment or order of the district court made in a contempt proceeding is

reviewable by the supreme court on writ of certiorari, the review going no further than to determine whether the lower court regularly pursued its authority; the writ cannot be used to correct errors committed in the exercise of jurisdiction. *State ex rel. Murphy v. District Court*, 99 M 209, 215, 41 P 2d 1113.

Id. On application for writ of certiorari to review a judgment of contempt, the supreme court may review the evidence introduced in the proceedings to determine whether the charges against contemnor are unsupported by the evidence, or the findings are contrary to all of the substantial evidence, or whether the decision has no evidence to support it, but the court cannot review the evidence to determine the preponderance thereof.

References

Cited or applied as section 1947, Code of Civil Procedure, in *State ex rel. Boston & M. C. C. & S. M. Co. v. District Court*, 22 M 241, 244, 56 P 281; *State ex rel. Grisom v. Justice Court*, 31 M 258, 261, 78 P 498; *State ex rel. Cotter v. District Court*, 34 M 303, 305, 87 P 614.

9844. A defective return of the writ may be perfected—hearing and judgment. If the return of the writ be defective, the court or judge may order a further return to be made. When a full return has been made, the court or judge must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below.

History: En. Sec. 379, p. 122, *Bannack Stat.*; re-en. Sec. 438, p. 223, *L. 1867*; re-en. Sec. 514, p. 140, *Cod. Stat. 1871*; re-en. Sec. 444, p. 181, *L. 1877*; re-en. Sec. 544, 1st Div. Rev. Stat. 1879; re-en. Sec. 562, 1st Div. Comp. Stat. 1887; re-en. Sec. 1948, *C. Civ. Proc. 1895*; re-en. Sec. 7210, *Rev. C. 1907*; re-en. Sec. 9844, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 1075*.

Operation and Effect

The office of the writ of certiorari is to annul, modify, or affirm the action of an inferior tribunal; it cannot supply defects or restrain excesses. *State ex rel. Furnish v. Mullendore*, 53 M 109, 114, 161 P 949.

Where defendant in a proceeding of a writ of certiorari after return made filed

a motion for judgment on the pleadings, which motion was argued by the parties and submitted for decision, and the court, instead of rendering judgment as required by this section, made an order, nonappealable in character, dismissing the proceeding, the writ of mandate compelling it to render judgment is the proper remedy. *State ex rel. Altop v. District Court et al.*, 72 M 49, 55, 231 P 99.

References

Cited or applied as section 1948, Code of Civil Procedure, in *State ex rel. Jackson v. Kennie*, 24 M 45, 57, 60 P 589; *State ex rel. Boston & M. Co. v. District Court*, 27 M 441, 447, 71 P 602; *State ex rel. Grisom v. Justice Court*, 31 M 258, 261, 78 P 498.

9845. Copy of judgment must be sent to the inferior tribunal. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified upon.

History: En. Sec. 380, p. 122, Bannack Stat.; re-en. Sec. 439, p. 223, L. 1867; re-en. Sec. 515, p. 140, Cod. Stat. 1871; re-en. Sec. 445, p. 181, L. 1877; re-en. Sec. 545, 1st Div. Rev. Stat. 1879; re-en. Sec. 563,

1st Div. Comp. Stat. 1887; re-en. Sec. 1949, C. Civ. Proc. 1895; re-en. Sec. 7211, Rev. C. 1907; re-en. Sec. 9845, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1076.

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9846. Judgment-roll. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitutes the judgment-roll.

History: En. Sec. 440, p. 223, L. 1867; re-en. Sec. 516, p. 140, Cod. Stat. 1871; re-en. Sec. 546, p. 181, L. 1877; re-en. Sec. 546, 1st Div. Rev. Stat. 1879; re-en. Sec. 564, 1st Div. Comp. Stat. 1887; re-en. Sec. 1950, C. Civ. Proc. 1895; re-en. Sec. 7212, Rev. C. 1907; re-en. Sec. 9846, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1077.

Operation and Effect

On appeal from a judgment of the district court on certiorari annulling a default judgment rendered by a justice's court, the record consists of the judgment-roll which embraces "a copy of the judg-

ment, signed by the clerk, entered upon or attached to the writ and return" (this section), and therefore the affidavit upon which the writ was issued, the sufficiency of which was not attacked in the trial court, was not properly a part of the record. *State v. Justice of Peace Court et al.*, 69 M 450, 452, 222 P 1055.

References

Cited or applied as section 1950, Code of Civil Procedure, in *State ex rel. Grissom v. Justice Court*, 31 M 258, 261, 78 P 498; *Thornton-Thomas Co. v. Bretherton*, 32 M 80, 92, 80 P 10.

CHAPTER 92

WRIT OF MANDATE

Section 9847. Mandate defined.

9848. When and by what court issued.

9849. Writ—when and upon what to issue.

9850. Must be either alternative or peremptory—substance.

9851. If the application be without notice, the alternative writ may issue; otherwise, the peremptory—notice and default.

9852. The adverse party may answer under oath.

9853. If an essential question of fact is raised, the court may order a jury trial.

9854. The applicant may demur to the answer or contradict it by proof.

9855. Motion for new trial—where made.

9856. Procedure upon failure to give notice of or denial of motion for new trial.

9857. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.

9858. Damages, costs and peremptory mandate allowed applicant, when.

9859. Service of the writ.

9860. Penalty for disobedience to the writ.

9847. Mandate defined. The writ of mandamus may be denominated a writ of mandate.

History: En. Sec. 382, p. 122, Bannack Stat.; re-en. Sec. 441, p. 224, L. 1867; re-en. Sec. 517, p. 141, Cod. Stat. 1871; re-en. Sec. 547, p. 181, L. 1877; re-en. Sec. 547, 1st Div. Rev. Stat. 1879; re-en. Sec. 565, 1st Div. Comp. Stat. 1887; re-en. Sec. 1960, C. Civ. Proc. 1895; re-en. Sec. 7213, Rev. C. 1907; re-en. Sec. 9847, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1084.

Operation and Effect

Mandamus is not a civil action, and the statute of Anne is not in force in this jurisdiction. *Chumasero v. Potts*, 2 M 242, 264; *Territory ex rel. Tanner v. Potts*, 3 M 364, 366; *Bailey v. Edwards*, 47 M 363,

371, 133 P 1095; *State v. Board of Prison Commrs. et al.*, 84 M 14, 273 P 1044.

The statute with respect to mandamus, or the "writ of mandate," as it is called, assimilates such a proceeding, in respect of pleading and practice, to the ordinary civil action. *Greeley v. Cascade County*, 22 M 580, 589, 57 P 274.

References

Cited or applied as section 547, First Division Revised Statutes 1879, in *Territory ex rel. Yellowstone County*, 6 M 147, 151, 9 P 918; *State v. Lemkie*, 62 M 51, 52, 202 P 1109; *State v. District Court et al.*, 69 M 415, 421, 222 P 444; *State v. Northern Pac. Ry. Co.*, 88 M 529, 549, 295 P 257.

9848. When and by what court issued. It may be issued by the supreme court or the district court, or any judge of the district court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

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History: En. Sec. 383, p. 122, Bannack Stat.; amd. Sec. 442, p. 224, L. 1867; re-en. Sec. 518, p. 141, Cod. Stat. 1871; re-en. Sec. 548, p. 181, L. 1877; re-en. Sec. 548, 1st Div. Rev. Stat. 1879; re-en. Sec. 566, 1st Div. Comp. Stat. 1887; amd. Sec. 1961, C. Civ. Proc. 1895; re-en. Sec. 7214, Rev. C. 1907; re-en. Sec. 9848, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1085.

By Whom the Writ May be Issued
If it is necessary that two justices of the supreme court should concur in the issuance of an alternative writ of mandamus, where the application is made to two justices, and the order directing the clerk to issue the writ is signed by only one of them, the other concurring, the writ is properly issued. State ex rel. Lambert v. Coad, 23 M 131, 135, 57 P 1092.

Extent of Relief
The character of the duty measures the extent of the relief which can be afforded by mandamus. State ex rel. Stuewe v. Hindson, 44 M 429, 438, 120 P 485.

General Requisites for Issuance of the Writ

The writ of mandate should go whenever there is no speedy or adequate remedy in the ordinary course of law, and the person seeking it is entitled to have the defendant perform a clear legal duty. Raleigh v. District Court, 24 M 306, 314, 61 P 991; State ex rel. Bean v. Lyons, 37 M 354, 365, 96 P 922; State ex rel. Stuewe v. Hindson, 44 M 429, 438, 120 P 485; State ex rel. Furnish v. Mullendore, 53 M 109, 116, 161 P 949.

To obtain the aid of a court by mandamus, relator must establish a clear legal right in himself to the relief prayed for, and a violation of duty by the person or officer sought to be coerced. State ex rel. Beach v. District Court, 29 M 265, 269, 74 P 498; State ex rel. Cutts v. Hart, 56 M 571, 578, 185 P 769.

Mandamus lies only to compel the performance of a clear legal duty. State ex rel. Breen v. Toole, 32 M 4, 10, 79 P 403; State ex rel. Donlan v. Board of Commrs., 49 M 517, 522, 143 P 984; State ex rel. Boulware v. Porter, 55 M 471, 475, 178 P 832.

In a proceeding by mandamus against the state treasurer to compel that official to pay a member of the legislature the compensation due him by law, the petitioner must show a legal right in himself to the relief prayed for, and a violation of his duty on the part of the state treasurer, and the court has nothing to do in such a proceeding with the question of a quantum meruit for the value of the services rendered by the petitioner. State ex rel. Cutts v. Hart, 56 M 571, 578, 185 P 769.

To secure the aid of a court by mandamus the relator must establish a clear legal right in himself, and a clear violation of a legal duty by the person or officer sought to be coerced into action, if there is any other adequate remedy to which he can resort to enforce his right, the writ does not lie. State ex rel. Peterson et al. v. Peck, 91 M 5, 8, 4 P 2d 1086.

Inadequate Right of Appeal is No Bar to Issuance of Writ

The existence of an inadequate right of appeal is not a bar to the issuance of a writ of mandamus. State v. District Court, 89 M 531, 534, 300 P 235.

Mandamus Lies for Supreme Court to Review and Correct Action of District Court in Construing Opinion of Supreme Court

The supreme court may construe its own judgments and orders, and where the district court has misconstrued its order in remanding a case, or has acted beyond its power in construing it, mandamus will issue to review and correct its action. State v. District Court et al., 77 M 594, 605, 251 P 1061.

Mandamus Lies to Compel a City to Levy a Tax to Pay a Contract Obligation

Mandamus was the remedy to compel a city to levy a special tax to pay ascertained water rentals due under a valid contract for a water supply, the city having repudiated the contract. A command in the writ that the city levy sufficient taxes to pay the rentals due, and those that will become due for the remaining six months of the year, is proper. State ex rel. Great Falls W. W. Co. v. Great Falls City Council, 19 M 518, 538, 49 P 15.

Mandamus Lies to Compel Assessment of Property

A principle of assessment which, as a settled policy, omits the assessment of a large portion of assessable property is fundamentally wrong; hence where the State Board of Equalization has adopted such a principle, mandamus lies to compel assessment of the omitted property. *State v. State Board of Equalization*, 93 M 19, 48, 17 P 2d 68.

Mandamus Lies to Compel Court Stenographer to Write Out and File Objections, etc.

Mandamus lies to compel the court stenographer to write out and file a list of the objections, rulings, and exceptions occurring on the trial of a cause. *State ex rel. Kranich v. Supple*, 22 M 184, 189, 56 P 20.

Mandamus Lies to Compel Executor to Execute a Conveyance

Under section 10228, requiring an executor, after the district court sitting in probate makes an order confirming a sale of estate real property, to execute a conveyance to the purchaser, execution of the conveyance is a mere ministerial act, performance of which may be compelled by mandamus. *State v. McCracken*, 91 M 157, 165, 6 P 2d 869.

Mandamus Lies to Compel Lower Court to Assume Jurisdiction of a Cause

While mandamus does not lie to compel a subordinate court to reverse a conclusion once reached, or correct an erroneous decision, or direct it how it shall decide a question, it does lie to compel it to assume jurisdiction and determine the merits of a cause where it erroneously decides, as a matter of law, that it has no jurisdiction or refuses to proceed, unless there is an adequate remedy by appeal or other method of review. *State v. District Court*, 89 M 531, 534, 300 P 235.

Mandamus Lies to Compel Sheriff to Deliver Property

When it becomes the sheriff's duty to deliver possession of the property in controversy to the plaintiff, in an action of claim and delivery, the performance of that duty may be compelled by mandamus. *State ex rel. Johnson v. Collins*, 41 M 526, 530, 110 P 526.

Mandamus Lies to Compel State Prison Authorities to Allow Attorney to See Client in Private

An attorney whose client is imprisoned in the state penitentiary may in his own behalf bring mandamus proceedings to compel the prison authorities to permit him to consult his client in private. *State v. Board of Prison Commrs. et al.*, 84 M 14, 19, 273 P 1044.

Mandamus Lies to Reinstate an Employee Discharged in Violation of Civil Service Laws

Mandamus lies to reinstate an officer or employee who has been discharged in violation of the civil service laws. *State ex rel. Driffill v. City of Anaconda*, 41 M 577, 581, 111 P 345.

Mandamus Lies to Require a Court to Reinstate a Cause and to Determine Same

Where, after defendant's motion for judgment on the pleadings had been argued and submitted, the court dismissed the action without prejudice on plaintiff's motion, mandamus will lie to require the court to reinstate the cause and determine defendant's motion. *State ex rel. Mont. C. Ry. Co. v. District Court*, 32 M 37, 45, 79 P 546.

While ordinarily mandamus does not lie to correct an error of the district court, yet where its erroneous action was tantamount to refusal to act—as where, on motion, it struck a petition for letters of administration from the files without affording an opportunity to petitioner to be heard on the merits, a duty specially enjoined upon it by law—mandamus is the proper remedy to compel restoration of the petition to the files. *State ex rel. Peel v. District Court*, 59 M 505, 516, 517, 197 P 741.

Power of Court to Issue Writ to Officer Outside of Its District or County

Held, that the district court of one district or county has jurisdiction to issue a writ of mandate directed to an officer of another district or county to compel him to perform a ministerial act which the law specially enjoins as a duty resulting from his office. *State v. District Court et al.*, 69 M 415, 422, 222 P 444.

When Court Will Mandamus an Officer to Do His Duty in Advance of the Time Fixed by Law

Where an officer's duty is a simple, defined duty, purely ministerial, arising under circumstances admitted or proved to exist, and imposed by law, and he refuses performance in advance of the time fixed by law therefor, mandamus will at once lie to compel a performance at the proper time; and the court will not wait to determine whether or not he should perform until some future time when litigation arose, and when it was too late to require the performance of the defined duty. *State ex rel. Lloyd v. Rotwitt*, 15 M 29, 36, 37 P 845.

When Mandamus is Not Proper

An ordinance granting a street railway company the right to construct and operate lines in certain streets, and providing that, if the company shall not construct

and operate a certain portion of the line within a certain time, the right shall be forfeited, as to the parts where the failure occurs, does not impose on the company the duty to continue the operation of any portion of the line, and mandamus cannot issue to compel it to do so. *State ex rel. Knight v. Helena Power & Light Co.*, 22 M 391, 393, 56 P 685.

A telephone company, having the absolute right to use the streets of a city for the erection of its poles and construction of its lines, subject only to such reasonable regulations by the city as to where in the streets the poles and other appliances should be placed, cannot compel the city by mandamus to designate the streets, avenues, and alleys upon which to place its necessary appliances. *State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor, etc., of Red Lodge*, 33 M 345, 346, 83 P 642.

Where a criminal cause is removed from one county to another for trial, it is the duty of the county to which it is transferred to furnish a prosecuting officer, and mandamus will not issue to compel the county from which the change of venue was had to pay special counsel appointed by the court to represent the state. *State v. Lewis & Clark County*, 34 M 351, 354, 86 P 419.

Mandamus lies to compel action, but not to control discretion. *State ex rel. Stuewe v. Hindson*, 44 M 429, 436, 120 P 485; *State ex rel. Scollard v. Board of Examiners*, 52 M 91, 98, 156 P 124.

Where the affidavit for the writ of mandamus does not disclose a clear legal duty on the part of a board of county commissioners to issue warrants in a certain amount in payment of a bridge voluntarily erected by relator upon a public highway, a demurrer for want of substance is properly sustained. *State ex rel. Donlan v. Board of Commrs.*, 49 M 517, 522, 143 P 984.

The writ of mandate will not issue to compel the doing of an idle or useless thing, but only to compel the performance of a clear legal duty. *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 596, 144 P 159.

The question whether state lands lying within three miles of the limits of a city or town shall be leased or sold, being one addressed to the sound discretion of the state board of land commissioners, mandamus does not lie to compel such board to entertain an application to lease. *State ex rel. Gibson v. Stewart*, 50 M 404, 407, 147 P 276.

Unless an act, performance of which by a board of county commissioners is sought to be compelled by mandamus, is one which the law specifically enjoins upon it as a

duty resulting from the office, the writ does not lie. *State ex rel. Koefod v. Board of Commrs.*, 56 M 355, 358, 185 P 147.

The writ of mandate lies only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station, and therefore will not issue to do a thing beyond the power or duty of the person sought to be compelled. *State v. Poland et al.*, 61 M 600, 606, 203 P 352.

Held, that mandamus to compel school trustees of a district of the third class to rescind their action in closing two of the three schools in the district taken on the ground of the unfavorable financial condition of the district and on account of the removal of many families in the vicinity of those closed does not lie, the matter of maintaining or closing of any particular school or schools, as well as the furnishing of transportation of the children to another school, being addressed to the discretion of the board which cannot be controlled by mandamus. *State ex rel. Robinson v. Desonia et al.*, 67 M 201, 203, 215 P 220.

Under this section, the writ of mandate issues only to compel the performance of an act which the law specially enjoins as a duty resting with the respondent; hence, it does not lie to compel the state board of equalization to compel it to consent to the transfer of shares of stock on the books of a foreign corporation doing business in the state and to return to the relator an inheritance tax paid under protest by the executor of the nonresident decedent, owner of the stock, the law not making it the specific duty of the board to do so. *State ex rel. Bankers' Trust Co. v. Walker*, 70 M 484, 502, 226 P 894.

While under *Greeley v. Cascade County*, 22 M 580, mandamus is a proper remedy to compel the county treasurer to pay interest coupons upon county bonds, if it then has funds out of which to make payment, where, in an action by the holder of interest coupons to recover the amount due thereon, there was no showing that the county was in funds at the time the action was commenced, the court could properly entertain the suit. *Kalman v. Treasure County et al.*, 84 M 285, 296, 275 P 743.

Upon the resignation of a town clerk, the mayor appointed a successor whom the council would not confirm; the town books were delivered by the former to the latter and held by her at the mayor's direction. Members of the council brought a proceeding in mandamus to compel the mayor to deliver the books to them for inspection. Held, that while the books being held by the appointee under his direction might be

said to be in his possession under his duty to care for and preserve them, the law did not impose upon him any duty which he may be coerced to perform with relation to them, and therefore the writ does not lie to compel action on his part. *State ex rel. Peterson et al. v. Peek*, 91 M 5, 8, 4 P 2d 1086.

There being no provision of law authorizing a county holding city property under tax deed to pay delinquent special assessments against it, mandamus does not lie to compel the county treasurer, acting as collector of taxes for the city, to collect them, the writ issuing only to compel the performance of a clear legal duty. *State ex rel. City of Billings v. Osten*, 91 M 76, 82, 5 P 2d 562.

When Mandamus is Proper Remedy

Where defendant in a proceeding for a writ of certiorari after return made filed a motion for judgment on the pleadings, which motion was argued by the parties and submitted for decision, and the court instead of rendering judgment as required by section 9844, made an order, non-appellable in character, dismissing the proceeding, the writ of mandate compelling it to render judgment is the proper remedy. *State ex rel. Altop v. District Court et al.*, 72 M 49, 54, 231 P 99.

Mandamus is a proper remedy where there is not a plain, speedy and adequate remedy at law, and the writ lies to compel the performance of an act which the law specifically enjoins as a duty. *State ex rel. Federal Land Bk. v. Hays*, 86 M 58, 68, 282 P 32; *State v. District Court et al.*, 97 M 523, 528, 37 P 2d 329.

Mandamus lies to compel action where the act sought to be compelled is one which the law specially enjoins as a duty resulting from an office, trust or station, but not to control discretion. *State v. District Court*, 89 M 531, 534, 300 P 235.

Mandamus is a proper remedy to compel the performance of a ministerial act or duty. *State v. McCracken*, 91 M 157, 165, 6 P 2d 869.

When Mandamus Lies to Compel a Board to Act

Mandamus does not lie to control the discretion lodged in a board of county commissioners in the matter of awarding a public contract, but where fraud has entered into the transaction, it cannot be said that discretion has been exercised, and the writ is available to compel the board to act. *State ex rel. R. M. F. Co. v. Toole*, 26 M 22, 29, 66 P 496; *State ex rel. Stuewe v. Hindson*, 44 M 429, 436, 120 P 485.

When the petition for the removal of a county seat is signed by a majority of the ad valorem taxpayers of the county, all of the signers being qualified voters, it is the ministerial duty of the board of commissioners to act upon the petition and submit the question of removal to a vote; and, if it declines to act, mandamus lies to compel it to act. *State ex rel. Stringfellow v. Board of Commrs.*, 42 M 62, 79, 111 P 144. See also *State ex rel. Arthurs v. Board of Commrs.*, 44 M 51, 71, 118 P 804.

Mandamus is the proper remedy to compel commissioners appointed to adjust county indebtedness between an old and a new county to reassemble and correctly apportion such indebtedness; the fact of their adjournment being immaterial. *State ex rel. Furnish v. Mullendore*, 53 M 109, 116, 161 P 949.

Failure or neglect of the Railroad Commission to act promptly upon an application for permission to operate a bus line is no justification for the applicant to operate without the requisite certificate, his remedy being to compel action by mandamus. *Northern Pacific Ry. Co. v. Bennett*, 83 M 483, 492, 272 P 987.

References

Cited or applied as section 566, First Division Compiled Statutes 1887, in *State v. First Judicial District*, 16 M 274, 40 P 600; as section 7214, Revised Codes, in *City of Butte v. Montana Ind. Tel. Co.*, 50 M 574, 579, 148 P 384; *Huntington v. Yellowstone County*, 80 M 20, 24, 257 P 1041.

9849. Writ—when and upon what to issue. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

History: En. Sec. 384, p. 123, Bannack Stat.; re-en. Sec. 443, p. 224, L. 1867; re-en. Sec. 519, p. 141, Cod. Stat. 1871; re-en. Sec. 549, p. 181, L. 1887; re-en. Sec. 549, 1st Div. Rev. Stat. 1879; re-en. Sec. 567, 1st Div. Comp. Stat. 1887; amd. Sec. 1962, C. Civ. Proc. 1895; re-en. Sec. 7215, Rev.

C. 1907; re-en. Sec. 9849, R. C. M. 1921 Cal. C. Civ. Proc. Sec. 1086.

Inadequate Right of Appeal is No Bar to Issuance of Writ

The existence of an inadequate right of appeal is not a bar to the issuance of a

writ of mandamus. *State v. District Court*, 89 M 531, 534, 300 P 235.

Nature of Writ

Mandamus, like injunction, is an emergency writ, and its purpose is to furnish a speedy remedy for some apparent wrong. The writ will not be issued to compel the performance of an act which would be useless, ineffectual, or unavailing as a remedy, and may be refused if long delay or laches in making the application appears, and there is no showing to explain or excuse its existence. *State ex rel. Beach v. District Court*, 29 M 265, 272, 74 P 498. See also *State ex rel. Bailey v. Edwards*, 40 M 313, 319, 106 P 703; *State ex rel. Bennetts v. Duncan*, 47 M 447, 451, 133 P 109.

Mandamus is an extraordinary remedy to be obtained only in those rare cases wherein there is not any plain, speedy and adequate remedy in the ordinary course of law, and therefore the applicant must disclose the facts which establish his clear legal right to the relief sought. *State ex rel. Duggan v. District Court*, 65 M 197, 199, 210 P 1062.

To supersede the remedy by mandamus, the party seeking the writ must not only have a specific, adequate legal remedy, but one competent to afford relief upon the very subject matter of his application; it must be a remedy which will place the relator in statu quo, i. e., in the same position he would have been had the duty, performance of which is sought to be compelled, been performed. *State v. McCracken*, 91 M 157, 165, 6 P 2d 869.

Party Beneficially Interested

An elector of the state is beneficially interested in legal proceedings to compel its officers to perform their duties, and is the proper party to apply for the writ of mandate to secure this result. *Chumasero v. Potts*, 2 M 242, 254. See also *State ex rel. Buck v. Board of Commrs.*, 21 M 469, 474, 54 P 939; *State ex rel. Stuewe v. Hindson*, 44 M 429, 438, 120 P 485; *Milligan v. City of Miles City*, 51 M 374, 382, 153 P 276; *Poe v. Sheridan County*, 52 M 279, 291, 157 P 185; *Hill v. Rae*, 52 M 378, 380, 158 P 826.

A resident and taxpayer of a school district, who sought by mandamus to compel a school board to submit the question of the removal of a school to the electors of the district, was a party beneficially interested, within the meaning of this section, and entitled to make the application for the writ. *State ex rel. Bean v. Lyons*, 37 M 354, 365, 96 P 922.

Pleadings

Since the alternative writ of mandate and the affidavit upon which it is issued

together constitute the first pleading of the applicant, a motion to quash challenges the sufficiency of both. *State ex rel. Duggan v. District Court*, 65 M 197, 199, 210 P 1062.

What Court May Consider in Determining Advisability of Issuing Writ

Mandamus is not a writ of right; it issues only in the discretion of the court and will only be allowed in furtherance of justice in a proper case. In determining whether it shall issue or not, the court is not bound to take the case as the applicant presents it; it may consider defendant's rights, the interests of third persons, the importance or unimportance of the case and the applicant's conduct. *State ex rel. Larsen v. District Court et al.*, 78 M 435, 439, 254 P 414.

When Mandamus Does Not Lie

Mandamus will not lie to compel the board of medical examiners to issue a certificate to practice medicine to an applicant whose demand has been refused, where the statute creating such board has provided a plain, speedy, and adequate remedy at law in such case in an appeal to the district court. *State ex rel. Narcross v. Board of Medical Examiners*, 10 M 162, 165, 25 P 440.

Mandamus may not be invoked to correct a judgment entered by the district court, or where the remedy by appeal is plain, speedy, and adequate. *State ex rel. Centennial Brewing Co. v. District Court*, 47 M 547, 548, 133 P 679.

The writ of mandate is available only in those rare cases where there is not any other plain, speedy and adequate remedy, hence does not lie to review an order granting or refusing to grant a change of venue, such order having been made appealable by Chapter 39, Laws of 1925. *State v. District Court*, 74 M 488, 489, 241 P 240.

The writ of mandate will not issue where the applicant has a plain, speedy and adequate remedy in equity, as by the issuance of an injunction, the court in the exercise of its discretion may refuse the writ. *State ex rel. Larsen v. District Court et al.*, 78 M 435, 439, 254 P 414.

While under *Greeley v. Cascade County*, 22 M 580, mandamus is a proper remedy to compel the county treasurer to pay interest coupons upon county bonds, if it then has funds out of which to make payment, where, in an action by the holder of interest coupons to recover the amount due thereon, there was no showing that the county was in funds at the time the action was commenced, the court could properly entertain the suit. *Kalman v. Treasure County et al.*, 84 M 285, 296, 275 P 743.

When Mandamus Lies

Mandamus may be granted when neither appeal nor other proceeding in the ordinary course of law affords a plain, speedy, and adequate remedy. State ex rel. King v. District Court, 24 M 494, 500, 62 P 820.

Mandamus is the proper remedy to compel the district court to dismiss a case against a defaulted defendant where a long time has elapsed without the default having been demanded or entered. State ex rel. Stiefel v. District Court, 37 M 298, 305, 96 P 337.

Mandamus is the proper remedy to require the trustees of a school district to determine the location of a site for a schoolhouse, where they arbitrarily remove a school to a site selected by themselves, without consulting the electors. State ex rel. Bean v. Lyons, 37 M 354, 365, 96 P 922.

Where defendant in a proceeding for a writ of certiorari after return made filed a motion for judgment on the pleadings, which motion was argued by the parties and submitted for decision, and the court instead of rendering judgment as required by section 9844, made an order, non-appealable in character, dismissing the proceeding, the writ of mandate compelling it to render judgment is the proper remedy. State ex rel. Altop v. District Court et al., 72 M 49, 55, 231 P 99.

9850. Must be either alternative or peremptory—substance. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted.

History: En. Sec. 385, p. 123, Bannack Stat.; re-en. Sec. 444, p. 224, L. 1867; re-en. Sec. 520, p. 141, Cod. Stat. 1871; re-en. Sec. 550, p. 181, L. 1887; re-en. Sec. 550, 1st Div. Rev. Stat. 1879; re-en. Sec. 568, 1st Div. Comp. Stat. 1887; amd. Sec. 1963, C. Civ. Proc. 1895; re-en. Sec. 7216, Rev. C. 1907; re-en. Sec. 9850, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1087.

Operation and Effect

An alternative writ of mandate which states generally the acts which the parties have omitted to do, and which they are required to perform, is sufficient under this section. State ex rel. Leech v. Board of Canvassers, 13 M 23, 28, 31 P 879.

The sufficiency of the affidavit on which an alternative writ of mandate is based

An attorney whose client is imprisoned in the state penitentiary may in his own behalf bring mandamus proceedings to compel the prison authorities to permit him to consult his client in private. State v. Board of Prison Commrs. et al., 84 M 14, 273 P 1044.

Mandamus is a proper remedy where there is not a plain, speedy and adequate remedy at law, and the writ lies to compel the performance of an act which the law specifically enjoins as a duty. State ex rel. Federal Land Bk. v. Hays, 86 M 58, 68, 282 P 32.

Mandamus is a proper remedy to compel the performance of a ministerial act or duty. State v. McCracken, 91 M 157, 165, 6 P 2d 869.

Id. Under section 10228, requiring an executor, after the district court sitting in probate makes an order confirming a sale of estate real property, to execute a conveyance to the purchaser, execution of the conveyance is a mere ministerial act, performance of which may be compelled by mandamus.

References

Cited or applied as section 1962, Code of Civil Procedure, in State ex rel. Great Falls W. W. Co. v. Great Falls City Council, 19 M 518, 538, 49 P 15; State ex rel. Mont. C. Ry. Co. v. District Court, 32 M 37, 45, 79 P 546.

may be tested by a motion to quash the writ; and such motion performs the same office as a general demurrer, and brings the law of the case before the court. State ex rel. State Pub. Co. v. Hogan, 22 M 384, 388, 56 P 818.

This section contemplates that, after service of a peremptory writ of mandate, a return shall be made by the party upon whom the writ is served; and while the code does not specify what the return shall contain, the general rule is that it should contain a certificate of compliance, unless something impossible or unlawful is commanded, or such a change of conditions has taken place as to make compliance improper, in which case the facts should be stated. State ex rel. Edwards v. District Court, 41 M 369, 371, 109 P 434.

9851. If the application be without notice, the alternative writ may issue; otherwise, the peremptory—notice and default. When an application to the court or judge is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days, or a shorter time, in the discretion of the court or judge. The writ cannot be granted by default. The case must be heard by the court or judge, whether the adverse party appear or not.

History: En. Sec. 386, p. 123, Bannack Stat.; re-en. Sec. 445, p. 224, L. 1867; re-en. Sec. 521, p. 142, Cod. Stat. 1871; re-en. Sec. 551, p. 182, L. 1887; re-en. Sec. 551, 1st Div. Rev. Stat. 1879; re-en. Sec. 569,

1st Div. Comp. Stat. 1887; amd. Sec. 1964, C. Civ. Proc. 1895; re-en. Sec. 7217, Rev. C. 1907; re-en. Sec. 9851, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1088.

9852. The adverse party may answer under oath. On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action.

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History: En. Sec. 387, p. 123, Bannack Stat.; re-en. Sec. 446, p. 224, L. 1867; re-en. Sec. 552, p. 142, Cod. Stat. 1871; re-en. Sec. 552, p. 182, L. 1877; re-en. Sec. 552, 1st Div. Rev. Stat. 1879; re-en. Sec. 570, 1st Div. Comp. Stat. 1887; amd. Sec. 1965, C. Civ. Proc. 1895; re-en. Sec. 7218, Rev. C. 1907; re-en. Sec. 9852, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1089.

Operation and Effect

This section and section 9859 show a proceeding in mandamus is not regarded by the legislative assembly as a civil action. *Chumasero v. Potts*, 2 M 242, 267; *Bailey v. Edwards*, 47 M 363, 371, 133 P 1095.

References

State v. State Bank of Moore et al., 90 M 539, 548, 4 P 2d 717.

9853. If an essential question of fact is raised, the court may order a jury trial. If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court or judge may, in its or his discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had. The question to be tried must be distinctly stated in the order for trial. If the proceeding is in the district court or before a district judge, the trial must take place as in other cases. If a jury be required in the supreme court, a jury must be drawn and selected from the jury-boxes of the county in which the seat of government is located, and the clerk of the district court of said county must place such boxes in the custody of the clerk of the supreme court for that purpose. The conduct of the trial shall be the same as in the district court, and the clerk of the supreme court shall have the same authority to issue process, enter orders and judgments as the district clerk has in like cases. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

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9853
102 Mont. 291
57 P (2d) 786

History: Ap. p. Sec. 388, p. 123, Bannack Stat.; re-en. Sec. 447, p. 224, L. 1867; re-en. Sec. 523, p. 142, Cod. Stat. 1871; re-en. Sec. 553, p. 182, L. 1877; re-en. Sec. 553, 1st Div. Rev. Stat. 1879; re-en. Sec.

571, 1st Div. Comp. Stat. 1887; en. Sec. 1966, C. Civ. Proc. 1895; re-en. Sec. 7219, Rev. C. 1907; re-en. Sec. 9853, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1090.

Operation and Effect

Any and all of the questions arising in a mandamus proceeding, whether of law or of fact, may be tried by the court without a jury, with or without a reference. *Chumascero v. Potts*, 2 M 242, 259; *Bailey v. Edwards*, 47 M 363, 372, 133 P 1095.

The rule that essential facts constituting a defense in mandamus proceedings and raising questions triable by jury or court must be pleaded by answer, applies only when such facts are not disclosed upon the face of the petition or affidavit. *State v. State Bank of Moore et al.*, 90 M 539 548, 4 P 2d 717.

9854. The applicant may demur to the answer or contradict it by proof. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may contradict it by proof, either in direct denial or by way of avoidance.

History: En. Sec. 389, p. 123, *Bannack Stat.*; re-en. Sec. 448, p. 224, L. 1867; re-en. Sec. 524, p. 142, *Cod. Stat.* 1871; re-en. Sec. 554, p. 183, L. 1877; re-en. Sec. 554, 1st Div. Rev. Stat. 1879; re-en. Sec. 572,

1st Div. Comp. Stat. 1887; re-en. Sec. 1967, C. Civ. Proc. 1895; re-en. Sec. 7220, Rev. C. 1907; re-en. Sec. 9854, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1091.

9855. Motion for new trial—where made. The motion for a new trial must be made in the court in which the issue of fact is tried.

History: En. Sec. 555, p. 183, L. 1877; re-en. Sec. 555, 1st Div. Rev. Stat. 1879; re-en. Sec. 573, 1st Div. Comp. Stat. 1887; re-en. Sec. 1968, C. Civ. Proc. 1895; re-en.

Sec. 7221, Rev. C. 1907; re-en. Sec. 9855, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1092.

9856. Procedure upon failure to give notice of or denial of motion for new trial. If no notice of a motion for a new trial be given, or, if given, the motion be denied, the argument must proceed at any time the court or judge may direct.

History: En. Sec. 1969, C. Civ. Proc. 1895; re-en. Sec. 7222, Rev. C. 1907; re-en. Sec. 9856, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1093.

9857. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial right of the parties, the court or judge must proceed to hear or fix a day for hearing the argument of the case.

History: En. Sec. 392, p. 124, *Bannack Stat.*; re-en. Sec. 451, p. 225, L. 1867; re-en. Sec. 527, p. 143, *Cod. Stat.* 1871; amd. Sec. 557, p. 183, L. 1877; re-en. Sec. 557, 1st Div. Rev. Stat. 1879; re-en. Sec. 575, 1st Div. Comp. Stat. 1887; re-en. Sec. 1970, C. Civ. Proc. 1895; re-en. Sec. 7223, Rev. C. 1907; re-en. Sec. 9857, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1094.

denied in the relator's replication, where the pleadings raised the questions of law only, and where relator relied upon the facts alleged in his affidavit, and expressly admitted by respondent's answer as ground for the relief which he prayed for. *State ex rel. Thompson v. Kenney*, 9 M 223, 230, 23 P 733.

References

Cited or applied as section 1970, Code of Civil Procedure, in *State ex rel. State Pub. Co. v. Hogan*, 22 M 384, 389, 56 P 818.

9858. Damages, costs and peremptory mandate allowed applicant, when. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay;

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109 P.(2d) 1103
109 P.(2d) 1108

9858
132 P.(2d) 158

9858
151 P. 2d 178

9858
177 P.(2d) 197

Provided, however, that in all cases where the respondent is a state, county or municipal officer all damages and costs, or either, which may be recovered or awarded shall be recovered and awarded against the state, county or municipal corporation represented by such officer, and not against such officer so appearing in said proceeding and the same shall be a proper claim against the state or county or municipal corporation for which such officer shall have appeared, and shall be paid as other claims against the state, county or municipality are paid; but in all such cases, the court shall first determine that the officer appeared and made defense in such proceeding in good faith.

History: En. Sec. 393, p. 124, Bannack Stat.; re-en. Sec. 452, p. 225, L. 1867; re-en. Sec. 528, p. 143, Cod. Stat. 1871; re-en. Sec. 558, p. 183, L. 1877; re-en. Sec. 558, 1st Div. Rev. Stat. 1879; re-en. Sec. 576, 1st Div. Comp. Stat. 1887; re-en. Sec. 1971, C. Civ. Proc. 1895; re-en. Sec. 7224, Rev. C. 1907; re-en. Sec. 9858, R. C. M. 1921; amd. Sec. 1, Ch. 5, L. 1925. Cal. C. Civ. Proc. Sec. 1095.

Damages Which May be Recovered

The damages allowable under this section, in a mandamus proceeding, are such as are incidental to the proceeding itself, and not those arising out of the transaction which the writ was invoked to redress. *Bailey v. Edwards*, 47 M 363, 373, 133 P 1095.

The damages which the applicant for a writ of mandamus is entitled to recover in case judgment is given in his favor, held to include the expense to which he was put in paying for the services of an attorney to bring the proceeding. *State ex rel. Shea v. Cocking et al.*, 66 M 169, 176, 179, 213 P 594.

Under this section, a successful applicant for a writ of mandamus may be awarded damages and costs; the damages contemplated are such as are incidental to the proceeding itself and not those which arose out of the prior preclusion and deprivation which the writ was invoked in part to redress, such damages including the expense incurred by relator in payment of services of an attorney rendered in bringing the proceeding. *State ex rel. Barry v. O'Leary et al.*, 83 M 445, 451, 272 P 677.

Under this section, the successful relators in a mandamus proceeding against the state board of equalization to compel reassessment of gross proceeds of mines for taxation purposes, held entitled to recover as damages their reasonable attorneys' fees and expenses incurred in bringing and prosecuting the action, including printing of briefs, such sums be-

ing a proper charge against the state represented by respondent board. *State v. State Board of Equalization*, 93 M 19, 49, 63 et seq., 17 P 2d 68.

Dismissed Party Defendant Not Entitled to Attorney's Fees and Costs

A mining company made a part respondent with the State Board of Equalization in a mandamus proceeding to compel reassessment of gross proceeds of mines' taxes, but dismissed from the action after hearing, held not entitled to attorneys' fees nor its expense incident to printing briefs, the statutes not so providing. *State v. State Board of Equalization*, 93 M 49, 63 et seq., 17 P 2d 68.

When Damages Are Deemed Waived

Under this section, held that where the applicant for a writ of mandate claims damages he must allege them in his application, or file a bill of particulars in the proceeding before conclusion of the hearing, and submit proof; otherwise damages are deemed waived and the court after final judgment entered is without jurisdiction to make award thereof in the proceeding. *State v. District Court et al.*, 75 M 122, 125, 242 P 421.

When Recoverable From State, County, etc.

While the general rule is that public officers are personally liable for the costs incurred in mandamus proceedings to compel them to perform their duties, since the enactment of this section, where a state, county or municipal officer is respondent in such a proceeding all damages and costs awarded to relator are recoverable from the body represented by the officer, if the court finds that he made his defense in good faith. *State ex rel. O'Connor v. McCarthy*, 86 M 100, 104 et seq., 282 P 1045.

References

State v. State Highway Commission, 82 M 63, 73, 265 P 1.

9859. Service of the writ. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed

by order of the court or judge. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.

History: Ap. p. Sec. 394, p. 124, Bannack Stat.; re-en. Sec. 453, p. 225, L. 1867; re-en. Sec. 529, p. 143, Cod. Stat. 1871; en. Sec. 559, p. 183, L. 1877; re-en. Sec. 559, 1st Div. Rev. Stat. 1879; re-en. Sec. 577, 1st Div. Comp. Stat. 1887; re-en. Sec. 1972, C. Civ. Proc. 1895; re-en. Sec. 7225, Rev.

C. 1907; re-en. Sec. 9859, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1096.

References

Cited or applied as section 7225, Revised Codes, in Bailey v. Edwards, 47 M 363, 371, 133 P 1095.

9860. Penalty for disobedience to the writ. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court or judge that any member of such tribunal, corporation, or board, or person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

History: En. Sec. 395, p. 124, Bannack Stat.; re-en. Sec. 454, p. 225, L. 1867; re-en. Sec. 530, p. 143, Cod. Stat. 1871; re-en. Sec. 560, p. 183, L. 1877; re-en. Sec. 560, 1st Div. Rev. Stat. 1879; re-en. Sec. 578, 1st Div. Comp. Stat. 1887; amd. Sec. 1973, C. Civ. Proc. 1895; re-en. Sec. 7226, Rev. C. 1907; re-en. Sec. 9860, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1097.

References

Cited or applied as section 1973, Code of Civil Procedure, in Greeley v. Cascade County, 22 M 580, 589, 57 P 274; State ex rel. Brass v. Horn, 36 M 418, 421, 93 P 351.

CHAPTER 93

WRIT OF PROHIBITION

- Section 9861. Prohibition defined.
9862. Where and when issued.
9863. Writ may be alternative or peremptory, form of.
9864. Certain provisions of the preceding chapter applicable.

9861. Prohibition defined. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

History: En. Sec. 561, p. 184, L. 1877; re-en. Sec. 561, 1st Div. Rev. Stat. 1879; re-en. Sec. 579, 1st Div. Comp. Stat. 1887; amd. Sec. 1980, C. Civ. Proc. 1895; re-en. Sec. 7227, Rev. C. 1907; re-en. Sec. 9861, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1102.

Counterpart of the Writ of Mandate

This section, making a writ of prohibition "the counterpart of a writ of mandate," does not enlarge the class of cases in which the writ may be resorted to in view of the clause providing that the writ is to arrest the proceedings of any tri-

bunal which are without, or in excess of, jurisdiction. State ex rel. Boston & M. C. C. & S. M. Co. v. District Court, 22 M 220, 231, 56 P 219.

Nature of Writ

The character of the writ of prohibition is not changed by the code; nor can any question be inquired into except that of jurisdiction in the proceeding inaugurated by it. It is preventive, rather than remedial, and cannot take the place of an appeal. State ex rel. Boston & M. C. C. & S. M. Co. v. District Court, 22 M 220, 231, 56 P 219.

The writ of prohibition is to be used sparingly for the furtherance of justice, and to secure order and regularity in the inferior tribunals; it arrests proceedings of a judicial character when they are without or in excess of jurisdiction; but it issues only when there is not a plain, speedy, and adequate remedy in the ordinary course of law. *State ex rel. Myer-sick v. District Court*, 53 M 450, 452, 164 P 546.

The writ of prohibition is appropriate only when the lower court is acting without or in excess of jurisdiction and when the relator has no plain, speedy and adequate remedy at law. *Boucher v. St. George et al.*, 88 M 162, 169, 293 P 315.

The writ of prohibition arrests proceedings when the court, corporation, board or person sought to be prohibited is proceeding without or in excess of jurisdiction; it is preventive, rather than remedial, cannot take the place of an appeal nor undo that which has been done. *State ex rel. Hauswirth v. Beadle et al.*, 90 M 24, 26, 300 P 197.

The writ of prohibition lies when a court is proceeding in excess of jurisdiction, but, where it has jurisdiction, a mistaken exercise of it does not justify a resort to the writ. *State ex rel. Sands v. District Court*, 95 M 427, 432, 26 P 2d 970.

Not Applicable to Arrest the Performance of a Mere Ministerial Function

An application for a writ of prohibition to prevent a county clerk from printing certain names on the official ballot will be dismissed on the ground that the supreme court does not have jurisdiction under this section to arrest the exercise of functions by a mere ministerial officer. *State ex rel. Scharnikow v. Hogan*, 24 M 379, 382, 62 P 493.

Presumption Obtains That Court Will Not Exceed Its Jurisdiction

On an application for a writ of prohibition to arrest the proceedings of a district court in a pending suit in equity, it will be presumed, in the absence of a showing to the contrary, that the court will not exceed the limitations of its jurisdiction, though it has no jurisdiction to grant a part of the relief asked for. *State ex rel. Boston & M. C. C. & S. M. Co. v. District Court*, 22 M 220, 238, 56 P 219.

What May be Reviewed to Determine Necessity for the Writ

It seems that, in order to ascertain whether a necessity exists for granting a writ of prohibition, a superior court is not precluded from determining by all that appears upon the face of the proceedings, and in rare cases even by evi-

dence aliunde the record, whether it is clearly apparent that the inferior court is about to exceed its jurisdiction. *State ex rel. Boston & M. C. C. & S. M. Co. v. District Court*, 22 M 220, 232, 56 P 219.

In considering the question whether the district court was without jurisdiction in making an order granting alimony and suit money to defend against an appeal from an order granting alimony and suit money, the supreme court may examine, not only the pleadings but the evidence before the lower court, in order to determine whether the lower court is about to exceed its jurisdiction. *State ex rel. Wooten v. District Court*, 57 M 517, 520, 189 P 233.

When Writ Does Not Lie

The writ of prohibition may issue only where there is no plain, speedy or adequate remedy in the ordinary course of law; hence where plaintiff had an appeal from a final judgment of the district court declaring forfeited liquors claimed by him and seized under the Prohibition Enforcement Act, he was not entitled to the writ to stay further action in the proceeding. *State ex rel. Barnes v. District Court*, 59 M 491, 492, 197 P 565.

The writ of prohibition lies only to arrest proceedings without or in excess of jurisdiction—the power to hear and determine the case; therefore where the affidavit for the writ does not present a jurisdictional question, as where a policeman under charges for misconduct seeks to disqualify a member of the police board from participating in the hearing for bias and prejudice but the statute does not provide for such disqualification, leaving the question of jurisdiction unaffected, the writ does not lie. *State ex rel. Mueller v. District Court*, 87 M 108, 116, 285 P 928.

Without or in Excess of Jurisdiction

A writ of prohibition will not lie to arrest the proceedings of an inferior court in the administration of an estate, unless it clearly appears that such proceedings are without, or in excess of, the jurisdiction of such inferior court. *State ex rel. Spalding v. Benton*, 12 M 66, 73, 29 P 425.

If the district court has jurisdiction of the subject-matter in controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy by prohibition. *State ex rel. Heinze v. District Court*, 32 M 394, 399, 80 P 673.

The rule that the supreme court will not issue a writ of prohibition to a district court while the matter as to which it is alleged the court will exceed its jurisdiction is pending before it undetermined,

and not until relator has in that court exhausted his remedies, does not apply where the lower court exceeded its jurisdiction in

taking cognizance of the matter in the first instance. State ex rel. Mueller v. District Court, 87 M 108, 116, 285 P 928.

9862. Where and when issued. The same may be issued by the supreme court or the district court, or any district judge, to any inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested.

History: En. Sec. 562, p. 184, L. 1877; re-en. Sec. 562, 1st Div. Rev. Stat. 1879; re-en. Sec. 580, 1st Div. Comp. Stat. 1887; amd. Sec. 1981, C. Civ. Proc. 1895; re-en. Sec. 7228, Rev. C. 1907; re-en. Sec. 9862, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1103.

"Beneficially Interested"

Since the court will look to the allegations of fact rather than to the legal conclusions that relators are beneficially interested, in determining whether a writ of prohibition should issue, an application or affidavit therefor by the mayor of a city whose interest he seeks to protect in litigation for the reinstatement of a policeman will be held sufficient, without stating that he is beneficially interested. State v. Jackson, 58 M 90, 93, 190 P 295.

Compared to Writ of Certiorari

The right to a writ of prohibition is not, like the right to a writ of certiorari, defeated by the existence of the remedy by appeal, unless this remedy is plain, speedy, and adequate. An application for the former writ is addressed to the sound discretion of the supreme court; and whenever it is made to appear, that under no conceivable circumstances can the district court render a valid judgment because of a lack of jurisdiction, the discretion should be exercised in favor of issuing the writ. State ex rel. Lane v. District Court, 51 M 503, 508, 154 P 200.

Mere Fact That the Remedy of Appeal is Available is Not Always a Bar to Writ

The existence of a remedy by appeal is not of itself a bar to a writ of prohibition, unless such remedy be plain, speedy, and adequate. A remedy is speedy when, having in mind the subject-matter involved, it can be pursued with expedition, and without essential detriment to the party aggrieved; and it is neither speedy nor adequate if its slowness is likely to produce immediate injury or mischief. State ex rel. Marshall v. District Court, 50 M 289, 292, 146 P 743.

Where the remedy by appeal from an order allowing alimony pendente lite, attorney's fees, and suit money is not ade-

quate or speedy, the fact that an appeal lies is not sufficient reason for denying the writ of prohibition against the enforcement of the order. State ex rel. Wooten v. District Court et al., 57 M 517, 189 P 233.

Where the court made an order allowing alimony and suit money to defendant to defend against an appeal from an order granting alimony and suit money pendente lite, the fact that an appeal lies from the first mentioned order will not oust the supreme court of jurisdiction to entertain a writ of prohibition restraining the enforcement of such an order, since upon each appeal a new order would be made and the action would be disposed of on its merits before the appeal could be heard and therefore an appeal would not be adequate or speedy. State ex rel. Wooten v. District Court, 57 M 517, 519, 189 P 233.

Where it is apparent that the district court cannot under any conceivable circumstances render a valid judgment in a cause pending before it, and an appeal would be neither speedy nor adequate, the writ of prohibition lies to prevent it from proceeding further. State ex rel. Thibodeau v. District Court, 70 M 202, 207, 224 P 866.

When Writ Does Not Lie

Prohibition does not lie to prevent further prosecution of an action in a police court to punish relator for a violation of a city ordinance, alleged by him to be void the remedy by appeal or by writ of habeas corpus being thorough and complete. State ex rel. Browne v. Booher, 43 M 569, 571, 118 P 271.

The writ of prohibition may issue only where there is no plain, speedy or adequate remedy in the ordinary course of law; hence where plaintiff had an appeal from a final judgment of the district court declaring forfeited liquors claimed by him and seized under the Prohibition Enforcement Act, he was not entitled to the writ to stay further action in the proceeding. State ex rel. Barnes v. District Court, 59 M 491, 492, 197 P 565.

When Writ May be Granted

Prohibition may be granted when neither appeal nor other proceeding in the

ordinary course of law affords a plain, speedy, and adequate remedy. State ex rel. King v. District Court, 24 M 494, 500, 62 P 820.

Where immediate injury or mischief might follow an attempt to exercise the right of appeal in a proceeding in which the district court, in alleged excess of jurisdiction, is about to enter a decree awarding a peremptory writ of mandate, the remedy is neither so speedy nor adequate as to bar the granting of a writ of prohibition under this section. State ex rel. Marshall v. District Court, 50 M 289, 292, 146 P 743.

The writ of prohibition may issue where it clearly appears that the district court has acted without jurisdiction and the remedy afforded by appeal is not sufficiently speedy or adequate to grant relief. State ex rel. McLeod v. District Court, 67 M 164, 166, 215 P 240.

Where personal property seized under an illegal search-warrant was about to be used as evidence in a prosecution against its owner for a violation of the liquor law and a petition to suppress its use had been denied, the writ of prohibition lies to prevent the threatened use of the property as evidence, since a judgment of conviction based thereon would be void, and the remedy by appeal would be neither speedy nor adequate. State ex rel. Thibodeau v. District Court, 70 M 202, 207, 224 P 866.

References

Cited or applied as section 7228, Revised Codes, in State ex rel. Myersick v. District Court, 53 M 450, 452, 164 P 546; State ex rel. McGrath v. District Court, 82 M 463, 466, 267 P 803; Boucher v. St. George et al., 88 M 162, 169, 293 P 315.

9863. Writ may be alternative or peremptory, form of. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court or judge from which it is issued, and to show cause before such court or judge, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return day inserted.

History: En. Sec. 563, p. 184, L. 1877; re-en. Sec. 563, 1st Div. Rev. Stat. 1879; re-en. Sec. 581, 1st Div. Comp. Stat. 1887; re-en. Sec. 1982, C. Civ. Proc. 1895; re-en. Sec. 7229, Rev. C. 1907; re-en. Sec. 9863, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1104.

9864. Certain provisions of the preceding chapter applicable. The provisions of the preceding chapter, except of the four first sections thereof, apply to this proceeding.

History: En. Sec. 564, p. 184, L. 1877; re-en. Sec. 564, 1st Div. Rev. Stat. 1879; re-en. Sec. 582, 1st Div. Comp. Stat. 1887; re-en. Sec. 1983, C. Civ. Proc. 1895; re-en. Sec. 7230, Rev. C. 1907; re-en. Sec. 9864, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1105.

CHAPTER 94

ISSUANCE OF WRITS AND RULES OF PRACTICE AND APPEALS

Section 9865. Writs of review, mandate, and prohibition may be returned and heard at discretion of court.

9866. Certain provisions applicable.

9867. Same.

9865. Writs of review, mandate, and prohibition may be returned and heard at discretion of court. Writs of review, mandate, and prohibition,

issued by the supreme court, or by a district court, or district judge, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be heard at any time.

History: En. Sec. 565, p. 185, L. 1877; Sec. 7231, Rev. C. 1907; re-en. Sec. 9865 re-en. Sec. 565, 1st Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1108.
re-en. Sec. 583, 1st Div. Comp. Stat. 1887; 1108.
amd. Sec. 1990, C. Civ. Proc. 1895; re-en.

9866. Certain provisions applicable. Except as otherwise provided in sections 9836 to 9867, the provisions of sections 9008 to 9832 of this code are applicable to and constitute the rules of practice in the proceedings mentioned in sections 9836 to 9867.

History: En. Sec. 2000, C. Civ. Proc. 1895; re-en. Sec. 7232, Rev. C. 1907; re-en. Sec. 9866, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1109.

References

State v. District Court et al., 69 M 415, 422, 222 P 444; State v. Northern Pac. Ry. Co., 88 M 529, 549, 295 P 257.

9867. Same. The provisions of sections 9008 to 9832 of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of sections 9836 to 9867, apply to the proceedings mentioned in said sections.

History: En. Sec. 2001, C. Civ. Proc. 1895; re-en. Sec. 7233, Rev. C. 1907; re-en. Sec. 9867, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1110.

CHAPTER 95

CONFESSION OF JUDGMENT WITHOUT ACTION

Section 9868. Judgment may be confessed for debt due or contingent liability.

9869. Statement in writing and form thereof.

9870. Filing statement and entering judgment.

9871. How—in justices' courts.

9868. Judgment may be confessed for debt due or contingent liability. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

History: En. Sec. 297, p. 105, Bannack Stat.; re-en. Sec. 352, p. 206, L. 1867; re-en. Sec. 426, p. 120, Cod. Stat. 1871; amd. Sec. 452, p. 162, L. 1877; re-en. Sec. 452, 1st Div. Rev. Stat. 1879; re-en. Sec. 465, 1st Div. Comp. Stat. 1887; re-en. Sec. 2040, C. Civ. Proc. 1895; re-en. Sec. 7250, Rev. C. 1907; re-en. Sec. 9868, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1132.

Operation and Effect

Where defendant, in an action to recover a debt, in response to a summons out

of a justice's court appeared in person on the day set for trial and orally acknowledged judgment, he in effect admitted the allegations of the complaint and the judgment entered thereon was to all intents and purposes a judgment on the pleadings, and not open to the objection that as a confession of judgment it was void because not evidenced by a writing executed by defendant as required by this section and the three following sections. (Hunter v. Eddy, 11 M 251, holding otherwise, overruled.)

9869. Statement in writing and form thereof. A statement in writing must be made, signed by the defendant and verified by his oath to the following effect:

1. It must authorize the entry of judgment for a specified sum.

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

History: En. Sec. 298, p. 105, Bannack Stat.; amd. Sec. 353, p. 206, L. 1867; re-en. Sec. 427, p. 120, Cod. Stat. 1871; re-en. Sec. 453, p. 162, L. 1877; re-en. Sec. 453, 1st Div. Rev. Stat. 1879; re-en. Sec. 466, 1st Div. Comp. Stat. 1887; re-en. Sec. 2041, C. Civ. Proc. 1895; re-en. Sec. 7251, Rev.

C. 1907; re-en. Sec. 9869, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1133.

References

State ex rel. Kennedy v. Hubbard, 77 M 170, 171, 253 P 271.

9870. Filing statement and entering judgment. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed thereon, becomes the judgment-roll.

History: En. Sec. 354, p. 206, L. 1867; re-en. Sec. 428, p. 120, Cod. Stat. 1871; re-en. Sec. 454, p. 162, L. 1877; re-en. Sec. 454, 1st Div. Rev. Stat. 1879; re-en. Sec. 467, 1st Div. Comp. Stat. 1887; amd. Sec. 2042, C. Civ. Proc. 1895; re-en. Sec. 7252,

Rev. C. 1907; re-en. Sec. 9870, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1134.

References

State ex rel. Kennedy v. Hubbard, 77 M 170, 171, 253 P 271.

9871. How—in justices' courts. In a justice's court, where the court has authority to enter the judgment, the statement may be filed with the justice, who may thereupon enter in his docket a judgment of his court for the amount confessed, with five dollars costs in the district court, and three dollars in the justice court. If a transcript of such judgment be filed with the clerk a copy of the statement must be filed with it.

History: En. Sec. 2043, C. Civ. Proc. 1895; re-en. Sec. 7523, Rev. C. 1907; re-en. Sec. 9871, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1135.

References

State ex rel. Kennedy v. Hubbard, 77 M 170, 171, 253 P 271.

CHAPTER 96

SUBMISSION OF CONTROVERSIES WITHOUT ACTION

Section 9872: Controversies—how submitted without action.

9873. Judgment on, as in other cases, but without costs prior to notice of trial.

9874. Judgment may be enforced or appealed from, as in an action.

9872. Controversies—how submitted without action. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith to determine the rights of the parties. The court must thereupon hear and determine the case, and render judgment thereon as if an action were depending.

9872 et seq.
88 P. (2d) 51

9872 et seq.
124 P. (2d) 1004

9872
161 P. 2d 902

History: En. Sec. 299, p. 106, Bannack Stat.; re-en. Sec. 355, p. 207, L. 1867; re-en. Sec. 429, p. 121, Cod. Stat. 1871; re-en. Sec. 455, p. 162, L. 1877; re-en. Sec. 455, 1st Div. Rev. Stat. 1879; re-en. Sec. 468, 1st Div. Comp. Stat. 1887; re-en. Sec. 2050, C. Civ. Proc. 1895; re-en. Sec. 7254, Rev. C. 1907; re-en. Sec. 9872, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1138.

Proceeding to Determine Heirship is Not a Civil Action and Cannot be Determined Under This Section

Proceedings to determine heirship, while partaking in form of the nature of a civil action, are not such, and therefore the provisions of this section, permitting parties to submit a civil action for determination by the district court upon an agreed statement of facts, have no application to such proceedings. In re Spriggs' Estate, 68 M 92, 93, 94, 216 P 1108.

Purpose

This section may be said to encourage the submission of agreed cases where they involve a real controversy. Carlson v. City of Helena, 38 M 581, 586, 101 P 163.

What is Not an Agreed Case Within This Section

Where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case, which has to be submitted with the formalities required by this and the two succeeding sections to give jurisdiction. Bickford v. Kirwin, 30 M 1, 5, 75 P 518.

What May be Submitted

A cause, having for its purpose the obtaining a decree to quiet the title to land,

may be submitted without pleadings under an agreed statement of facts. Lockey v. City of Bozeman, 42 M 387, 390, 113 P 286.

When the Action of the Court in Deciding a Question is Appealable

The action of the court in deciding or answering questions submitted under this section by a statement which fails to show the controversy between the parties, does not constitute an enforceable or appealable order or judgment. Jefferson County Commissioners v. Gilliam, 17 M 333, 42 P 852.

References

Cited or applied as section 2050, Code of Civil Procedure, in Hauswirth v. Mueller, 25 M 156, 158, 64 P 324; State v. Northern Pacific Express Co., 27 M 419, 420, 71 P 404; Northwestern Mut. Life Ins. Co. v. Lewis and Clark County, 28 M 484, 488, 72 P 982; Daly Bank & Trust Co. v. Board of Commrs., 33 M 101, 102, 81 P 950; State v. Aetna Banking & Trust Co., 34 M 379, 380, 87 P 268; as section 7254, Revised Codes, in Cunningham v. Northwestern Improvement Co., 44 M 180, 203, 119 P 554; Grush v. Bishop, 46 M 97, 98, 126 P 619; Helena Light & Ry. Co. v. City of Helena, 47 M 18, 27, 130 P 446; Crow Creek Irr. Dist. v. Crittenden, 71 M 66, 68, 227 P 63; State ex rel. Walker et al. v. Jones, 80 M 574, 582, 261 P 356; London G. & A. Co., Ltd., v. Indus. Acc. Bd., 82 M 304, 307, 266 P 1103; State v. District Court et al., 83 M 400, 411, 272 P 525; School District No. 1 v. City of Helena, 87 M 300, 305, 287 P 164; School District No. 12 v. Pondera Co., 89 M 342, 345, 297 P 498.

9873. Judgment on, as in other cases, but without costs prior to notice of trial. Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment constitute the judgment-roll.

History: En. Sec. 300, p. 106, Bannack Stat.; re-en. Sec. 356, p. 207, L. 1867; re-en. Sec. 430, p. 121, Cod. Stat. 1871; re-en. Sec. 456, p. 163, L. 1877; re-en. Sec. 456, 1st Div. Rev. Stat. 1879; re-en. Sec. 469, 1st Div. Comp. Stat. 1887; re-en. Sec. 2051, C. Civ. Proc. 1895; re-en. Sec. 7255, Rev. C. 1907; re-en. Sec. 9873, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1139.

References

Cited or applied as section 2051, Code of Civil Procedure, in Hauswirth v. Mueller, 25 M 156, 158, 64 P 324; Daly Bank & Trust Co. v. Board of Commrs., 33 M 101, 102, 81 P 950; as section 7255, Revised Codes, in Cunningham v. Northwestern Improvement Co., 44 M 180, 203, 119 P 554.

9874. Judgment may be enforced or appealed from, as in an action. The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

History: En. Sec. 301, p. 106, Bannack Stat.; re-en. Sec. 357, p. 207, L. 1867; re-en. Sec. 431, p. 121, Cod. Stat. 1871;

re-en. Sec. 457, p. 163, L. 1877; re-en. Sec. 457, 1st Div. Rev. Stat. 1879; re-en. Sec. 470, 1st Div. Comp. Stat. 1887; re-en. Sec.

2052, C. Civ. Proc. 1895; re-en. Sec. 7256, Rev. C. 1907; re-en. Sec. 9874, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1140.

References

Cited or applied as section 2052, Code of Civil Procedure, in Hauswirth v. Muel-

ler, 25 M 156, 158, 64 P 324; Daly Bank & Trust Co. v. Board of Commrs., 33 M 101, 102, 81 P 950; as section 7256, Revised Codes, in Lockey v. City of Bozeman, 42 M 387, 390, 113 P 286; Cunningham v. Northwestern Improvement Co., 44 M 180, 203, 119 P 554.

CHAPTER 97

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS

- Section 9875. Persons confined may be discharged.
 9876. Notice of application.
 9877. Service of notice.
 9878. Examination before judge.
 9879. Interrogatories may be in writing.
 9880. Oath to be administered.
 9881. Order of discharge.
 9882. If not discharged, prisoner may again apply—when.
 9883. Discharge final.
 9884. Judgment remains in force.
 9885. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.
 9886. Plaintiff to advance funds for support of prisoner.

9875. Persons confined may be discharged. Any person confined in jail, on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions of this chapter specified.

History: En. Sec. 107, p. 48, Cod. Stat. 1871; re-en. Sec. 145, p. 74, L. 1877; re-en. Sec. 145, 1st Div. Rev. Stat. 1879; re-en. Sec. 147, 1st Div. Comp. Stat. 1887; re-en. Sec. 2060, C. Civ. Proc. 1895; re-en. Sec. 7257, Rev. C. 1907; re-en. Sec. 9875, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1143.

9876. Notice of application. Such person must cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to a judge of the district court of the county in which such person may be confined, for the purpose of obtaining a discharge from his imprisonment.

History: En. Sec. 108, p. 48, Cod. Stat. 1871; re-en. Sec. 146, p. 74, L. 1877; re-en. Sec. 146, 1st Div. Rev. Stat. 1879; re-en. Sec. 148, 1st Div. Comp. Stat. 1887; re-en. Sec. 2061, C. Civ. Proc. 1895; re-en. Sec. 7258, Rev. C. 1907; re-en. Sec. 9876, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1144.

9877. Service of notice. Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application. If the plaintiff be not a resident of the county, and have no agent or attorney in the county, no such notice will be served.

History: En. Sec. 109, p. 48, Cod. Stat. 1871; re-en. Sec. 147, p. 74, L. 1877; re-en. Sec. 147, 1st Div. Rev. Stat. 1879; re-en. Sec. 149, 1st Div. Comp. Stat. 1887; re-en. Sec. 2062, C. Civ. Proc. 1895; re-en. Sec. 7259, Rev. C. 1907; re-en. Sec. 9877, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1145.

9878. Examination before judge. At the time and place specified in the notice, such person must be taken before the judge, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal or pertinent evidence that may be produced by the debtor or the creditor.

History: En. Sec. 110, p. 48, Cod. Stat. 1871; re-en. Sec. 148, p. 74, L. 1877; re-en. Sec. 148, 1st Div. Rev. Stat. 1879; re-en. Sec. 150, 1st Div. Comp. Stat. 1887; re-en. Sec. 2063, C. Civ. Proc. 1895; re-en. Sec. 7260, Rev. C. 1907; re-en. Sec. 9878, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1146.

9879. Interrogatories may be in writing. The plaintiff in the action may, upon such examination, propose to the prisoner any such interrogatories pertinent to the inquiry; and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

History: En. Sec. 2064, C. Civ. Proc. 1895; re-en. Sec. 7261, Rev. C. 1907; re-en. Sec. 9879, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1147.

9880. Oath to be administered. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to-wit: "I, _____, do solemnly swear that I have not any estate real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to hinder, delay, or defraud my creditors; so help me God."

History: En. Sec. 111, p. 48, Cod. Stat. 1871; re-en. Sec. 149, p. 74, L. 1877; re-en. Sec. 149, 1st Div. Rev. Stat. 1879; re-en. Sec. 151, 1st Div. Comp. Stat. 1887; re-en. Sec. 2065, C. Civ. Proc. 1895; re-en. Sec. 7262, Rev. C. 1907; re-en. Sec. 9880, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1148.

9881. Order of discharge. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause.

History: En. Sec. 112, p. 48, Cod. Stat. 1871; re-en. Sec. 150, p. 74, L. 1877; re-en. Sec. 150, 1st Div. Rev. Stat. 1879; re-en. Sec. 152, 1st Div. Comp. Stat. 1887; re-en. Sec. 2066, C. Civ. Proc. 1895; re-en. Sec. 7263, Rev. C. 1907; re-en. Sec. 9881, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1149.

9882. If not discharged, prisoner may again apply—when. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings must thereupon be had.

History: En. Sec. 113, p. 48, Cod. Stat. 1871; re-en. Sec. 151, p. 74, L. 1877; re-en. Sec. 151, 1st Div. Rev. Stat. 1879; re-en. Sec. 153, 1st Div. Comp. Stat. 1887; re-en. Sec. 2067, C. Civ. Proc. 1895; re-en. Sec. 7264, Rev. C. 1907; re-en. Sec. 9882, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1150.

9883. Discharge final. The prisoner, after being so discharged, is forever exempt from arrest or imprisonment for the same debt, unless he be convicted of having wilfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

History: En. Sec. 114, p. 48, Cod. Stat. 1871; re-en. Sec. 152, p. 74, L. 1877; re-en. Sec. 152, 1st Div. Rev. Stat. 1879; re-en. Sec. 154, 1st Div. Comp. Stat. 1887; re-en. Sec. 2068, C. Civ. Proc. 1895; re-en. Sec. 7265, Rev. C. 1907; re-en. Sec. 9883, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1151.

9884. Judgment remains in force. The judgment against any prisoner who is discharged remains in full force against any estate which may then

or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

History: En. Sec. 2069, C. Civ. Proc. 1895; re-en. Sec. 7266, Rev. C. 1907; re-en. Sec. 9884, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1152.

9885. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

History: En. Sec. 115, p. 48, Cod. Stat. Sec. 2070, C. Civ. Proc. 1895; re-en. Sec. 1871; re-en. Sec. 153, p. 74, L. 1877; re-en. 7267, Rev. C. 1907; re-en. Sec. 9885, Sec. 153, 1st Div. Rev. Stat. 1879; re-en. R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1153, 1st Div. Comp. Stat. 1887; re-en. 1153.

9886. Plaintiff to advance funds for support of prisoner. Whenever a prisoner is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor.

History: En. Sec. 2071, C. Civ. Proc. 1895; re-en. Sec. 7268, Rev. C. 1907; re-en. Sec. 9886, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1154.

CHAPTER 98

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY—FORCIBLE ENTRY AND UNLAWFUL DETAINER

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9887. Forceible entry defined. Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property or mining claim; or,

2. Who, after entering peaceably upon real property or mining claim, turns out by force, threats, or menacing conduct, the party in possession.

History: Earlier acts relating to forcible entry and unlawful detainer were Sec. 647, p. 171, Bannack Stat.; re-en. Sec. 636, p. 163, Cod. Stat. 1871; re-en. Sec. 696, 1st Div. Rev. Stat. 1879; re-en. Sec. 716, 1st Div. Comp. Stat. 1887.

This section en. Sec. 2080, C. Civ. Proc. 1895; re-en. Sec. 7269, Rev. C. 1907; re-en. Sec. 9887, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1159.

Jurisdiction

Held, that the provision of section 21, Article VIII, of the Constitution, conferring upon justice of the peace courts concurrent jurisdiction with district courts in cases of forcible entry and unlawful detainer actions, is not limited by the provision of section 20 of that article declaring that justices' courts shall not have jurisdiction in any case where the debt, claim, etc., exceeds the sum of \$300, but that as to forcible entry and unlawful detainer actions their jurisdiction is unlimited in so far as money demands are concerned. *Cashman v. Vickers et al.*, 69 M 516, 522, 223 P 897.

Operation in General

Acts of plaintiff subsequent to the entry are no defense, and his abandonment of the land subsequent to the wrong complained of does not justify defendant. *Spellman v. Rhode*, 33 M 21, 27, 81 P 395.

Purpose

The purpose of the provisions of this chapter is to furnish a summary remedy to obtain possession of real property, and to prevent even rightful owners from taking the law into their own hands and proceeding to recover possession by violence. *Spellman v. Rhode*, 33 M 21, 23, 81 P 395; *Herzog v. The Texas Company*, 88 M 580, 587, 294 P 962.

Scope of Remedy

In an action for forcible entry under this section, neither the title nor the right to the possession of land may be made matters of investigation. *Spellman v. Rhode*, 33 M 21, 24, 81 P 395.

Sufficiency of the Complaint

Where the case was tried on the theory that the complaint stated a cause of action for a forcible entry under this section, without objection by either party, its sufficiency will be determined on this theory on appeal, although it contains some allegations more appropriate to an action in

ejectionment. *Spellman v. Rhode*, 33 M 21, 23, 81 P 395.

Id. A complaint alleging that plaintiff was in possession of certain described lands, engaged in cultivating them as a homestead settlement, and that defendant forcibly and without right entered thereon, and by force and arms ejected plaintiff therefrom, states a cause of action for a forcible entry under subdivision 1 of this section.

In an action in forcible entry, an allegation of the complaint that though the doors and windows of the dwelling in question had been securely fastened, defendant forced open the doors and windows and entered the dwelling, etc., was sufficient to constitute a "breaking" open of the doors and windows, under this section. *Sprinkle v. Anderson*, 57 M 223, 187 P 908.

Complaint in a justice's court in an action for forcible entry, alleging inter alia that defendant forcibly entered on the premises and in a forcible manner ejected the plaintiff, etc., held, sufficient to show that the acts were done violently, "force" and "violence" as the latter terms are used in this section, with relation to forcible entry and detainer, being synonymous. *Lambert v. Helena Adjustment Co. et al.*, 69 M 510, 513, 222 P 1057.

Id. Since neither title to nor the right of possession of real property can be made an issue in an action for forcible entry and detainer, allegation of either in a complaint in an action of that nature before a justice of the peace, may be treated as surplusage and the complaint, otherwise sufficient, upheld.

What Constitutes

An instruction that within the meaning of the forcible entry statute any opening of a closed door involving the use of force, however slight, even with the use of a key, if done without the consent of the person actually and peaceably in possession is to be regarded as breaking open the door, held a correct statement of the law. *Herzog v. The Texas Company*, 88 M 580, 587, 294 P 962.

References

Cited or applied as section 2080, Code of Civil Procedure, in *Eakins v. Kemper*, 21 M 160, 161, 53 P 310; *Kennedy v. Dickie*, 27 M 70, 75, 69 P 672; as section 7269, Revised Codes, in *Centennial Brewing Co. v. Rouleau*, 49 M 490, 499, 143 P 969.

9888. Forcible detainer defined. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property or mining claim, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night-time, or during the absence of the occupant of any lands or mining claim, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant.

The occupant of real property or mining claim, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisputed possession of such lands.

History: En. Sec. 2081, C. Civ. Proc. 1895; re-en. Sec. 7270, Rev. C. 1907; re-en. Sec. 9888, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1160.

Defective Verdict

In forcible detainer, a verdict is defective which fails to find that defendant detained the property. *McCleary v. Crowley*, 22 M 245, 248, 56 P 227.

Sufficiency of the Allegations of the Complaint

Under subdivision 1 of this section, a demand for possession is not essential to be alleged in a complaint which charges that the possession was peaceably acquired, but is withheld unlawfully and by force. *McCleary v. Crowley*, 22 M 245, 248, 56 P 227.

Where the complaint in forcible detainer did not allege that defendant took possession in the night, or in the absence of the owners, the action was under subdivision 1 of this section, and the complaint was

not invalid in failing to allege that plaintiff had been in peaceable and undisputed possession within five days before the entry of defendant; the plaintiff not being required to establish such fact either by subdivision 1 of this section or by section 9899. *Kennedy v. Dickie*, 27 M 70, 74, 69 P 672.

Id. An allegation in forcible detainer that defendant has unlawfully withheld possession by menaces and threats of violence, and still unlawfully withholds possession of the property from plaintiff, is a sufficient allegation of such facts.

References

Cited or applied as section 2081, Code of Civil Procedure, in *Spellman v. Rhode*, 33 M 21, 24, 81 P 395; *Cashman v. Vickers et al.*, 69 M 516, 522, 223 P 897; *Lambert v. Helena Adjustment Co. et al.*, 69 M 510, 514, 222 P 1057; *Park Saddle Horse Co. v. Cook*, 89 M 414, 417, 300 P 242.

9889. Unlawful detainer defined. A tenant of real property or mining claim, for a term less than life, is guilty of unlawful detainer:

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of the landlord, or the successor in estate of his landlord, if any there be, but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. Where he continues in possession, in person or by subtenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term without any demand of possession or notice to quit by the landlord, or the successor in estate of his

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landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. When he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Within three days after the serving of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture. If the covenants and conditions of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant, demanding the performance of the violated covenant or conditions of the lease. A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to an undertenant, in case of his unlawful detention of the premises underlet to him.

4. Any tenant or subtenant, assigning or subletting, or committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall, upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this chapter.

History: Ap. p. Sec. 658, p. 174, *Bannack Stat.*; re-en. Sec. 647, p. 165, *Cod. Stat.* 1871; re-en. Sec. 707, 1st Div. Rev. Stat. 1879; re-en. Sec. 727, 1st Div. Comp. Stat. 1887; en. Sec. 2082, *C. Civ. Proc.* 1895; re-en. Sec. 7271, *Rev. C.* 1907; re-en. Sec. 9889, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 1161.

Jurisdiction

Held, that the provision of section 21, Article VIII, of the Constitution, conferring upon justice of the peace courts concurrent jurisdiction with district courts in cases of forcible entry and unlawful detainer actions, is not limited by the provision of section 20 of that article declaring that justices' courts shall not have jurisdiction in any case where the debt, claim, etc., exceeds the sum of \$300, but that as to forcible entry and unlawful detainer actions their jurisdiction is unlimited in so far as money demands are

concerned. *Cashman v. Vickers et al.*, 69 M 516, 522, 223 P 897.

Operation and Effect

The provision in the fourth subdivision of this section, against an assignment of the lease without the lessor's consent, is for the benefit of the lessor; but if, in case of such assignment, he fails to avail himself of the privilege of declaring the lease ended, he, by his inaction, waives the breach of the condition. *Winslow v. Dun-dom*, 46 M 71, 83, 125 P 136.

Parties

Under this section, providing for the recovery of damages in an action for unlawful detainer including rent, directors of a corporation lessee, who united in refusing to surrender possession after the term and after default in payment of rent, may be joined as defendants, and are individually liable, jointly and severally, for the dam-

ages awarded, and directors who did not join in such refusal need not be made parties. *Northwest Theatres Co. v. Hanson*, 4 F. 2d 471.

Sufficiency of Complaint

The complaint in an action for unlawful detainer, brought under subdivision 1 of this section, need not allege that plaintiff was entitled to the possession of the premises at the time of the commencement of the action, or gave notice, or demanded possession before bringing action. *Centennial Brewing Co. v. Rouleau*, 49 M 490, 499, 143 P 969.

Id. In an action for unlawful detainer, brought under the first subdivision of this section, the complaint should allege specifically that the holding over is without the permission of the plaintiff, or state facts sufficient to furnish a clear inference to that effect.

The complaint in an action for unlawful detainer, alleging a demand for possession unless the defendant pay the rent, his refusal to surrender, and his retention of the premises until he was compelled by legal process to give them up, impliedly set forth that the defendant's possession after such demand was without the plaintiff's permission, and sufficiently characterized the action as for an unlawful detainer.

9890. Service of notice. The notices required by the preceding section may be served, either:

1. By delivering a copy to the tenant personally; or,
2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or,
3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

History: En. Sec. 2083, C. Civ. Proc. 1895; re-en. Sec. 7272, Rev. C. 1907; re-en. Sec. 9890, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1162.

9891. What courts have jurisdiction. The district court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this chapter; provided, that justices' courts, within their respective towns, townships, or cities, shall have concurrent jurisdiction.

History: En. Sec. 2084, C. Civ. Proc. 1895; re-en. Sec. 7273, Rev. C. 1907; re-en. Sec. 9891, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1163.

after default in the payment of rent. *Bush v. Baker*, 51 M 326, 333, 152 P 750.

Id. To support a recovery of rent in an action for unlawful detainer under subdivision 2 to this section, plaintiff must establish, and the jury must find, that there had been an unlawful detainer.

An action in unlawful detainer to recover possession of real property from a tenant at will cannot be maintained, under this section and sections 6744-6746, without first terminating the tenancy by giving at least thirty days' notice in writing and, after its termination, giving three days' notice to surrender possession, and the complaint must show that both notices were given; hence where plaintiff alleged that the thirty-day notice was given but failed to aver that the three-day notice was likewise given, the complaint did not state a cause of action and the justice court before which the action was brought was without jurisdiction to try the cause. *Boucher v. St. George et al.*, 88 M 162, 166, 293 P 315.

References

Lambert v. Helena Adjustment Co. et al., 69 M 510, 514, 222 P 1057; *Doyle v. Mullaney et al.*, 89 M 20, 26, 295 P 760; *Lish v. McDonald*, 89 M 592, 594 et seq., 300 P 206; *State v. District Court et al.*, 96 M 600, 603 et seq., 31 P 2d 837.

References

State ex rel. St. George v. Justice Court, 80 M 53, 56, 257 P 1034.

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9892. Parties defendant. No person other than the tenant of the premises, and subtenant if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be non-suited for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, is guilty of the offense charged, judgment must be rendered against him. In case a defendant has become a subtenant of the premises in controversy, after the service of the notice provided for by part 2 of section 9889 of this code, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. In case a married woman be a tenant, or a subtenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she has separate property, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action, or against her separate property. All persons who enter the premises under the tenant, after the commencement of the action, shall be bound by the judgment, the same as if he or they had been made party to the action.

History: En. Sec. 2085, C. Civ. Proc. 1895; re-en. Sec. 7274, Rev. C. 1907; re-en. Sec. 9892, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1164.

9893. Parties generally. Except as provided in the preceding section, the provisions of sections 9008 to 9832 of this code, relating to parties to civil actions, are applicable to this proceeding.

History: En. Sec. 2086, C. Civ. Proc. 1895; re-en. Sec. 7275, Rev. C. 1907; re-en. Sec. 9893, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1165.

9894. Complaint—judge to fix day for appearance of defendant and summons. The plaintiff, in his complaint, which must be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be issued thereon as in other cases, returnable at a date designated therein, which shall not be less than four days nor more than twelve days from its date. The summons must be served personally upon the defendants, if within the state; if not within the state, in the same manner as notices are required to be served in section 9890. The complaint need not be served.

History: En. Sec. 2087, C. Civ. Proc. 1895; re-en. Sec. 7276, Rev. C. 1907; re-en. Sec. 9894, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1166.

References

Cited or applied as section 2087, Code of Civil Procedure, in *Eakins v. Kemper*, 21 M 160, 164, 53 P 310; as section 7276, Revised Codes, in *Centennial Brewing Co. v. Rouleau*, 49 M 490, 499, 143 P 969; *State ex rel. St. George v. Justice Court*, 80 M 53, 56, 257 P 1034.

9895. Summons, form and service of. The summons must state the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day, and must notify the defendant to appear and answer within the time designated, or that the relief sought will be taken against him. The summons must be directed to the defendant, and be served at least four days before the return day designated therein, and must be served and returned in the same manner as summons in civil actions is served and returned. Upon the return of any summons issued under this chapter, where the same has not, for any reason, been served, or not served in time, the plaintiff may have a new summons issued, the same as if no previous summons had been issued.

History: En. Sec. 2088, C. Civ. Proc. 1895; re-en. Sec. 7277, Rev. C. 1907; re-en. Sec. 9895, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1167.

Operation and Effect

Under this section, summons in an action for unlawful detainer must be served at least four days before the return day designated therein. Summons in such an action was issued out of a justice of the peace court and served on the eighth day of a certain month and made returnable on the twelfth of that month. Held, on appeal from a judgment quashing an alternative writ of prohibition attacking the jurisdiction of the justice, that the statute contemplates at least four full

days before return day; that therefore in computing the time for service the return day as well as the day of service, the latter under section 10707, relating to computation of time generally in which an act provided by law is to be done, must be excluded; that, in the instant case, four full days from day of service to return day had not expired and hence that the justice court did not obtain jurisdiction of the action. *State ex rel. St. George v. Justice Court*, 80 M 53, 56, 257 P 1034.

References

State ex rel. Bevan v. Mountjoy, 82 M 594, 601, 268 P 558; *Novaek v. Perich* et al., 90 M 91, 93, 300 P 240.

9896. Judgment by default. If, at the time appointed, the defendant does not appear and defend, the court must enter his default, and enter judgment in favor of the plaintiff, as prayed for in the complaint.

History: En. Sec. 2089, C. Civ. Proc. 1895; re-en. Sec. 7278, Rev. C. 1907; re-en. Sec. 9896, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1169.

References

State ex rel. St. George v. Justice Court, 80 M 53, 58, 257 P 1034.

9897. Defendant may appear, etc. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

History: En. Sec. 2090, C. Civ. Proc. 1895; re-en. Sec. 7279, Rev. C. 1907; re-en. Sec. 9897, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1170.

References

State ex rel. St. George v. Justice Court, 80 M 53, 58, 257 P 1034.

9898. Trial by jury. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending.

History: En. Sec. 2091, C. Civ. Proc. 1895; re-en. Sec. 7280, Rev. C. 1907; re-en. Sec. 9898, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1171.

9899. Showing required of plaintiff in forcible entry or detainer—showing required of defendant. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of,

that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined, and such showing is a bar to the proceedings.

History: En. Sec. 654, p. 173, Bannack Stat.; re-en. Sec. 643, p. 164, Cod. Stat. 1871; re-en. Sec. 703, 1st Div. Rev. Stat. 1879; re-en. Sec. 723, 1st Div. Comp. Stat. 1887; amd. Sec. 2092, C. Civ. Proc. 1895; re-en. Sec. 7281, Rev. C. 1907; re-en. Sec. 9899, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1172.

Operation and Effect

Under this statute the defendant is not permitted to show title in himself or to disprove the title of the plaintiff. Boardman v. Thompson, 3 M 387.

The action for forcible entry and detainer is quasi criminal. Sheehy v. Flaherty, 8 M 365, 20 P 687.

A complaint in forcible detainer, showing that defendant has been in possession of the property for over a year, is not bad, as showing a defense within this section, unless it also shows such possession to have been quiet. Kennedy v. Dickie, 27 M 70, 76, 60 P 672.

Id. If the object of the action is to obtain the remedy for a forcible entry, the proof required by this section is two-fold,

namely, proof of the forcible entry, as defined in section 9887, and proof that the plaintiff "was peaceably in the actual possession at the time of the forcible entry." If the purpose of the action is to obtain relief from a forcible detainer, proof must be made, under this section, of the forcible detainer, as defined in section 9888, and of the plaintiff's right to the possession at the time of the forcible detainer.

Under this section, plaintiff in a forcible entry action is required only to show, in addition to a forcible entry of the premises, that he was peaceably in the actual possession thereof at the time of the forcible entry, the jury being required to assess the damages sustained by plaintiff, and the court to render judgment for three times the amount thus assessed (section 9901). Herzog v. The Texas Company, 88 M 580, 587, 294 P 962.

References

Cited or applied as section 2092, Code of Civil Procedure, in Spellman v. Rhode, 33 M 21, 24, 81 P 395; Park Saddle Horse Co. v. Cook, 89 M 414, 418, 300 P 242.

9900. Complaint must be amended in certain cases. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either forcible entry or forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform with such proof; such amendment must be made without any imposition of terms. No continuance shall be permitted on account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor.

History: En. Sec. 2093, C. Civ. Proc. 1895; re-en. Sec. 7282, Rev. C. 1907; re-en. Sec. 9900, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1173.

9901. Verdict and judgment. If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occa-

sioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant, guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment, as here provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

History: En. Sec. 2094, C. Civ. Proc. 1895; re-en. Sec. 7283, Rev. C. 1907; re-en. Sec. 9901, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1174.

Operation and Effect

A money judgment in forcible detainer is not sustained by a verdict which fails to find that defendant detained the property, since, under this section, damages may be assessed only when occasioned by forcible detainer. *McCleary v. Crowley*, 22 M 245, 249, 56 P 227.

When an unlawful detainer has been proven and damages have been awarded, the trial court has not any discretion under this section, but must render judgment for treble the amount of the award. *Centennial Brewing Co. v. Rouleau*, 49 M 490, 505, 143 P 969.

In proceedings for unlawful detainer, three things are recoverable, namely, rents, restitution of the premises, and damages; and, while the recovery of all these is dependent on the fact of the unlawful detainer, they are dependent on each other. *Bush v. Baker*, 51 M 326, 333, 152 P 750.

A municipal corporation, such as a county, being no more than a political subdivision of the state for governmental purposes, cannot be subjected to a penal liability, and therefore an action for treble (or penal) damages for unlawful detainer does not lie. *Sullivan v. Big Horn County*, 66 M 45, 212 P 1105.

Since the province of the jury in an action for forcible entry goes no further than the ascertainment of the amount of the actual damages sustained by plaintiff, and the statute (this section) makes it the duty of the court to treble that amount in entering judgment, a matter with which the jury is not concerned, refusal to instruct the jury that any amount found by it in favor of the plaintiff would be multiplied by three, or to permit counsel for defendant to call the statutory provision relating thereto to their attention in argument, was not error. *Herzog v. The Texas Company*, 88 M 580, 587, 294 P 962.

References

Northwest Theatres Co. v. Hanson, 4 F. 2d 471.

9902. Verification of complaint and answer. The complaint and answer must be verified. If new matter be set up in the answer, it is deemed denied.

History: En. Sec. 2095, C. Civ. Proc. 1895; re-en. Sec. 7284, Rev. C. 1907; re-en. Sec. 9902, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1175.

9903. Appeal. An appeal may be taken by the plaintiff or defendant as in other cases.

History: En. Sec. 2096, C. Civ. Proc. 1895; re-en. Sec. 7285, Rev. C. 1907; re-en. Sec. 9903, R. C. M. 1921.

9904. Rules of practice. Except as otherwise provided in this chapter, provisions of sections 9008 to 9832 of this code are applicable to and constitute the rules of practice mentioned in this chapter.

History: En. Sec. 2097, C. Civ. Proc. 1895; re-en. Sec. 7286, Rev. C. 1907; re-en. Sec. 9904, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1177.

9905. Appeals—how taken, etc. The provisions of sections 9008 to 9832 of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

History: En. Sec. 2098, C. Civ. Proc. 1895; re-en. Sec. 7287, Rev. C. 1907; re-en. Sec. 9905, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1178.

9906. Relief against forfeiture of lease. The court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in section 9901. The application may be made by a tenant or subtenant, or mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.

History: En. Sec. 2099, C. Civ. Proc. 1895; re-en. Sec. 7288, Rev. C. 1907; re-en. Sec. 9906, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1179.

References

Cited or applied as section 7288, Revised Codes, in Centennial Brewing Co. v. Rouleau, 49 M 490, 499, 143 P 969.

CHAPTER 99

LIENS, REFERENCE TO CIVIL CODE GOVERNING

Section 9907. Liens and their enforcement.

9907. Liens and their enforcement. Special liens of mechanics and laborers, liens for salaries and wages, seed-grain liens, threshermen's liens, loggers' liens, and other miscellaneous liens, together with the enforcement thereof, are regulated by sections 8318 to 8395 of the Civil Code.

History: En. Sec. 9907, R. C. M. 1921, by recommendation of code commissioner, 1921.

CHAPTER 100

CONTEMPTS

Section 9908. What acts or omissions are contempts.

9909. Re-entry on property after eviction—when a contempt.

9910. A contempt committed in the presence of the court may be punished summarily—when not so committed, an affidavit or statement shall be made.

9911. A warrant of attachment may issue or a notice to show cause.

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9913. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.

9914. Bail-bond, form and conditions of.

9915. Officer must return warrant and undertaking, if any.

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- 9916. Hearing.
- 9917. Judgment and penalty, if guilty.
- 9918. If the contempt is the omission to perform any act, the person may be imprisoned until performance.
- 9919. Proceedings where party fails to appear.
- 9920. Illness sufficient cause for nonappearance of party arrested—confinement under arrest for contempt.
- 9921. Judgment and orders in such cases final.

9908. What acts or omissions are contempts. The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

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1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

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2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service;

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Assuming to be an officer, attorney, or counsel of a court, and acting as such without authority;

7. Rescuing any person or property, in the custody of an officer, by virtue of an order or process of such court;

8. Unlawfully detaining a witness, or party to an action, while going to, or remaining at, or returning from the court where the action is on the calendar for trial;

9. Any other unlawful interference with the process or proceedings of a court;

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience, by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

History: Ap. p. Sec. 396, p. 125, Bank Stat.; re-en. Sec. 455, p. 226, L. 1867; re-en. Sec. 531, p. 144, Cod. Stat. 1871; en. Sec. 566, p. 185, L. 1877; re-en. Sec. 566, 1st Div. Rev. Stat. 1879; re-en. Sec. 584, 1st Div. Comp. Stat. 1887; re-en. Sec. 2170, C. Civ. Proc. 1895; re-en. Sec. 7309, Rev. C. 1907; re-en. Sec. 9908, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1209.

Subd. 1Attorney Repeating Objections Previously Saved by Exception Contrary to Admonitions of Court

Since a point once saved by exception is saved for all purposes of the case, unless thereafter waived, an attorney appearing for one charged with crime, who after settlement of a bill of exceptions to the court's denial of his motion to dismiss the information for failure to bring defendant to trial within six months after filing thereof and being advised by the court that the objection based upon the motion to dismiss would go to every proceeding in the cause, thereafter against the admonition repeatedly persisted in making the motion to dismiss, he was properly adjudged guilty of contempt. *State ex rel. Hurley v. District Court*, 76 M 222, 232, 246 P 250.

Publishing a Telegram Relative to Proceedings

The act of causing a telegram to be published in a newspaper published in the city in which the supreme court was then in session, setting forth that a bet had been made between certain parties that, owing to the influence of certain claimants to the property involved in a case then pending before said court, it would reverse its former decision in the case, was held to be within the scope of the first subdivision of this section, and to constitute a contempt of court. *Territory v. Murray*, 7 M 251, 262, 15 P 145. See also *In re Shannon*, 11 M 67, 70, 27 P 352; *In re MacKnight*, 11 M 126, 136, 27 P 336.

Subd. 3Entering Judge's Chambers Without Leave and Using a Paper Left Therein

An attorney who enters the judge's chambers without leave, and takes a discarded memorandum of proceedings from the waste-basket, indorses it, and files it with the clerk, is guilty of contempt. *State ex rel. Coleman v. District Court*, 51 M 195, 199, 149 P 973.

Subd. 5Disobedience of an Injunction Order

One guilty of a contempt of court by a wilful disobedience of an injunction order lawfully issued may be punished under the summary procedure provided for in this chapter, or he may be dealt with under the Penal Code as for a misdemeanor, under section 10944. *State ex rel. Flynn v. District Court*, 24 M 33, 35, 60 P 493.

Disobedience of an Order

Where an order made at a term of court has been disobeyed, the judge at chambers in vacation has power to punish the same

as a contempt. *State ex rel. Northern Pac. Ry. Co. v. Loud*, 24 M 428, 431, 62 P 497.

Violating a Water Rights Decree

Under the provisions of this section, where a decree determining the relative rights of water users declared that the relator in proceedings for supervisory control was not entitled to use any water after the flow of the stream receded below 1,619 inches, if the water constituting the natural supply was needed by the prior appropriator; and where it appeared that all the water flowing in a certain stream was needed by prior appropriators, the relator's use of a portion of the water constituted, *prima facie*, a violation of the decree and a contempt of the court. *State ex rel. Zosel v. District Court*, 56 M 578, 581, 185 P 1112.

Subd. 6Assuming to be an Attorney

Where a person, without a license to practice law, employs all the customary methods to advertise himself as an attorney and counselor-at-law, he is guilty of contempt, under subdivision 6 of this section. *In re Bailey*, 50 M 365, 368, 146 P 1101.

Subd. 8Unlawfully Detaining a Witness

The action of a party in secreting and forcibly keeping in hiding a witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted a contempt of court. *Buntin v. Chicago, Milwaukee & St. Paul Ry. Co.*, 54 M 495, 496, 172 P 330.

Subd. 9Attempt to Corrupt a Juror

An attempt to corruptly influence a member of a jury panel constitutes an unlawful interference with the proceedings of the court, and is punishable as a contempt, irrespective of whether such juror has been actually sworn to try a cause or not. *State ex rel. Webb v. District Court*, 37 M 191, 197, 95 P 593.

Corrupting the Records

Any act done for the purpose of corrupting the records of a court of justice, whether successful or not, constitutes an unlawful interference with the proceedings of the court, and, when an attorney is the author of the act, he violates the duty enjoined by his position. *State ex rel. Coleman v. District Court*, 51 M 195, 200, 149 P 973.

Refusal to Receive Summons or Other Papers

The district court may punish a defendant in an action in claim and delivery

for contempt, notwithstanding, technically, it had not acquired jurisdiction over him, by reason of the fact that he had refused to receive a copy of the summons or other papers which authorized the officer to take the property in controversy into his possession, where it appeared that he knew the mission of the officer, and openly announced his intention to prevent the officer from doing his duty in the premises. *State ex rel. Bruce v. District Court*, 33 M 359, 363, 83 P 641.

Resistance of or Interference With an Officer Endeavoring to Take Property

Resistance of, or interference with, an officer while endeavoring to take property into his possession, pursuant to the provisions of section 9223, in an action in claim and delivery, is an interference with the proceedings of the court in the cause, and constitutes a contempt within the meaning of subdivision 9 of this section. *State ex rel. Bruce v. District Court*, 33 M 359, 362, 83 P 641.

Withholding of Adversary's Original Bill of Exceptions

Where a party litigant serves upon his adversary the original draft of his proposed bill of exceptions, instead of a copy thereof, as he may do under section 9390, such draft does not become the property of the latter, but is, though not technically so until settled as the bill of exceptions and filed with the clerk, a record in the case, and if, by withholding it, the settlement of the bill is prevented, such act constitutes an unlawful interference with the new trial proceedings and a contempt of court, within the meaning of subdivision 9 of this section. *State ex rel. Thelen v. District Court*, 51 M 337, 340, 152 P 475.

In General

The power to punish for contempt is inherent in the courts of record of this state, is a part of their very life, and a necessary incident to the exercise of judicial functions. It exists independently of statutes, and cannot be taken away or so far abridged by the legislature as to leave such courts without proper and vigorous means of protecting themselves from insult or of actually enforcing their lawful orders. *Territory v. Murray*, 7 M 251, 257, 15 P 145; *State ex rel. Boston & M. Co. v. Judges*, 30 M 193, 200, 76 P 10; *In re Mettler*, 50 M 299, 302, 146 P 747; *State ex rel. Metcalf v. District Court*, 52 M 46, 48, 155 P 278.

A contempt of court is in a sense a public offense, yet it is not one a prosecution for which is exclusively controlled by constitutional limitations circumscribing methods of prosecution of strictly criminal

offenses. *State ex rel. Flynn v. District Court*, 24 M 33, 35, 60 P 493; *State ex rel. Boston & M. Co. v. Judges*, 30 M 193, 198, 76 P 10.

Contempt proceedings are sui generis, and have most, if not all, of the characteristics of a criminal case, and few, if any, of a civil action. *State ex rel. Boston & M. Co. v. Judges*, 30 M 193, 198, 76 P 10; *Dunlavy v. Doggett*, 38 M 204, 208, 99 P 436.

The enumeration in this section of certain acts as contempts is not exclusive, since other acts, not mentioned therein, are referred to as constituting contempts in section 10944. *State ex rel. Metcalf v. District Court*, 52 M 46, 48, 155 P 278.

Contempt proceedings are criminal in their nature, and the evidence must show that the accused is guilty beyond a reasonable doubt, otherwise he is entitled to his discharge. *State ex rel. Nett v. District Court et al.*, 72 M 206, 210, 232 P 204.

How Reviewable by Supreme Court

The only way in which one adjudged guilty of contempt may have the proceedings reviewed by the supreme court, under section 3, Article VIII of the Constitution, is by invoking the writ of review, or, in a proper case, the writ of supervisory control. *Ex parte Burns*, 83 M 200, 205, 209, 271 P 439.

What is Not Contempt

Where one pays out money in good faith to meet the just obligations of creditors, and thereby incapacitates himself to obey an order of court, his failure to obey the order is not contempt. *State ex rel. McLean v. District Court*, 37 M 485, 488, 97 P 841. See also *Nixon v. Nixon*, 15 M 6, 8, 37 P 488.

For disobedience of a void order of court, a party cannot be adjudged guilty of contempt. *State v. District Court et al.*, 61 M 346, 350, 202 P 575.

An attorney for a defendant charged with crime on a second trial of the cause after disagreement of the jury on the first, asked permission to interpose a plea of once in jeopardy, stating that the jury on the former trial had been wrongfully discharged over the objection of defendant, and upon refusal of his motion to dismiss offered a typewritten copy of a minute entry of defendant's plea of once in jeopardy containing the clause that dismissal of the jury had been ordered over defendant's objection, which statement the trial judge declared to be untrue. At the conclusion of the trial the attorney was cited for contempt and was found guilty of an attempt to falsify the records of the court. Held, that the inclusion of the objectionable clause, even if untrue,

did not constitute an attempt to falsify court records. *State ex rel. Hurley v. District Court*, 76 M 222, 232, 246 P 250.

References

Cited or applied as section 584, First Division Compiled Statutes 1887, in *Blaine v. Briscoe*, 16 M 582, 41 P 1002; as section

2170, Code of Civil Procedure, in *State ex rel. Breen v. District Court*, 34 M 107, 109, 85 P 870; *State ex rel. Brass v. Horn*, 36 M 418, 421, 93 P 351; *State v. District Court*, 61 M 558, 567, 202 P 756; *State ex rel. Bacorn v. District Court*, 73 M 297, 301 et seq., 236 P 553; *State v. District Court et al.*, 85 M 215, 218, 278 P 122.

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9909. Re-entry on property after eviction—when a contempt. Every person dispossessed of or ejected from or out of any real property, by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon, or takes possession of any such real property, or induces or procures any person not having a right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon conviction for such contempt, the court or justice of the peace must immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property, under the original judgment or process, to such possession.

History: En. Sec. 567, p. 186, L. 1877; re-en. Sec. 567, 1st Div. Rev. Stat. 1879; re-en. Sec. 585, 1st Div. Comp. Stat. 1887; re-en. Sec. 2171, C. Civ. Proc. 1895; re-en. Sec. 7310, Rev. C. 1907; re-en. Sec. 9909, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1210.

Operation and Effect

Neither a contempt proceeding nor a writ of possession is a proper remedy to restore the plaintiff, in an ejectment suit,

to the possession of premises adjudged to belong to him and from which he alleges he was ousted by the successor in interest of the defendant in a preceding action, under the assertion of a right not adjudicated theretofore. *Baker v. Butte Water Co.*, 40 M 583, 586, 107 P 819.

References

State ex rel. Nett v. District Court et al., 72 M 206, 210, 232 P 204.

9910. A contempt committed in the presence of the court may be punished summarily—when not so committed, an affidavit or statement shall be made. When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer.

History: Ap. p. Sec. 397, p. 125, Ban-nack Stat.; en. Sec. 456, p. 226, L. 1867; re-en. Sec. 532, p. 145, Cod. Stat. 1871; re-en. Sec. 568, p. 186, L. 1877; re-en. Sec. 568, 1st Div. Rev. Stat. 1879; re-en. Sec. 586, 1st Div. Comp. Stat. 1887; amd. Sec. 2172, C. Civ. Proc. 1895; re-en. Sec. 7311, Rev. C. 1907; re-en. Sec. 9910, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1211.

Affidavit Essential Unless Contempt Committed in Presence of the Court

In all contempt proceedings, save for such as are committed in the court's im-

mediate presence, an affidavit is essential. *State ex rel. Gemmell v. Clancy*, 24 M 359, 363, 61 P 987.

"As Occurring"

The participial expression "as occurring" is equivalent to "which occurred," and does not merely relate to time and place. *State ex rel. Rankin v. District Court*, 58 M 276, 289, 191 P 772.

"Direct" and "Indirect" Contempt

"Direct" contempt embraces all those contemptuous acts which may be committed

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while the trial of a case is actually in progress or during a recess after the trial has commenced and which tend to prevent or delay the resumption of the trial; while a "constructive" or "indirect" contempt includes all such acts as are committed when the court is not sitting but which tend by their operation to obstruct and embarrass or prevent the due administration of justice. *State ex rel. Stagg v. District Court et al.*, 76 M 495, 498, 248 P 213.

How Contempts Shall be Punished

A direct contempt may be punished summarily, but a constructive contempt can be punished only after a hearing upon an affidavit showing the facts constituting the contempt, and the answer thereto by the party accused, as provided in section 9916. In *re Mettler*, 50 M 299, 301, 146 P 747.

While under this section, a contempt committed in the immediate view and presence of the court or judge may be punished summarily, in the case of an "indirect" contempt—one committed without the immediate view and presence of the court—the court or judge acquires jurisdiction only by the filing of an affidavit or statement of the facts. *State ex rel. Stagg v. District Court et al.*, 76 M 495, 498, 248 P 213.

Judicial Officers

The act of 1905, relative to the appointment of commissioners to measure and divide water among persons declared by decree of court to be entitled thereto, and empowering such commissioners to arrest any person interfering with the distribution made by them, does not constitute them judicial officers, in the sense that violations of their orders are contempts committed in the immediate view and presence of the court. *State ex rel. Flynn v. District Court*, 33 M 115, 118, 82 P 450.

Notice to Party of Contempt Not Committed in the Presence of the Court

It was improper to refuse to allow relator to move to dissolve a temporary injunction, or to be heard in opposition to the motion to continue it, on the ground that he was in contempt for violating the injunction by posting notices on the property on which he was forbidden to go, when no contempt proceedings had been instituted against him, no affidavit containing the facts constituting the contempt had been presented, no notice had been given him, no order to show cause why he should not be punished for contempt had been served upon him, and no opportunity was given him to defend himself in the matter. *State ex rel. Gemmell v. Clancy*, 24 M 359, 362, 61 P 987. See also *Harley v. Montana O. P. Co.*, 27 M 388, 391, 71 P 407.

In cases where the alleged contempt consists in the violation by a party of an order made in a civil suit still pending, such party is entitled to a separate and distinct notice of the contempt proceedings, in order that he may be afforded an opportunity to prepare his defense. *State ex rel. Gemmell v. Clancy*, 24 M 359, 364, 61 P 987.

Record on Review of Contempt

On certiorari to review an order of the district court adjudging one guilty of a direct contempt, the supreme court may not look beyond the order adjudging the contemnor guilty, which, under this section, constitutes the record of the case, to determine from the facts whether or not the judgment was proper. *State ex rel. Breen v. District Court*, 34 M 107, 110, 85 P 870.

Where the trial court having had under consideration the question of a direct contempt recites the facts as occurring in its immediate view or presence in the order adjudging an attorney guilty of contempt (this section) the reviewing court cannot look to the counter-statement of the attorney but must rely upon the recitation of the court. *State ex rel. Hurley v. District Court*, 76 M 222, 246 P 250.

While in a proceeding for constructive contempt—one not committed in the presence of the court or judge—the affidavit, the process, the answer of the contemnor and the evidence, when properly preserved, together with the judgment, constitute the record, the correct practice requires that the court make findings of fact in its order of commitment showing as a matter of law that the accused is in fact guilty of contempt, or at least make reference to or adopt the allegations of the affidavit upon which the charge is based. *Ex parte Burns*, 83 M 200, 201, 271 P 439.

Sufficiency of Affidavit Charging Contempt

Where a writ of mandate directed a sheriff to forthwith levy upon and sell property on execution, and an affidavit was presented to the court two days later charging contempt in that the officer had failed and refused to comply with the order of the court and had not made return forthwith, the affidavit was insufficient to meet the requirement of this section, that facts constituting the contempt must be alleged therein. *State ex rel. Duggan v. District Court*, 65 M 197, 201, 210 P 1062.

A proceeding in contempt against a party to an action for refusal to answer questions as a witness before a notary public in taking his deposition for use by plaintiff in the action is criminal in its nature

and entirely independent of the action itself; it must be instituted by affidavit which must state facts sufficient to disclose that a contempt has been committed, no intendments or presumptions in favor of its averments being permissible. *State ex rel. Bacorn v. District Court*, 73 M 297, 302, 236 P 553.

Sufficiency of Order Charging Contempt

An order declaring a person guilty of a direct contempt must recite the facts upon which the conclusion that the contemnor is guilty is based. Where the district court, in an order adjudging an attorney-at-law guilty of such contempt, merely recited that while the court was in session, the contemnor addressed it in an insolent manner, and contemptuously attempted to call the presiding judge as a witness to prove certain scandalous matter, the order referred to was insufficient to meet the requirements of this section. *State ex rel. Green v. District Court*, 34 M 107, 110, 85 P 870.

In the absence of some requirement in the statute, prescribing the form in which a charge for contempt must be presented, a general statement, substantial enough to justify a conclusive inference of knowledge and intent in the contemnor at the time it was alleged he attempted to willfully influence jurors, was sufficient to confer jurisdiction upon the district court. *State ex rel. Webb v. District Court*, 37 M 191, 196, 95 P 593.

Id. While a contempt proceeding is criminal in its nature, and in a case of that character it is generally necessary to allege, in some way, the intent with which the unlawful act has been committed, yet where it appeared as a conclusive inference from the facts stated in the affidavits filed that the contemnor intended to corruptly influence jurors, it was not necessary to specially allege the intent with which the act was done.

Where an attorney is adjudged guilty of a contempt committed in the presence of the court, the order of commitment

must recite the facts alleged to have constituted the contempt, so that the judgment of conviction may be examined and reviewed; unless it does so, no review is possible, and the order cannot stand. *In re Mettler*, 50 M 299, 302, 146 P 747.

Id. An order of the district court adjudging an attorney guilty of contempt committed in its immediate presence, which recited that the contemnor "by his conduct, words, and manner disturbed the orderly proceedings of this court, and by his insolent demeanor, angry words, is in contempt," etc., consisted of mere conclusions, and was fatally defective because not in compliance with the provision of this section, that such an order must recite the facts as occurring at the time of the alleged contempt.

A judgment in a direct contempt must recite the facts showing the contemptuous words, acts, or manner, as the case may be, in order that there may be a record to which the appellate court may look to ascertain whether the facts "as occurring" in its immediate view and presence are sufficient to form the basis of a judgment. *State ex rel. Rankin v. District Court*, 58 M 276, 290, 191 P 772.

The power of the district court to punish for contempt for disobedience of a lawful order or judgment is not arbitrary; it must be exercised only when the necessity arises and then with intelligent discretion to serve its purpose and under the rules of procedure established; the record must show the proof of substantial facts warranting the judgment of contempt. *State v. District Court et al.*, 85 M 215, 218, 278 P 122.

References

Cited or applied as section 2172, Code of Civil Procedure, in *State ex rel. Northern Pac. Ry. Co. v. Loud*, 24 M 428, 430, 62 P 497; *State ex rel. Rankin v. District Court*, 58 M 276, 285, 191 P 772; *State ex rel. Nett v. District Court et al.*, 72 M 206, 210, 232 P 204.

9911. A warrant of attachment may issue or a notice to show cause. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted, and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

History: En. Sec. 457, p. 226, L. 1867; re-en. Sec. 533, p. 145, Cod. Stat. 1871; re-en. Sec. 568, p. 186, L. 1877; re-en. Sec. 568, 1st Div. Rev. Stat. 1879; re-en. Sec.

586, 1st Div. Comp. Stat. 1887; re-en. Sec. 2173, C. Civ. Proc. 1895; re-en. Sec. 7312, Rev. C. 1907; re-en. Sec. 9911, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1212.

References

Cited or applied as section 2173, Code of Civil Procedure, in *State ex rel. Gemmell v. Clancy*, 24 M 359, 362, 61 P 987; as

section 7312, Revised Codes, in *State ex rel. Rankin v. District Court*, 58 M 276, 290, 191 P 772.

9912. Bail may be given by a person arrested under such warrant. Whenever a warrant of attachment is issued, pursuant to this chapter, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement.

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History: En. Sec. 458, p. 226, L. 1867; re-en. Sec. 534, p. 145, Cod. Stat. 1871; re-en. Sec. 569, p. 186, L. 1877; re-en. Sec. 569, 1st Div. Rev. Stat. 1879; re-en. Sec. 587, 1st Div. Comp. Stat. 1887; re-en. Sec. 2174, C. Civ. Proc. 1895; re-en. Sec. 7313, Rev. C. 1907; re-en. Sec. 9912, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1213.

9913. Sheriff must, upon executing the warrant, arrest and detain the person until discharged. Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

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History: En. Sec. 459, p. 226, L. 1867; re-en. Sec. 535, p. 145, Cod. Stat. 1871; re-en. Sec. 570, p. 186, L. 1877; re-en. Sec. 570, 1st Div. Rev. Stat. 1879; re-en. Sec. 588, 1st Div. Comp. Stat. 1887; re-en. Sec. 2175, C. Civ. Proc. 1895; re-en. Sec. 7314, Rev. C. 1907; re-en. Sec. 9913, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1214.

9914. Bail-bond, form and conditions of. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon; or they will pay, as may be directed, the sum specified in the warrant, or ordered by court or judge.

9914
60 P(2d)369

History: En. Sec. 460, p. 227, L. 1867; re-en. Sec. 536, p. 145, Cod. Stat. 1871; re-en. Sec. 570, p. 187, L. 1877; re-en. Sec. 570, 1st Div. Rev. Stat. 1879; re-en. Sec. 588, 1st Div. Comp. Stat. 1887; re-en. Sec. 2176, C. Civ. Proc. 1895; re-en. Sec. 7315, Rev. C. 1907; re-en. Sec. 9914, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1215.

NOTE.—The words “or ordered by court or judge” first appeared in section 2176, Code of Civil Procedure 1895.

9915. Officer must return warrant and undertaking, if any. The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

9915
60 P(2d)369

History: En. Sec. 461, p. 227, L. 1867; re-en. Sec. 537, p. 145, Cod. Stat. 1871; re-en. Sec. 571, p. 187, L. 1877; re-en. Sec. 571, 1st Div. Rev. Stat. 1879; re-en. Sec. 589, 1st Div. Comp. Stat. 1887; re-en. Sec. 2177, C. Civ. Proc. 1895; re-en. Sec. 7316, Rev. C. 1907; re-en. Sec. 9915, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1216.

9916. Hearing. When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

9916
60 P(2d)369

History: En. Sec. 399, p. 126, Bannack Stat.; amd. Sec. 462, p. 227, L. 1867; re-en. Sec. 538, p. 145, Cod. Stat. 1871; re-en. Sec. 572, p. 187, L. 1877; re-en. Sec. 572, 1st Div. Rev. Stat. 1879; re-en. Sec. 590, 1st Div. Comp. Stat. 1887; re-en. Sec. 2178,

C. Civ. Proc. 1895; re-en. Sec. 7317, Rev. C. 1907; re-en. Sec. 9916, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1217.

Operation and Effect

A person charged with constructive contempt may make answer by affidavit, by a verified answer or by a verbal plea of not guilty; and on the hearing should be permitted to present every defense to show

that he is not guilty of the contempt charged. State ex rel. Nett v. District Court et al., 72 M 206, 211, 232 P 204.

References

Cited or applied as section 2178, Code of Civil Procedure, in State ex rel. Gemmell v. Clancy, 24 M 359, 362, 61 P 987; as section 7317, Revised Codes, in In re Mettler, 50 M 299, 301, 146 P 747.

9917. Judgment and penalty, if guilty. Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

History: En. Sec. 463, p. 227, L. 1867; re-en. Sec. 539, p. 145, Cod. Stat. 1871; re-en. Sec. 573, p. 188, L. 1877; re-en. Sec. 573, 1st Div. Rev. Stat. 1879; re-en. Sec. 591, 1st Div. Comp. Stat. 1887; amd. Sec. 2179, C. Civ. Proc. 1895; re-en. Sec. 7318, Rev. C. 1907; re-en. Sec. 9917, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1218.

General Limitation as to Penalty

While the general rule is that a litigant in contempt of court will be denied any favors or privileges which the court may extend to litigants, it is limited in its application to the proceedings in the cause in which the contempt occurred, and therefore may not be invoked in an action other than the one in which the alleged contempt was committed. Davenport v. Davenport, 69 M 405, 411, 222 P 422.

Id. Courts may not extend the punishment for contempt beyond fine and imprisonment, or both, by either refusing to try a cause because plaintiff was in contempt of another court or granting defendant a new trial because of the same contempt.

Improper Penalty

An injunction to restrain a party from working in a mine, and requiring the same to be securely timbered, imposed as a punishment for an alleged contempt, is null and void, for the reason that it attempts to denounce a penalty for a contempt not warranted by this section. In re Sutton, 26 M 557, 558, 71 P 1132.

On the hearing of an order to show cause why an injunction should not issue, it was error to reject defendant's evidence and issue the injunction because defendant was in contempt for violating a restraining order. Such action on the part of the court was a denial of due process of law. Harley v. Montana O. P. Co., 27 M 388, 392, 71 P 407. See also King Tonopah Mining Co. v. Lynch, 232 Fed. 485, 490.

In General

An attorney found guilty of contempt was properly subject to punishment by fine and imprisonment in the county jail until the fine was paid. State ex rel. Coleman v. District Court, 51 M 195, 200, 149 P 973.

Judgment of the district court in a contempt proceeding arising out of the failure of defendant husband to pay alimony, sentencing him to five days in jail and to pay a fine of \$50 on default of which payment he was to be confined at the rate of one day for each two dollars of the fine, but suspending execution thereof for a time to enable him to purge himself of the contempt by making a certain payment into court for the benefit of the wife, held not objectionable as coercive but proper under this section. State ex rel. Murphy v. District Court, 99 M 209, 214, 41 P 2d 1113.

No Additional Penalty Possible

No penalty additional to that prescribed by the statute may be imposed upon the person found guilty of contempt. Dunlavey v. Doggett, 38 M 204, 208, 99 P 436.

In the absence of statute on the subject, attorney's fees and other expenses incurred by the owner of a water right in instituting and prosecuting to a successful determination a contempt proceeding for the violation of a decree of court settling his rights, are not recoverable as items in an action against the contemnor for damages proximately caused by his disobedience of the order. Dunlavey v. Doggett, 38 M 204, 210, 99 P 436.

Purpose of Penalty

Contempt proceedings do not furnish a remedy available to the plaintiff for the redress or prevention of a private wrong. While such proceedings may have the result of deterring the defendants from again interfering with plaintiff's rights, still the object to be attained is vindica-

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9917
123 P.(2d) 975

9917
198 P.(2d) 761

tion of the dignity of the authority of the court, and not indemnity for the plaintiff or any judgment in his favor. *Dunlavey v. Doggett*, 38 M 204, 210, 99 P 436.

References

Cited or applied as section 2179, Code of Civil Procedure, in *State ex rel. Flynn v.*

District Court, 24 M 33, 35, 60 P 493; *State ex rel. Gemmell v. Clancy*, 24 M 359, 362, 61 P 987; as section 7318, Revised Codes, in *State ex rel. McLean v. District Court*, 37 M 485, 488, 97 P 841; *State ex rel. Cash v. District Court et al.*, 78 M 92, 95, 252 P 388.

9918. If the contempt is the omission to perform any act, the person may be imprisoned until performance. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he shall have performed it, and in that case the act must be specified in the warrant of commitment.

9918
60 P(2d)369

9918
123 P.(2d) 975

9918
198 P.(2d) 761
199 P.(2d) 272

History: En. Sec. 400, p. 126, *Bannack Stat.*; re-en. Sec. 464, p. 227, L. 1867; re-en. Sec. 540, p. 146, *Cod. Stat.* 1871; re-en. Sec. 574, p. 188, L. 1877; re-en. Sec. 574, 1st Div. Rev. Stat. 1879; re-en. Sec. 592, 1st Div. Comp. Stat. 1887; re-en. Sec. 2180, C. Civ. Proc. 1895; re-en. Sec. 7319, Rev. C. 1907; re-en. Sec. 9918, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1219.

imprisoned in the county jail under this section until he shall have performed, is, upon proof of inability to pay, entitled to his release from confinement. *State ex rel. Cash v. District Court et al.*, 78 M 92, 95, 252 P 388.

Operation and Effect

Inability to render obedience to an order of court is a good defense to a charge of contempt for its violation, unless it appears that the person charged has voluntarily and contumaciously brought the disability upon himself. *State ex rel. McLean v. District Court*, 37 M 485, 488, 97 P 841.

Where the evidence in a contempt proceeding does not show that it was within the power of the contemnor to perform an act required of him by an order of court, or that he voluntarily and contumaciously brought the disability upon himself, he may not be punished by imprisonment in jail until he does perform it. *Ex parte Burns*, 83 M 200, 206 et seq., 271 P 439.

The commitment of a person to jail for failure to pay alimony under this section is void, where the record shows that at the time of the contempt proceeding it was not within the power of the contemnor to comply with the order of the court. *State ex rel. Scott v. District Court*, 58 M 355, 366, 192 P 829.

Under this section, providing that a contemnor may be imprisoned until he shall have performed an act decreed to be done if it is yet in his power to perform it, inability to perform is a good defense unless his inability in that behalf has been contumaciously brought on by himself, and commitment to jail of a husband for failure to pay alimony is void where the evidence discloses inability to perform, regardless of whether or not he sought revocation or modification of the decree. *State ex rel. Murphy v. District Court*, 99 M 209, 214, 41 P 2d 1113.

Held, on application for writ of supervisory control, that one adjudged guilty of contempt for failure to pay alimony and

9919. Proceedings where party fails to appear. When the warrant of arrest has been returned served, if the person arrested does not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

9919
60 P(2d)369

History: En. Sec. 466, p. 227, L. 1867; re-en. Sec. 542, p. 146, *Cod. Stat.* 1871; re-en. Sec. 576, p. 188, L. 1877; re-en. Sec. 576, 1st Div. Rev. Stat. 1879; re-en. Sec.

594, 1st Div. Comp. Stat. 1887; re-en. Sec. 2181, C. Civ. Proc. 1895; re-en. Sec. 7320, Rev. C. 1907; re-en. Sec. 9919, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1220.

9920
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9920. Illness sufficient cause for nonappearance of party arrested—confinement under arrest for contempt. Whenever, by the provisions of this chapter, an officer is required to keep a person, arrested on a warrant

of attachment, in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend, is sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon a warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

History: En. Sec. 467, p. 227, L. 1867; 595, 1st Div. Comp. Stat. 1887; re-en. Sec. 2182, C. Civ. Proc. 1895; re-en. Sec. 7321, Rev. C. 1907; re-en. Sec. 9920, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1221.

9921. Judgment and orders in such cases final. The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive, and there is no appeal; but the action of a district court or judge can be reviewed on a writ of certiorari by the supreme court, or a judge thereof, and the action of a justice of the peace, or other inferior court, by the district court or judge of the county in which such justice or judge of such inferior court resides.

History: Ap. p. Sec. 468, p. 228, L. 1867; amd. Sec. 544, p. 146, Cod. Stat. 1871; re-en. Sec. 578, p. 188, L. 1877; re-en. Sec. 578, 1st Div. Rev. Stat. 1879; re-en. Sec. 596, 1st Div. Comp. Stat. 1887; en. Sec. 2183, C. Civ. Proc. 1895; re-en. Sec. 7322, Rev. C. 1907; re-en. Sec. 9921, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1222.

Operation and Effect

The provision of this section, making the judgment and orders of the court or judge in contempt proceedings final and conclusive, and denying the right of appeal therefrom, shows that the judgments and orders contemplated by the statute are those which may emanate from a judge at chambers, as well as from the court itself. *State ex rel. Northern Pac. Ry. Co. v. Loud*, 24 M 428, 432, 433, 62 P 497.

Id. Where the district judge dismissed contempt proceedings, holding that he was not authorized to entertain them, mandamus to compel him to hear and determine them was the proper remedy, since an appeal from the order of dismissal would not lie.

The supreme court is not limited to review a judgment of contempt by writ of certiorari, but may also do so by writs of supervisory control. *State ex rel. Sutton v. District Court*, 27 M 128, 130, 69 P 988.

Contempt proceedings are *sui generis*, and for the violation of a lawful judgment of the district court, that court alone has authority to inflict punishment, and this authority is so far exclusive that by express legislative declaration the right of appeal is denied. *State ex rel. Zosel v. District Court*, 56 M 578, 581, 185 P 1112.

Id. If a district court acts without jurisdiction in a contempt proceeding, such

action may, under this section, be reviewed on certiorari, and in exigent cases where the court acts within its jurisdiction, but in a manner so arbitrary and unlawful as to be tyrannical, the supreme court may intervene by virtue of the power of supervisory control conferred by the constitution over inferior courts, but in such a case the court is limited to an examination of the record to ascertain whether there is substantial evidence to justify the order adjudging the accused guilty.

The only way in which one adjudged guilty of contempt may have the proceedings reviewed by the supreme court, under section 3, Article VIII of the Constitution, is by invoking the writ of review, or, in a proper case, the writ of supervisory control. *Ex parte Burns*, 83 M 200, 206, 271 P 439.

Under this section, providing that the judgment and orders made in a case of contempt are final and there is no appeal, an attempted appeal from an order dismissing a proceeding in contempt after a hearing will be dismissed. *Hanson v. Hanson*, 83 M 428, 272 P 543.

A judgment or order of the district court made in a contempt proceeding is reviewable by the supreme court on writ of certiorari, the review going no further than to determine whether the lower court regularly pursued its authority; the writ cannot be used to correct errors committed in the exercise of jurisdiction. *State ex rel. Murphy v. District Court*, 99 M 209, 215, 41 P 2d 1113.

Id. On application for writ of certiorari to review a judgment of contempt, the supreme court may review the evidence introduced in the proceeding to determine whether the charges against

contemnor are unsupported by the evidence, or the findings are contrary to all of the substantial evidence, or whether the decision has no evidence to support it, but the court cannot review the evidence to determine the preponderance thereof.

References

Cited or applied as section 2183, Code of Civil Procedure, in *State ex rel. Boston & M. Co. v. Judges*, 30 M 193, 198, 76 P 10; as section 7322, Revised Codes, in *In re Mettler*, 50 M 299, 302, 146 P 747.

CHAPTER 101

DISSOLUTION OF CORPORATIONS BY THE DISTRICT COURT

- Section 9922. Corporations—how dissolved.
 9923. Application—what to contain.
 9924. Application—how signed and verified.
 9925. Filing application and publication of notice.
 9926. Objections may be filed.
 9927. Hearing of applications—directors as trustees of creditors and stockholders—copy of judgment to be filed with secretary of state.
 9928. Judgment-roll and appeals.

9922. Corporations—how dissolved. A corporation may be dissolved by the district court of the county where its principal place of business is situated, upon its voluntary application for that purpose.

History: En. Sec. 2190, C. Civ. Proc. 1895; re-en. Sec. 7323, Rev. C. 1907; re-en. Sec. 9922, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1227.

References

Cited or applied as section 7323, Revised Codes, in *Smith v. Iron Mountain Tunnel Co.*, 46 M 13, 17, 125 P 649.

9923. Application—what to contain. The application must be in writing, and must set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders or members;

2. That all claims and demands against the corporation have been satisfied and discharged.

History: En. Sec. 2191, C. Civ. Proc. 1895; re-en. Sec. 7324, Rev. C. 1907; re-en. Sec. 9923, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1228.

9924. Application—how signed and verified. The application must be signed by a majority of the board of trustees, directors, or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

History: En. Sec. 2192, C. Civ. Proc. 1895; re-en. Sec. 7325, Rev. C. 1907; re-en. Sec. 9924, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1229.

9925. Filing application and publication of notice. If the court is satisfied that the application is in conformity with this chapter, the judge thereof must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days' notice of the application, by publication in some newspaper published in the county; and if there are none such, then by advertisements posted up in three of the principal public places in the county.

History: En. Sec. 2193, C. Civ. Proc. 1895; re-en. Sec. 7326, Rev. C. 1907; re-en. Sec. 9925, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1230.

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9926. Objections may be filed. At any time before the expiration of the time of publication, any person may file his objections to the application.

History: En. Sec. 2194, C. Civ. Proc. 1895; re-en. Sec. 7327, Rev. C. 1907; re-en. Sec. 9926, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1231.

9927. Hearing of applications—directors as trustees of creditors and stockholders—copy of judgment to be filed with secretary of state. After the time of publication has expired, the court or judge may, upon five days' notice to the persons who have filed objections, or without further notice if no objections have been filed, proceed to hear and determine the application, and if all the statements made therein are shown to be true, must, by judgment, declare the corporation dissolved. The court or judge, in such action, shall ascertain the names of the directors of said corporation then in office, and shall incorporate such names in the judgment of dissolution, and the persons so named shall be the trustees of the creditors and stockholders or members of such dissolved corporation. If in any judgment of dissolution heretofore entered, the court declared who were the trustees, such declaration is conclusive evidence thereof. It shall be the duty of the clerk of such district court to immediately file with the secretary of state a copy of the judgment provided for in this section duly certified by such clerk.

History: En. Sec. 2195, C. Civ. Proc. R. C. M. 1921; amd. Sec. 1, Ch. 55, L. 1895; re-en. Sec. 7328, Rev. C. 1907; amd. 1925. Cal. C. Civ. Proc. Sec. 1232. Sec. 2, Ch. 125, L. 1919; re-en. Sec. 9927,

9928. Judgment-roll and appeals. The application, notices, proof of publication, objections (if there be any), and declaration of dissolution constitute the judgment-roll; and from the judgment an appeal may be taken, as from other judgments of the district court.

History: En. Sec. 2196, C. Civ. Proc. 1895; re-en. Sec. 7329, Rev. C. 1907; re-en. Sec. 9928, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1233.

References
Cited or applied as section 7329, Revised Codes, in *Smith v. Iron Mountain Tunnel Co.*, 46 M 13, 17, 125 P 649.

CHAPTER 102

DISSOLUTION OF CORPORATIONS BY ACT OF DIRECTORS

Section 9929. Voluntary dissolution of corporations.

9930. Directors shall file statement, where—contents of statement.

9931. Effect of filing statement.

9932. Same with reference to foreign corporations.

9929. Voluntary dissolution of corporations. Any corporation organized under the laws of this state, which has ceased to transact business, and which has no assets, may be dissolved upon a compliance with the provisions of this act.

History: En. Sec. 1, Ch. 119, L. 1919; re-en. Sec. 9929, R. C. M. 1921.

9930. Directors shall file statement, where—contents of statement. A majority of the directors of such corporation, or, in the event some of the directors are dead, a majority of those living, shall file in the office of the clerk of the district court of the county in which the principal office of such corporation is located, a statement, verified by their oaths, setting forth:

1. That said corporation has ceased to transact business;
2. That said corporation has no assets;
3. That said corporation has no intention of ever again resuming operations.

A copy of said statement, certified by the clerk of said district court, shall be filed in the office of the secretary of state.

History: En. Sec. 2, Ch. 119, L. 1919; re-en. Sec. 9930, R. C. M. 1921.

9931. Effect of filing statement. Upon the filing of such certified copy of such statement in the office of the secretary of state, such corporation shall thereupon become dissolved, and thereafter the directors shall be relieved from any further liability in connection with such corporation.

9931
67 P (2d) 311,
312, 313

History: En. Sec. 3, Ch. 119, L. 1919; re-en. Sec. 9931, R. C. M. 1921.

9932. Same with reference to foreign corporations. Such a statement, filed with reference to a foreign corporation, whose principal property and operations were in Montana, shall also relieve the directors from any further liability under the laws of this state, as relating to said corporation.

9932
67 P (2d) 312,
313

History: En. Sec. 4, Ch. 119, L. 1919; re-en. Sec. 9932, R. C. M. 1921.

CHAPTER 103

EMINENT DOMAIN

- Section 9933. Eminent domain defined.
9934. What are public uses.
9935. What estates in land may be acquired by condemnation.
9936. Private property defined—classes enumerated.
9937. Facts necessary to be found before condemnation.
9938. Parties may make location—may enter to make surveys.
9939. Jurisdiction in district court.
9940. The complaint and its contents.
9941. Summons, what to contain—how issued and served.
9942. Who may defend.
9943. Power of court to appoint commissioners, etc.
9944. Meeting of commissioners.
9945. The date with respect to which compensation shall be assessed, and the measure thereof.
9946. Report of commissioners.
9947. Appeal from assessment of commissioners.
9948. New proceedings to cure defective title.
9949. Payment of damages or deposit of bond therefor.
9950. Damages—to whom paid.
9951. Final order of condemnation—what to contain—when filed, title vests.
9952. Putting plaintiff in possession.
9953. Costs, allowance and apportionment of.
9954. Rules of practice.
9955. Private roads.
9956. Exceptions.
9957. Temporary logging roads.
9958. Damages to be paid before land can be used.

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9959. Eminent domain defined. Eminent domain is the right of the state to take private property for public use. This right may be exercised in the manner provided in this chapter.

History: En. Sec. 579, p. 189, L. 1877; amd. Sec. 2210, C. Civ. Proc. 1895; re-en. re-en. Sec. 579, 1st Div. Rev. Stat. 1879; Sec. 7330, Rev. C. 1907; re-en. Sec. 9933, re-en. Sec. 597, 1st Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1237.

Operation and Effect

Condemnation proceedings are special proceedings provided for by the statute. State ex rel. Davis v. District Court, 29 M 153, 155, 74 P 200.

The right to take private property from its owner against his will can only be invoked pursuant to law; authority for the exercise of such right must be clearly expressed in the law before it will be allowed, and when the right is sought to be exercised the provisions of the law must be rigorously complied with. State ex rel. McMaster v. District Court, 80 M

228, 260 P 134; State et al. v. Aitchison et al., 96 M 335, 341, 30 P 2d 805.

References

Cited or applied as section 579, First Division Revised Statutes 1879, in Montana Central Ry. Co. v. Helena & R. M. R. Co., 6 M 416, 12 P 916; School Dist. No. 1 v. Powers et al., 62 M 151, 204 P 598; In re Valley Center Drain District, 64 M 545, 211 P 218; State ex rel. McLeod v. District Court, 67 M 164, 168, 215 P 240; Komposh v. Powers et al., 75 M 493, 499, 244 P 298; State ex rel. Livingston v. District Court, 90 M 191, 195, 300 P 916.

9934. What are public uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislative assembly of the state.
3. Public buildings and grounds for the use of any county, city, or town, or school district; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any county, city, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, city, or town, or the inhabitants thereof, which may be authorized by the legislative assembly; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes or ordinances by which the same may be authorized.
4. Wharves, docks, piers, chutes, booms, ferries, bridges, of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water, and drainage and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs, necessary for collecting and storing water.
5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, mills, or smelters for the reduction of ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills, and smelters for the reduction of ores; also an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores, and sites for reservoirs necessary for collecting and storing water.

6. Private roads leading from highways to residences or farms.

7. Telephone or electric light lines.

8. Telegraph lines.

9. Sewerage of any city, county, or town, or any subdivision thereof, whether incorporated or unincorporated, or of any settlement consisting of

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60 P (2d) 385

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92 P. (2d) 325

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112 P. (2d) 1060,
1061

103 M
60 P 385

not less than ten families, or of any public buildings belonging to the state, or to any college or university.

10. Tramway lines.

11. Electric power lines.

12. Logging railways.

13. Temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways, for such time as the court or judge may determine; provided, the grounds of state institutions be excepted.

History: En. Sec. 580, p. 189, L. 1877; re-en. Sec. 580, 1st Div. Rev. Stat. 1879; re-en. Sec. 598, 1st Div. Comp. Stat. 1887; amd. Sec. 2211, C. Civ. Proc. 1895; amd. Sec. 1, p. 135, L. 1899; amd. Sec. 1, Ch. 4, L. 1907; Sec. 7331, Rev. C. 1907; re-en. Sec. 9934, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1238.

Necessity of Use is an Essential Allegation

Complainant must allege the necessity of the use for which the condemnation is sought. *City of Helena v. Harvey*, 6 M 114, 9 P 903.

Not Necessary to Show Present or Prospective Demand for Product Furnished if a Public Use

Where plaintiff electric power company, in a condemnation proceeding, alleged sufficient facts to show that the use sought to be made of the land was a public one, it was not necessary to specifically allege that there was a present or prospective demand for its products. *Interstate Power Co. v. Anaconda Copper Min. Co.*, 52 M 509, 515, 159 P 408.

Power Dam is a Public Use

The taking of land for the purpose of flooding it, rendered necessary by the construction of a dam for generating electric power, to be sold to industrial enterprises and to the public generally, the power also to be utilized for pumping water upon arid lands, is for such public use as will support the right to acquire the land by condemnation. *Helena Power Transmission Co. v. Spratt*, 35 M 108, 125, 88 P 773.

A power plant is one of the public uses for which land may be condemned; and the complaint, in a proceeding for the purpose, need not allege a promise of accomplishment in respect to the use, but only that the plaintiff is one of the agencies chosen by the state to exercise the power of eminent domain, and that the use for which the property is to be

taken is one of the public uses enumerated in the statute. *Interstate Power Co. v. Anaconda Copper Min. Co.*, 52 M 509, 515, 159 P 408.

Public or Private Use a Question for the Courts

The taking of private property for the private use of another violates the Fourteenth Amendment to the federal Constitution, and the legislature has not the power to declare that that which is in truth a private use shall be a public one, the question whether a particular use is a private or public one being determinable by the courts. *Komposh v. Powers et al.*, 75 M 493, 499, 502, 244 P 298.

Uses Favoring Mining Industry

Subdivision 5 of this section was designed to favor the mining industry of the state. *Kipp v. Davis-Daly Copper Co.*, 41 M 509, 519, 110 P 237.

Who May Invoke the Right

A domestic corporation engaged in the express business is not authorized to invoke the power of eminent domain to any greater extent than a private individual, and the power is not open to the one for any purpose for which it is not open to the other. *Wells Fargo & Co. v. Harrington*, 54 M 235, 241, 169 P 463.

References

Cited or applied as section 2211, Code of Civil Procedure, before amendment, in *State ex rel. Bloomington v. District Court*, 34 M 535, 541, 88 P 44; as section 7331, Revised Codes, in *Northern Pacific Ry. Co. v. McAdow*, 44 M 547, 552, 121 P 473; as section 2211, Code of Civil Procedure, before amendment, in *City of Butte v. Montana Independent Tel. Co.*, 50 M 574, 580, 148 P 384; *State ex rel. McLeod v. District Court*, 67 M 164, 168, 215 P 240; *State ex rel. Livingston v. District Court*, 90 M 191, 195, 300 P 916; *State et al. v. Aitchison et al.*, 96 M 335, 341, 30 P 2d 805.

9935. What estates in land may be acquired by condemnation. The following is a classification of the estates and rights in lands subject to be taken for public use:

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1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs or dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit, of debris or tailings of a mine.

2. An easement, when taken for any other use.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

History: En. Sec. 581, p. 190, L. 1877; re-en. Sec. 581, 1st Div. Rev. Stat. 1879; re-en. Sec. 599, 1st Div. Comp. Stat. 1887; re-en. Sec. 2212, C. Civ. Proc. 1895; re-en. Sec. 7332, Rev. C. 1907; re-en. Sec. 9935, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1239.

References

Cited or applied as section 7332, Revised Codes, in *State ex rel. Galen v. District Court*, 42 M 105, 114, 112 P 706.

9936. Private property defined—classes enumerated. The private property which may be taken under this chapter includes:

1. All real property belonging to any person;

2. Lands belonging to this state, or to any county, city, or town, not appropriated to some public use;

3. Property appropriated to public use; but such property must not be taken unless for a more necessary public use than that to which it has already been appropriated;

4. Franchises for roads, bridges, and ferries, and all other franchises; but such franchises must not be taken unless for free highways, free bridges, railroads, or other more necessary public use;

5. All rights-of-way for any and all the purposes mentioned in section 9934, and any and all structures and improvements thereon, and the lands held and used in connection therewith must be subject to be connected with, crossed, or intersected by any other right-of-way of improvements, or structures thereon. They must also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections must be made in manner most compatible with the greatest public benefit and least private injury;

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

History: En. Sec. 582, p. 190, L. 1877; re-en. Sec. 582, 1st Div. Rev. Stat. 1879; re-en. Sec. 600, 1st Div. Comp. Stat. 1887; amd. Sec. 2213, C. Civ. Proc. 1895; re-en. Sec. 7333, Rev. C. 1907; re-en. Sec. 9936, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1240.

compensation to the person or persons entitled to the present use. *Carlson v. City of Helena*, 39 M 82, 105, 102 P 39.

Lands belonging to the state, except as otherwise indicated in subdivision 2 of this section, may be taken by the exercise of the power of eminent domain, and the state may properly be made a party to the action; in other words, the state has expressly consented to be sued under such circumstances. *State ex rel. Galen v. District Court*, 42 M 105, 112, 116, 112 P 706.

Id. Lands granted to the state for common school purposes cannot be taken under condemnation proceedings. Congress commanded that sections 16 and 36 in each township should be sold at public sale, and the framers of the state constitution expressly agreed, for the state, not to dis-

Operation and Effect

A beneficial use of the water flowing in the streams of the state is a public use; but it may be appropriated to a more necessary public use, and it is not necessary that the new public use should, in all cases, be a different public use. It does not follow, however, that a city can acquire the exclusive right to the use of the water in a particular stream; it must first be shown that the use for which it is sought is a more necessary use, and the city must then be able financially to make

pose of them, except in the manner prescribed, without the consent of the United States.

Held, that land owned by a cemetery association organized for profit is private property, which under this section, may be taken by eminent domain for public cemetery purposes. *Forestvale C. Assn. v. Helena C. Assn.*, 62 M 52, 57, 203 P 359.

Id. Under the rule that a public corporation may by condemnation take prop-

erty of an individual or a private corporation used for the same public purpose as that for which it is sought to be condemned, held, that unsold lots of a cemetery association whose corporate existence had expired and ninety-nine per cent. of whose stock was held by one individual, could properly be acquired by eminent domain by a corporation for public cemetery purposes.

9937. Facts necessary to be found before condemnation. Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law.
2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. The plaintiff or defendant, or any party interested in the proceedings, can appeal to the supreme court from any finding or judgment made or rendered under this chapter, as in other cases. Such appeal does not stay any further proceedings under this chapter.

History: En. Sec. 583, p. 191, L. 1877; re-en. Sec. 583, 1st Div. Rev. Stat. 1879; re-en. Sec. 601, 1st Div. Comp. Stat. 1887; amd. Sec. 2214, C. Civ. Proc. 1895; re-en. Sec. 7334, Rev. C. 1907; re-en. Sec. 9937, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1241.

A More Necessary Public Use

Where a railroad, which traverses the side of a mountain in a mining section, has within its right-of-way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and which have not been used by it during the several years of its construction in connection with any such operations, and in all reasonable probability not necessary for any future use, and another road, in seeking the same objective points, is obliged to take parts of such unused right-of-way to avoid a considerably more circuitous route at a different grade, of very much greater cost and of serious damage to many mining properties, and would, in any event, be obliged to parallel the adversary road a part of the way, under such conditions the taking of the unused parts of the one railroad by the other is a more necessary public use. *Butte, Anaconda & Pacific Ry. v. Montana Union Ry. Co.*, 16 M 504, 538, 41 P 232.

Water appropriated for irrigation purposes may be condemned to procure a water supply, where the use for which it is to be taken is more necessary than the existing use, and a complaint in proceedings to condemn for a city water supply water already appropriated to a public use must allege this latter fact, the rela-

tive degrees of necessity being a question for judicial determination. *City of Helena v. Rogan*, 26 M 452, 476, 68 P 798.

Appeal by Plaintiff—Constitutionality of Statute Authorizing

Contention of defendant land owner in a proceeding by the state to condemn land for highway purposes, that this section and sections 9950-9952, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, is invalid under section 14, Article III, of the State Constitution prohibiting the taking of private property for public use without paying just compensation therefor, and that the appeal should therefore be dismissed, held not meritorious. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Definition of Necessary

The word "necessary," as used in a statute of this character, does not mean an absolute necessity for the particular location sought, but a reasonable necessity to be determined from considerations of practicability, economy, and facilities, under the particular circumstances of the case, having regard to senior rights and the benefits to the public. *Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co.*, 16 M 504, 538, 41 P 232.

The word "necessary" does not mean an absolute or indispensable necessity, but one reasonable, requisite, and proper for the accomplishment of the end in view, under the peculiar circumstances of the case. *Butte, Anaconda & Pacific Ry. Co.*

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v. Montana Union Ry. Co., 16 M 504, 541, 41 P 232, 50 Am. St. Rep. 508, 31 L. R. A. 298; Northern Pacific Ry. Co. v. McAdow, 44 M 547, 554, 121 P 473.

Effect of Right to Appeal

The provision of this section, authorizing any party to appeal to the supreme court from any findings or judgment, as in other cases, precludes a resort to certiorari. State ex rel. Davis v. District Court, 29 M 153, 156, 74 P 200.

Right of Railroad to Condemn

The provisions of sections 6002, 6503, and 6507 are exceedingly liberal in bestowing upon railroad corporations the power to appropriate the property of the citizen to carry forward the public service; but they must, nevertheless, be interpreted

in the light of this section, and the rule of necessity must be determinative in each instance. Northern Pacific Ry. Co. v. McAdow, 44 M 547, 555, 121 P 473.

Who Shall Decide the Necessity of the Use

The necessity of the taking or using the roadbed or right-of-way, built or secured by another railroad company through a canyon or defile, is a question for decision by the district court of the county in which the canyon is located. Montana Central Ry. Co. v. Helena & R. M. R. Co., 6 M 416, 418, 12 P 916.

References

State ex rel. McLeod v. District Court, 67 M 164, 166, 168, 215 P 240.

9938. Parties may make location—may enter to make surveys. In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section 9943. The state, or its agents in charge of such public use, may enter upon the land and make examination, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except from injuries resulting from negligence, wantonness, or malice.

History: En. Sec. 584, p. 191, L. 1877; re-en. Sec. 584, 1st Div. Rev. Stat. 1879; re-en. Sec. 602, 1st Div. Comp. Stat. 1887; re-en. Sec. 2215, C. Civ. Proc. 1895; re-en. Sec. 7335, Rev. C. 1907; re-en. Sec. 9938, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1242.

Operation and Effect

In taking, by a proper proceeding, the land of a private individual for a public use, the greatest possible good to the public

and the least possible harm to the individual are alone to be considered; but where the taking is by a naked trespass, the individual can say to the trespasser: "You have no right whatever on my property." Postal Telegraph-Cable Co. v. Nolan, 53 M 129, 137, 162 P 169.

References

State ex rel. Livingston v. District Court, 90 M 191, 195, 300 P 916.

9939. Jurisdiction in district court. All proceedings under this chapter must be brought in the district court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

History: En. Sec. 585, p. 191, L. 1877; re-en. Sec. 585, 1st Div. Rev. Stat. 1879; re-en. Sec. 603, 1st Div. Comp. Stat. 1887; re-en. Sec. 2216, C. Civ. Proc. 1895; re-en. Sec. 7336, Rev. C. 1907; re-en. Sec. 9939, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1243.

Operation and Effect

Proceedings to condemn water appropriated for irrigation purposes may be brought and tried in the county in which the land is situated, though the water is to be taken in another county. City of Helena v. Rogan, 26 M 452, 470, 473, 68 P 798.

Id. A complaint by a city for the condemnation of water rights in a stream for

a water supply is not defective for failing to allege that it has a right-of-way to the stream, or will be able to acquire such right.

The provision of this section, that condemnation proceedings must be brought in the county where the land is situated, implies that they must also be tried there, unless transferred by the court or judge in some manner authorized by law. State ex rel. Davis v. District Court, 29 M 153, 155, 74 P 200.

References

Cited or applied as section 585, First Division Revised Statutes 1879, in City of Helena v. Harvey, 6 M 114, 118, 9 P

903; *Montana Central Ry. Co. v. Helena & R. M. R. Co.*, 6 M 416, 418, 12 P 916; as section 2216, Code of Civil Procedure,

in *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 551, 87 P 963.

9940. The complaint and its contents. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right-of-way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of the entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. When application for the condemnation of a right-of-way for the purposes of sewerage is made on behalf of a settlement, or town, or a county, the county commissioners of the county may be named as plaintiff.

History: En. Sec. 586, p. 192, L. 1877; re-en. Sec. 586, 1st Div. Rev. Stat. 1879; re-en. Sec. 604, 1st Div. Comp. Stat. 1887; amd. Sec. 2217, C. Civ. Proc. 1895; re-en. Sec. 7337, Rev. C. 1907; re-en. Sec. 9940, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1244.

Description of Land

Where the complaint, in a proceeding to condemn land, sets forth definitely the bounds on three sides of a tract sought to be taken, and designates a well-known navigable stream as the boundary on the fourth side, this designation is sufficient without express reference to high or low-water mark; in any event, it meets the requirements of the rule that "that is certain which can be made certain by means of the description or references contained in the petition." *Interstate Power Co. v. Anaconda Copper Min. Co.*, 52 M 509, 513, 514, 159 P 408.

Id. The area of the land sought to be acquired by condemnation proceedings is not required to be stated in the petition. The requirement of the statute is met when the description is definite enough to identify the land sought to be taken, even though it be conceded that the statement of the area would materially aid in its identification.

Description of lands sought to be condemned for a private road required by this section to be set forth in the complaint, is sufficient if it is definite enough to

identify the lands. *Komposh v. Powers et al.*, 75 M 493, 506, 244 P 298.

Complaint describing three parcels of land by metes and bounds and alleging that only a portion thereof was desired, held sufficient compliance with the rule that if the description is definite enough to identify the lands sought to be taken it is sufficient as against the contention that it did not appear that plaintiff commission intended to use a considerable portion of a given piece of land, describing it only as so much land. *State et al. v. Whitcomb et al.*, 94 M 415, 425, 22 P 2d 823.

Necessity of Use

To condemn private land for an alley-way, the complainant must allege the necessity of the use for which the condemnation is sought; otherwise, evidence of such necessity is inadmissible. *City of Helena v. Harvey*, 6 M 114, 118, 9 P 903. See also *City of Helena v. Rogan*, 26 M 452, 476, 68 P 798.

When Issues Will be Presumed Correct

Where plaintiff railroad company, in a condemnation proceeding, failed to take default against defendants, who had not answered or demurred, but permitted the case to proceed as if pleadings had been filed and issues properly made, and found no fault with any of the proceedings until hearing in the district court, it will be presumed that issues were made and properly determined. *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 555, 87 P 963.

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9941. Summons, what to contain—how issued and served. The clerk must issue a summons, which must contain the names of the parties, a description of the lands proposed to be taken, a statement of the public use for which it is sought, and a notice to the defendants to appear before the court or judge, at a time and place therein specified, and show cause why the property described should not be condemned as prayed for in the complaint. Such summons must, in other particulars, be in form of a summons in a civil action, and must be served in like manner upon each defendant named therein, at least ten days previous to the time designated in such notice for the hearing, and no copy of the complaint need be served. But the failure to make such service upon a defendant does not affect the right to proceed against any or all other of the defendants, upon whom service of summons had been made.

History: En. Sec. 587, p. 192, L. 1877; re-en. Sec. 587, 1st Div. Rev. Stat. 1879; amd. Sec. 605, 1st Div. Comp. Stat. 1887; amd. Sec. 2218, C. Civ. Proc. 1895; re-en. Sec. 7338, Rev. C. 1907; re-en. Sec. 9941, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1245.

References

Cited or applied as section 2218, Code of Civil Procedure, in Yellowstone Park R. R. Co. v. Bridger Coal Co., 34 M 545, 553, 87 P 963.

9942. Who may defend. All persons named in the complaint, in occupation of, or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, answer, or demur, each in respect to his own property or interest.

History: En. Sec. 588, p. 192, L. 1877; re-en. Sec. 588, 1st Div. Rev. Stat. 1879; re-en. Sec. 606, 1st Div. Comp. Stat. 1887; amd. Sec. 2219, C. Civ. Proc. 1895; re-en. Sec. 7339, Rev. C. 1907; re-en. Sec. 9942, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1246.

References

Cited or applied as section 2219, Code of Civil Procedure, in Yellowstone Park R. R. Co. v. Bridger Coal Co., 34 M 545, 554, 87 P 963.

9943. Power of court to appoint commissioners, etc. The court or judge has power:

1. To regulate and determine the place and manner of making the connections and crossings, and enjoying the common uses mentioned in subdivision 5, section 9936, and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by the laws of this state or of the United States;

2. To determine whether or not the use for which the property is sought to be appropriated is a public use, within the meaning of the laws of this state;

3. To limit the amount of property sought to be appropriated, if in the opinion of the court or judge the quantity sought to be appropriated is not necessary;

4. If the court or judge is satisfied that the public interests require the taking of such lands, it or he must make an order appointing three competent persons, resident in said county, commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner, or other person interested in such property, as damages, by reason of the appropriation of such property, and specify the time and place of the first meeting of such commissioners, and fixing their compensation. Any party may

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object to the appointment of any person as a commissioner on the same grounds that he might object to him as a trial juror.

History: Ap. p. Sec. 589, p. 193, L. 1877; re-en. Sec. 589, 1st Div. Rev. Stat. 1879; re-en. Sec. 607, 1st Div. Comp. Stat. 1887; amd. Sec. 2220, C. Civ. Proc. 1895; re-en. Sec. 7340, Rev. C. 1907; re-en. Sec. 9943, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1247.

Operation and Effect

In condemnation proceedings by a railroad company to obtain parts of the right-of-way of another road, the question of damages for crossings may be properly referred to commissioners. *Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co.*, 16 M 504, 549, 41 P 232.

Failure of defendant in condemnation proceedings to appear, either by demurrer or answer, does not relieve the court of the duty of determining whether the use for which the property sought to be condemned is a public use, limiting the amount taken to the necessities of the case, and ascertaining the damages as provided in this section and sections 9944

and 9947. *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 555, 87 P 963.

Where land, sought to be condemned by a corporation for the construction of a dam to be used in the generation of electric power, had been flooded prior to the appointment of commissioners to determine the damages, an objection to their appointment that it was so flooded was properly overruled, in the absence of any evidence that the water could or would not be withdrawn to enable an examination of the premises. *Spratt v. Helena Power Transmission Co.*, 37 M 60, 90, 94 P 631.

The taking of private property for the private use of another violates the Fourteenth Amendment to the federal Constitution, and the legislature has not the power to declare that that which is in truth a private use shall be a public one, the question whether a particular use is a private or public one being determinable by the courts. *Komposh v. Powers et al.*, 75 M 483, 501, 244 P 298.

9944. Meeting of commissioners. The commissioners mentioned in the last section must, before entering upon their duties, severally take and subscribe an oath before some person qualified to administer oaths, to faithfully and impartially discharge the duties of their appointment. The commissioners must meet at the time and place mentioned in the order appointing them, and proceed to examine the lands sought to be appropriated, and shall hear the allegations and evidence of all persons interested in each of the several parcels of land, and shall ascertain and assess:

1. The value of the property sought to be appropriated, and all improvements thereon pertaining to the realty, and of each and every separate estate and interest therein; if it consist of different parcels, the value of each parcel and each estate or interest therein must be separately assessed.

2. If the property sought to be appropriated constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvements proposed by the plaintiff, and if the benefit shall be equal to the damage assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefits shall be less than the damages assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value.

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle-guards where fences may cross the line of such railroad.

5. As far as practicable, compensation must be assessed for each source of damage separately.

History: En. Sec. 608, 1st Div. Comp. Stat. 1887; amd. Sec. 1, p. 269, L. 1891; amd. Sec. 2221, C. Civ. Proc. 1895; re-en. Sec. 7341, Rev. C. 1907; re-en. Sec. 9944, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1248.

Damages Caused to Portion of Land Not Taken—What Constitutes Independent Parcels

Within the meaning of this section, subdivision 2, declaring that where property sought to be condemned constitutes only a part of a larger parcel, damages may be awarded which will accrue to the portion not sought to be taken, by reason of the severance therefrom, parts of the whole tract separated by intervening private lands are generally considered as independent parcels. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Id. By eminent domain proceedings the state sought to acquire a strip of land containing 85 acres for highway purposes from a body of land comprising more than 21,000 acres used for livestock purposes. While the major body of the land was inclosed by a common fence, a number of tracts therein were owned by others, and the common fence was maintained only by mere license, acquiescence or failure to protest. A number of tracts controlled by defendant were noncontiguous and some were more than nine miles from the desired right-of-way. Held, that error was committed in admitting evidence showing damage to all the lands, whether contiguous or not, on the theory that they were used as a unit as grazing lands in defendant's livestock operations.

Damages Must be Readily Ascertainable, Not Remote or Speculative

Recoverable damages in eminent domain proceedings must be the natural and proximate consequence of the taking of the lands; they must be readily ascertainable and not remote, speculative or contingent. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Id. Evidence that the taking of land for highway purposes through a cattle country would, after constructing fences, result in cattle breaking through the fences in search of water or when alarmed by automobiles, necessitating employment of additional help to make repairs, etc., held inadmissible as referring to an element of damage too remote, speculative and conjectural.

Damages Not Allowable for Fence as Such

In the absence of statutory provision therefor, in determining the damages incident to the taking of ranch land for highway purposes, allowance may not be made for a fence as such, and proof of the necessity of fencing and its cost is proper only as a means of showing the depreciation in market value of the remaining land by reason of the taking of the highway strip. *Lewis and Clark County v. Nett*, 81 M 261, 265, 263 P 418.

Damages Recoverable for Farm Land Taken for Highway

While ordinarily damages for the taking of land for highway purposes may be awarded for injury done to the particular lot or tract of land from which the right-of-way strip is taken regardless of what other lands the owner may possess, where a small tract from which the strip is sought to be taken is isolated from a ranch proper by a railroad but used for the pasturing of dairy cows, milked upon the ranch, the additional inconvenience and danger in the use of the pasture by the construction of a highway on which automobiles are constantly passing may be considered as an item of damages, as may also the construction of a fence along the highway to maintain the inclosure. *State et al. v. Hoblitt et al.*, 87 M 403, 408 et seq., 288 P 181.

Damages Recoverable Must Flow From Proximate Consequences of Taking of Land

It is not every possible element of depreciation in value of land a portion of which is taken for highway purposes for which compensation may be awarded; recoverable damages must be the natural and proximate consequence of the taking; they must be direct and certain, actual, reasonable and readily ascertainable, not remote, speculative or contingent. *Lewis & Clark County v. Nett*, 81 M 261, 265, 263 P 418.

Damages to Adjacent Property

Under this section and the next succeeding section, damages accruing to adjacent property from improper construction of a railroad are not allowable in condemnation proceedings for a railroad right-of-way. *Montana R. R. Co. v. Freeser*, 29 M 210, 213, 74 P 407.

Effect of Failure of Defendant to Appear

The defendant in condemnation proceedings is required to appear, either by demurrer or answer; and if he fails so to do, he has no standing in court for any purpose, and may not be heard in the subsequent proceedings, notwithstanding the provisions of this section, that the commissioners appointed to assess the damages shall hear the allegations and evidence of all persons interested, said section having reference to cases where the parties defendant are not in default. *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 554, 87 P 963; *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 600, 144 P 159.

General Neighborhood Benefits Cannot be Set Off

Where land is taken by a railroad company for right-of-way purposes, general neighborhood benefits resulting to the owner in common with others from the construction of the road, the building of a depot, elevator, etc., but not peculiar or special to himself, may not be set off against the damages resulting to him from the taking of the land; hence evidence of such general benefits was properly excluded. *Gallatin Valley Electric Ry. v. Neible et al.*, 57 M 27, 186 P 689.

Measure of Damages

The measure of damages in a proceeding for the condemnation of land for a public highway is the fair cash market value of the land sought to be condemned with the depreciation of such value of the land from which the strip is to be taken, less allowable deductions for benefits proven,

the values to be determined as of the date of the commencement of the proceeding. *Lewis & Clark County v. Nett*, 81 M 261, 265, 263 P 418.

No Damages for Discontinuance of Public Highway

The owner of land abutting on a country highway, as distinguished from a city street, has no property or other vested right in the continuance of it as a highway, and may not claim damages for its discontinuance, caused by the laying out of a new road by the highway commission, for inconvenience caused to the owner in marketing his farm products, for diverting traffic from his door, diminishing his trade and thus depreciating the value of his land. *State et al. v. Hoblitt et al.*, 87 M 403, 408 et seq., 288 P 181.

Remedy as to Report of Commissioners—Waiver

Where commissioners, appointed to assess damages occasioned by the taking of land through eminent domain proceedings, do not perform their whole duty in the premises, either by reason of their non-feasance or malfeasance, the injured party may appeal or move to set aside their report. Upon failure to invoke either of these remedies, such party may not thereafter be heard to say that his property was taken without due process of law. *Spratt v. Helena Power Transmission Co.*, 37 M 60, 94, 94 P 631.

References

Cited or applied as section 7341, Revised Codes, in *Great Northern Ry. Co. v. Fiske*, 54 M 231, 233, 169 P 44; *State et al. v. Anderson et al.*, 92 M 313, 318, 13 P 2d 228.

9945. The date with respect to which compensation shall be assessed, and the measure thereof. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation of all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected. If an order be made letting the plaintiff into possession, as provided in section 9952, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or damages.

History: En. Sec. 591, p. 194, L. 1877; re-en. Sec. 591, 1st Div. Rev. Stat. 1879; re-en. Sec. 609, 1st Div. Comp. Stat. 1887; amd. Sec. 2222, C. Civ. Proc. 1895; re-en. Sec. 7342, Rev. C. 1907; re-en. Sec. 9945, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1249.

Operation and Effect

This and the preceding section definitely fix the time when compensation and dam-

ages accrue, and also establish the right to recover damages which will accrue to that portion of a larger tract not sought to be condemned, and the basis for the appraisal is the proper construction of the improvements as to the entire tract and additional damages cannot be given by reason of an improper construction of the improvements. *Montana R. R. Co. v. Freeser*, 29 M 210, 214, 74 P 407.

9945
63 P (2d) 136

Where damages are assessed by a jury in condemnation proceedings after and in excess of an award by commissioners, it is proper for the court to add and fix the date and rate of interest in its judgment, since interest is a matter regulated by statute with which the jury has nothing to do. *Helena Power Transmission Co. v. Spratt*, 40 M 254, 256, 106 P 5.

The "actual value" which under this section shall be the measure of compensation for land taken under the power of eminent domain, is the price which would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy—the market value. *State et al. v. Hoblitt et al.*, 87 M 403, 413, 288 P 181.

Id. The owner of land sought to be condemned has the right to obtain its market value, based upon its availability for the most valuable purpose for which it can be used, whether so used or not, and since under this section the market value at the date of the summons controls,

the land must be shown to have been marketable for the purpose stated at that time; the showing must be that the use is one to which the land may reasonably be applied; speculative uses, remote and conjectural possibilities, such as that farm lands might be platted into town lots, or as to what they would bring if certain fruit-trees were planted thereon, are not to be taken into consideration.

Id. The test for determining the market value of land sought to be acquired by condemnation is "What is its value for any commercial use in the immediate present, or in reasonable anticipation in the near future?"

References

Cited or applied as section 2222, Code of Civil Procedure, in *Butte Electric Ry. Co. v. Mathews*, 34 M 487, 492, 87 P 460; as section 7342, Revised Codes, in *Great Northern Ry. Co. v. Fiske*, 54 M 231, 234, 169 P 44; *Gallatin Valley Electric Ry. v. Neible et al.*, 57 M 27, 37, 186 P 689.

9946. Report of commissioners. Within thirty days after making their appraisalment and the assessment of damages, the commissioners must file a report of their proceedings, accompanied by a map, if a right-of-way be sought, showing the route, location, and termini thereof, in the office of the clerk of the court, and the clerk must notify the parties interested that such report has been filed, which notice must be served upon all the parties interested, in the same manner as a summons.

History: En. Sec. 2223, C. Civ. Proc. 1895; re-en. Sec. 7343, Rev. C. 1907; re-en. Sec. 9946, R. C. M. 1921.

References

Cited or applied as section 7343, Revised Codes, in *Great Northern Ry. Co. v. Fiske*, 54 M 231, 234, 169 P 44.

9947. Appeal from assessment of commissioners. An appeal from any assessment made by the commissioners may be taken and prosecuted in the court where the report of said commissioners is filed by any party interested. Such appeal must be taken within the period of thirty (30) days after the service upon appellant of the notice of the filing of the award by the service of notice of such appeal upon the opposing party or his attorney in such proceedings, and the same shall be brought on for trial upon the same notice and in the same manner as other civil actions, and unless a jury shall be waived by the consent of all parties to such appeal, the same shall be tried by jury, and the damages to which appellant may be entitled, by reason of the appropriation of his property, shall be re-assessed upon the same principle as hereinbefore prescribed for the assessment of such damages by commissioners; upon any verdict or assessment by commissioners becoming final, judgment shall be entered declaring that upon payment of such verdict or assessment, together with the interests and costs allowed by law, if any, the right to construct and maintain such railroad or other public work or improvement, and to take, use and appropriate the property described in such verdict or assessment, for the use and purposes for which said land has been condemned, shall,

as against the parties interested in such verdict or assessment, be and remain in the plaintiff and his or its heirs, successors or assigns forever. In case the party appealing from the award of the commissioners in any proceeding, as aforesaid, shall not succeed in changing to his advantage the amount of damages finally awarded in such proceeding, he shall not recover the costs of such appeal, but all the costs of the appellee upon such appeal shall be taxed against and recovered from the appellant; provided, that upon the trial of such appeal, the plaintiff may contest the right of any party or parties thereto to any of the property mentioned and set forth or involved in said appeal, which was located after the preliminary survey of any such railroad, seeking to condemn its right of way under and pursuant to the provisions of this act; provided, such condemnation proceedings are begun within one year after such preliminary survey.

History: En. Sec. 608, p. 220, L. 1887; re-en. Sec. 2224, C. Civ. Proc. 1895; re-en. Sec. 7344, Rev. C. 1907; re-en. Sec. 9947, R. C. M. 1921; amd. Sec. 1, Ch. 145, L. 1927.

Allowance of Costs

This section, providing that if the party appealing to the district court from an award made by the commissioners appointed in a proceeding in eminent domain shall not succeed in changing to his advantage the amount of damages awarded, he shall not recover his costs of appeal, but all costs of respondent shall be recovered from appellant, applies only to an appeal by defendant; hence, where plaintiff state appealed, and the court exercised its discretion vested in it by section 9953, and awarded costs against plaintiff, the damages awarded by the jury being substantially the same as those awarded by the commissioners, the supreme court will not interfere. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 112, 43 P 2d 674.

Appeal Must be Taken From the Entire Award

If there is any right to appeal under this section, given to a railroad company, from the judgment on an award by commissioners in condemnation proceedings instituted by the company, such appeal must, in view of sections 9944 to 9946, inclusive, and sections 9949 and 9952 be taken from the entire award; it cannot be taken from such portions of the award only as the condemner is dissatisfied with. *Great Northern Ry. Co. v. Fiske*, 54 M 231, 233, 169 P 44.

How Re-assessed

This section provides that upon appeal from the award of the commissioners the damages "shall be re-assessed upon the same principle as hereinbefore prescribed for the assessment of such damages by

commissioners." This simply means that the assessment shall be made conformably to section 9944, which has to do with a finding on the separate items of damages. *State et al. v. Anderson et al.*, 92 M 313, 317, 13 P 2d 228.

Right to Appeal is a Statutory Right

In condemnation proceedings, the right to appeal is purely statutory, and may be granted to, or withheld from, either party or both, at the discretion of the legislature, if no constitutional provision is thereby infringed. *Great Northern Ry. Co. v. Fiske*, 54 M 231, 233, 169 P 44.

What May be Considered an Appeal

Where, in a proceeding to condemn a right-of-way, plaintiff alleges title in defendant, a contention that the verdict for damages was not supported by the evidence, because there was no evidence that defendant's title was valid, cannot be considered by the supreme court. *Helena & Livingston S. & R. Co. v. Lynch*, 25 M 497, 498, 65 P 919.

Findings of the jury, in condemnation proceedings, with relation to the amount of damages sustained by defendants by the taking of a railroad right-of-way through their lands, complained of as excessive, will not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of the "just compensation" provided for by section 14, article III, of the constitution. *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 563, 87 P 963. See also *Lewis v. Northern Pacific Ry. Co.*, 36 M 207, 224, 92 P 469.

The sole question presented to the district court on appeal from the award of commissioners in condemnation proceedings, under this section, is as to the amount of damages to be allowed, and the judgment should determine that issue and no other. *Great Northern Ry. Co. v. Benjamin*, 51 M 167, 175, 149 P 968.

When Appeal is Proper

Where a railroad company pays a sum into court on an award of damages made by commissioners for right-of-way railroad purposes, this is to be regarded as a "just compensation," within section 14, article III, of the constitution, although the owner has appealed from the award; and the granting of an order by the court, allowing the railroad company possession and use of such right-of-way pending such appeal, is proper. *State ex rel. Volunteer Min. Co. v. McHatton*, 15 M 159, 160, 38 P 711.

9948. New proceedings to cure defective title. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this chapter prescribed.

History: En. Sec. 592, p. 194, L. 1877; re-en. Sec. 592, 1st Div. Rev. Stat. 1879; re-en. Sec. 610, 1st Div. Comp. Stat. 1887;

If commissioners appointed to assess damages in eminent domain proceedings do not perform their whole duty, the injured party may appeal. *Spratt v. Helena Power Transmission Co.*, 37 M 60, 94, 94 P 631.

References

Cited or applied as section 7344, Revised Codes, in *Helena Power Transmission Co. v. Spratt*, 40 M 254, 255, 106 P 5; as section 2224, Code of Civil Procedure, in *State ex rel. Culbertson Ferry Co. v. District Court*, 49 M 595, 600, 144 P 159; *Gallatin Valley Elec. Ry. v. Neible*, 57 M 27, 33, 186 P 689; *Lewis & Clark County v. Nett*, 81 M 261, 265, 263 P 418.

re-en. Sec. 2225, C. Civ. Proc. 1895; re-en. Sec. 7345, Rev. C. 1907; re-en. Sec. 9948, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1250.

9949. Payment of damages or deposit of bond therefor. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; but may, at the time of or before the payment, elect to build the fences and cattle-guards, and, if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court, in double the assessed cost of the same, to build such fences and cattle-guards within eight months from the time the railroad is built on the land taken, and, if such bond be given, need not pay the cost of such fences and cattle-guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

History: En. Sec. 593, p. 194, L. 1877; re-en. Sec. 593, 1st Div. Rev. Stat. 1879; re-en. Sec. 611, 1st Div. Comp. Stat. 1887; amd. Sec. 2226, C. Civ. Proc. 1895; re-en. Sec. 7346, Rev. C. 1907; re-en. Sec. 9949, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1251.

References

Cited or applied as section 7346, Revised Codes, in *Great Northern Ry. Co. v. Fiske*, 54 M 231, 234, 169 P 44.

9950. Damages—to whom paid. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court or judge, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

History: En. Sec. 594, p. 194, L. 1877; re-en. Sec. 594, 1st Div. Rev. Stat. 1879; re-en. Sec. 612, 1st Div. Comp. Stat. 1887; re-en. Sec. 2227, C. Civ. Proc. 1895; re-en. Sec. 7347, Rev. C. 1907; re-en. Sec. 9950, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1252.

Appeal by Plaintiff—Constitutionality of Statute Authorizing

Contention of defendant land owner in a proceeding by the state to condemn land for highway purposes, that section 9937,

this section and sections 9951 and 9952, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, is invalid under section 14, Article III, of the Constitution prohibiting the taking of private property for public use without paying just compensation therefor, and that the appeal should therefore be dismissed, held not meritorious. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Operation and Effect

A trustee, as holder of the legal title to land taken by a railroad company in con-

demnation proceedings, is *prima facie* entitled to the money ordered paid to him. *Forbis v. Cannon*, 35 M 424, 427, 90 P 161.

9951. Final order of condemnation—what to contain—when filed, title vests. When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court or judge must make a final order of condemnation, which must describe the property condemned, and the purposes of such condemnation. A copy of the order must be filed in the office of the county clerk, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

History: En. Sec. 595, p. 195, L. 1877; re-en. Sec. 595, 1st Div. Rev. Stat. 1879; re-en. Sec. 613, 1st Div. Comp. Stat. 1887; re-en. Sec. 2228, C. Civ. Proc. 1895; re-en. Sec. 7348, Rev. C. 1907; re-en. Sec. 9951, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1253.

Constitution prohibiting the taking of private property for public use without paying just compensation therefor, and that the appeal should therefore be dismissed, held not meritorious. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Appeal by Plaintiff—Constitutionality of Statute Authorizing

Contention of defendant land owner in a proceeding by the state to condemn land for highway purposes, that sections 9937, 9950, this section and 9952, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, is invalid under section 14, Article III, of the

Operation and Effect

The final order of condemnation follows the payment of an award, and cannot be entered in advance without infringing the constitutional provision that private property shall not be taken without just compensation having been first made to, or paid into court for, the owner. *Great Northern Ry. Co. v. Benjamin*, 51 M 167, 175, 149 P 968.

9952. Putting plaintiff in possession. At any time after the report and assessment of damages of the commissioners have been made and filed in the court, and either before or after appeal from such assessment, or from any other order or judgment in the proceedings, the court or any judge thereof at chambers, upon application of the plaintiff, shall have power to make an order that upon payment into court for the defendant entitled thereto of the amount of damages assessed, either by the commissioners or by the jury, as the case may be, the plaintiff be authorized, if already in possession of the property of such defendant sought to be appropriated, to continue in such possession; or, if not in possession, that the plaintiff be authorized to take possession of such property and use and possess the same during the pendency and until the final conclusion of the proceedings and litigation, and that all actions and proceedings against the plaintiff on account thereof be stayed until such time; provided, however, that where an appeal is taken by such defendant, the court or judge may, in its or his discretion, require the plaintiff, before continuing or taking such possession, in addition to paying into court the amount of damages assessed, to give bond or undertaking, with sufficient sureties, to be approved by the judge and to be in such sum as the court or judge may direct, conditioned to pay defendant any additional damages and costs over and above the amount assessed, which it may finally be determined that defendant is entitled to for the appropriation of the property, and all damages which defendant may sustain if for any cause such property shall not be finally taken for public uses. The amount assessed as damages by the commissioners, or by the jury on appeal, as the case may be, shall be

taken and considered, for the purposes of this section, until reassessed or changed in the further proceedings, as just compensation for the property appropriated; but the plaintiff, by payment into court of the amount assessed, or by giving security as above provided, shall not be thereby prevented or precluded from appealing from such assessment, but may appeal in the same manner and with the same effect as if no money had been deposited or security given; and in all cases where the plaintiff deposits the amount of the assessment and continues in possession, or takes possession of the property, as herein provided, the defendant entitled thereto, if there be no dispute as to the ownership of the property, may at any time demand and receive from the court the money so deposited, and shall not by such demand or receipt be barred or precluded from his right of appeal from such assessment, but may, notwithstanding, take and prosecute his appeal from such assessment; provided, that if the amount of such assessment is finally reduced on appeal by either party, such defendant who has received the amount of the assessment deposited shall be liable to the plaintiff for any excess of the amount so received by him over the amount finally assessed, with legal interest on such excess from the time such defendant received the money deposited, and the same may be recovered by action; and, provided, further, that upon any appeal from assessment of damages by the commissioners to a jury, the jury may find as compensation or damages a less as well as an equal or greater amount than that assessed by the commissioners.

History: Ap. p. Sec. 596, p. 195, L. 1877; re-en. Sec. 596, 1st Div. Rev. Stat. 1879; amd. Sec. 614, 1st Div. Comp. Stat. 1887; amd. Sec. 2, p. 272, L. 1891; en. Sec. 2229, C. Civ. Proc. 1895; re-en. Sec. 7349, Rev. C. 1907; re-en. Sec. 9952, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1254.

Appeal by Plaintiff—Constitutionality of Statute Authorizing

Contention of defendant land owner in a proceeding by the state to condemn land for highway purposes, that sections 9937, 9950, 9951 and this section, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, is invalid under section 14, Article III, of the State Constitution prohibiting the taking of private property for public use without paying just compensation therefor, and that the appeal should therefore be dismissed, held not meritorious. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Operation and Effect

Merely because a corporation had become a trespasser by reason of the reversal of an order of the district court empowering it to take lands under condemnation proceedings, it was not thereafter, while still a trespasser, deprived of the right to again invoke the power of

eminent domain. *Spratt v. Helena Power Transmission Co.*, 37 M 60, 93, 94 P 631.

Id. After the report and assessment of the commissioners, appointed to determine the damages in eminent domain proceedings, had been made and filed, and the amount of damages so assessed had been paid into court for the owner of the property, the court properly permitted plaintiff to continue in possession of the property which had theretofore been obtained under an order in a like proceeding, the judgment in which, however, had been reversed on appeal.

A recital in condemnation proceedings that plaintiff have judgment and execution against defendant for any sum theretofore paid by plaintiff to defendant in accordance with the award, which award was appealed from, is improper, as the statute gives an ample remedy if plaintiff is entitled to recover any amount from defendant. *Great Northern Ry. Co. v. Benjamin*, 51 M 167, 175, 149 P 968.

References

Cited or applied as section 2229, Code of Civil Procedure, in *Butte Electric Ry. Co. v. Mathews*, 34 M 487, 492, 87 P 460; as section 7349, Revised Codes, in *Helena Power Transmission Co. v. Spratt*, 40 M 254, 255, 106 P 5; *Great Northern Ry. Co. v. Fiske*, 54 M 231, 233, 169 P 44.

9953. Costs, allowance and apportionment of. Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

History: En. Sec. 597, p. 195, L. 1877; re-en. Sec. 597, 1st Div. Rev. Stat. 1879; re-en. Sec. 615, 1st Div. Comp. Stat. 1887; re-en. Sec. 2230, C. Civ. Proc. 1895; re-en. Sec. 7350, Rev. C. 1907; re-en. Sec. 9953, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1255.

Operation and Effect

Under this section, the allowance of costs in condemnation proceedings is in the discretion of the district court. *State et al. v. Bradshaw Land etc. Co.*, 99 M 95, 43 P 2d 674.

Id. Section 9947, providing that if the party appealing to the district court from

an award made by the commissioners appointed in a proceeding in eminent domain shall not succeed in changing to his advantage the amount of damages awarded, he shall not recover his costs of appeal, but all costs of respondent shall be recovered from appellant, applies only to an appeal by defendant; hence where plaintiff state appealed, and the court exercised its discretion vested in it by this section, and awarded costs against plaintiff, the damages awarded by the jury being substantially the same as those awarded by the commissioners, the supreme court will not interfere.

9954. Rules of practice. Except as otherwise provided in this chapter, the provisions of sections 9008 to 9832 of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

History: En. Sec. 2231, C. Civ. Proc. 1895; re-en. Sec. 7351, Rev. C. 1907; re-en. Sec. 9954, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1256.

Operation and Effect

In case commissioners to assess damages in eminent domain proceedings do not perform their whole duty, the injured party may move to set aside their report.

Spratt v. Helena Power Transmission Co., 37 M 60, 94, 94 P 631.

References

Cited or applied as section 2231, Code of Civil Procedure, in *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 M 545, 554, 87 P 963; *State et al. v. Anderson et al.*, 92 M 313, 317, 13 P 2d 228.

9955. Private roads. Private roads may be opened in the manner prescribed by this chapter, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

History: En. Sec. 2232, C. Civ. Proc. 1895; re-en. Sec. 7352, Rev. C. 1907; re-en. Sec. 9955, R. C. M. 1921.

Operation and Effect

Whether a way is a public or private one is determined by the extent of the right to use it, not by the extent to which that right is actually exercised; and if a private road sought to be established under this section, leading from a public highway through lands of a private owner to those owned by plaintiff, may be used by the public generally, although others than plaintiff may have slight occasion

to use it, the statute authorizing its establishment as this section does, under such circumstances is not open to constitutional objection. *Komposh v. Powers et al.*, 75 M 493, 500 et seq., 244 P 298.

Id. Under section 1765, and this section, authorizing the establishment of a private road, the appointment of commissioners to determine the damages occasioned thereby, etc., is not necessary, the matters ordinarily determined by commissioners in eminent domain proceedings being determinable in such a case by the jury.

9956. Exceptions. Nothing in this code must be construed to abrogate or repeal any statute providing for the taking of property in any city, town, or county for road or street purposes.

History: En. Sec. 2233, C. Civ. Proc. 1895; re-en. Sec. 7353, Rev. C. 1907; re-en. Sec. 9956, R. C. M. 1921.

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98 P.(2d) 326

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172 F.(2d) 387

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178 P. (2) 859,
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9957. Temporary logging roads. In the event that temporary roads for logging purposes or grounds for banking purposes are opened or taken, the same shall include only the temporary right to use the same, and the order of condemnation for said road shall fix the length of time and the date from which such road shall be opened or land shall be used, and at the expiration of said period so fixed, the right to use said road or land shall cease, and the use of said land shall revert to the party from whom the same is taken, or to his legal successor in interest; provided, that no lands or grounds shall be taken for such temporary logging roads or banking grounds for a period of time longer than five years, and when taken for a period of time exceeding one year, the amount of damage for such year shall be fixed separately, and the amount fixed for each particular year must be paid on or before the first day of January of each year; and in the event that the amount so fixed for any one year is not paid as herein specified, then and in that event the use of such lands shall revert to the party from whom the same is taken, or to his successor in interest.

History: En. Sec. 1, Ch. 89, L. 1907; Sec. 7354, Rev. C. 1907; re-en. Sec. 9957, R. C. M. 1921.

9958. Damages to be paid before land can be used. In any suit for the opening of any temporary logging road or for the use of any ground or land for banking purposes, the court shall not finally order the opening of such road, nor the right to use such land or ground, until the amount assessed as damages has been paid into court for the benefit of the party or parties owning or holding such land; and in the event that any such land is occupied by a lessee, such lessee shall be made a party to the suit, and the final decree of the court shall apportion the amount of compensation received between the lessee and the owner of such lands, such decree being subject to the right of appeal of any party in interest.

History: En. Sec. 1, Ch. 89, L. 1907;
Sec. 7355, Rev. C. 1907; re-en. Sec. 9958,
R. C. M. 1921.

References

Cited or applied as section 7355, Revised Codes, in *Northern Pacific Ry. Co. v. McAdow*, 44 M 547; 552, 121 P 473; *Komposh v. Powers et al.*, 75 M 493, 499, 244 P 298.

CHAPTER 104

ESCHEATED ESTATES

- Section 9959. Manner of commencing proceedings relative to escheated estates.
9960. Receiver of rents and profits may be appointed.
9961. Appearance, pleadings, and trial.
9962. Proceedings by persons claiming escheated estates.

9959. Manner of commencing proceedings relative to escheated estates. When the attorney-general is informed that any real estate has escheated to this state, he must file an information in behalf of the state in the district court of the county in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last seized, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of Montana has right by law to such estate. Upon such information a

summons must issue to such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from date of the order, why the same should not vest in this state; which order must be published for at least one month from the date thereof, in a newspaper published in the county, if one be published therein, and in case no newspaper is published in the county, in some other newspaper in this state.

History: En. Sec. 2250, C. Civ. Proc. 1895; re-en. Sec. 7356, Rev. C. 1907; re-en. Sec. 9959, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1269.

Operation and Effect

A proceeding by the attorney-general to reduce property to his possession, or a proceeding by him in the nature of an inquest of office to determine whether the state has title to lands, may not, in any event, be commenced within five years after the death of the decedent. *State ex rel. Donovan v. District Court*, 25 M 355, 364, 65 P 120.

Id. Where a testator had no resident heirs, the state was entitled to file objections to the probate of the will before the expiration of five years from the testator's death; otherwise the right to contest would be barred by the provisions of section 10048.

References

Cited or applied as section 7356, Revised Codes, in *In re Pomeroy*, 51 M 119, 124, 151 P 333; *State v. Kearns*, 79 M 299, 308, 257 P 1002.

9960. Receiver of rents and profits may be appointed. The court or judge, upon the information being filed and upon the application of the attorney-general, either before or after answer, upon notice to the party claiming such estate, if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

History: En. Sec. 2251, C. Civ. Proc. 1895; re-en. Sec. 7357, Rev. C. 1907; re-en. Sec. 9960, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1270.

9961. Appearance, pleadings, and trial. All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, and the title of the state to lands and tenements therein mentioned, at any time before the time of answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose in open court within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered that the state be seized of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the state, or traverse any material fact set forth in the information, the issue of fact must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the lands and tenements in the information mentioned, or any part thereof, judgment must be rendered that the state be seized thereof, and recover costs of suit against the defendants. In any judgment rendered, or that has been heretofore rendered by any court of competent jurisdiction, escheating real property to the state, on motion of the attorney-general, the court or judge shall make an order that said real property be sold by the sheriff of the county where the same is situate, at public

sale, after giving such notice of the time and place of sale as may be prescribed by the court or judge in said order; that the sheriff shall, within five days after such sale, make a report thereof to the court, and upon the hearing of the said report, the court or judge may examine the said witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expense of a new sale, may be obtained, the court or judge may vacate the sale, and direct another sale to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent. more in amount than that named in the report be made to the court in writing by a responsible person, the court or judge may, in its or his discretion, accept such offer, and confirm the sale to such person, or order a new sale. If it appears to the court or judge that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent., exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court or judge must make an order confirming the sale, and directing the sheriff, in the name of the state, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the state therein, and the sheriff shall, out of the proceeds of such sale, pay the costs of said proceedings incurred on behalf of the state, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court or judge, not exceeding ten per cent. on the amount of such sale, and the residue thereof shall be paid by said sheriff into the state treasury.

History: En. Sec. 2252, C. Civ. Proc. 1895; re-en. Sec. 7358, Rev. C. 1907; re-en. Sec. 9961, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1271.

9962. Proceedings by persons claiming escheated estates. Within twenty years after judgment for any proceedings had under this chapter, a person, not a party or privy to such proceedings, may file a petition in the district court of the county in which the seat of government is located, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court must thereupon try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or, if it has been sold and the proceeds paid into the state treasury, then it must order the auditor to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after

their respective disabilities cease; provided, however, that any person claiming the proceeds of the sale of escheated property, or property alleged to have escheated, which have been paid into the treasury of the state of Montana, at any time before the first day of July, 1895, shall have one year after the passage of this act in which to file his petition for the recovery of such proceeds, as hereinabove provided.

History: En. Sec. 2253, C. Civ. Proc. 1895; re-en. Sec. 7359, Rev. C. 1907; amd. Sec. 1, Ch. 132, L. 1913; re-en. Sec. 9962, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1272.

Operation and Effect

The limitation of twenty years within which to file petition in the district court to determine one's heirship to escheated property is exclusive, and the limitation periods prescribed for ordinary actions have no application to such a proceeding. In re Pomeroy, 33 M 69, 72, 81 P 629.

Id. Formerly, a citizen of the United States, claiming, as heir of the deceased owner, property reduced to possession by the state under the escheat laws contained in the Compiled Statutes of 1887, could obtain no relief save through this section, which was not retroactive; but in 1913 an act was passed whereby heirs, left without relief by the section, were given a year

after the passage of the act within which to file their petitions.

Id. This section is not retrospective within the meaning of that term as used in the constitution.

Id. In so far as this section authorizes a judgment that the auditor draw his warrant in the absence of an appropriation, it is in direct conflict with the constitution and invalid. There appears to be no objection to the statute in so far as it authorizes the petitioner to establish his right to the property as a claim against the state which in equity and good conscience it ought to discharge, leaving to subsequent legislative assemblies to provide by adequate appropriations for such claims as they arise and are adjudicated.

References

State v. Kearns, 79 M 299, 257 P 1002.

CHAPTER 105

CHANGE OF NAMES—OF PERSONS—OF WATERCOURSES

Section 9963. Jurisdiction.

9964. Application for change of name—how made.

9965. Notice of hearing.

9966. Hearing of application and remonstrance.

9967. Return by clerk of district court.

9968. Change of name of watercourses—petition—contents.

9969. Notice and publication.

9970. Objections and hearing thereon.

9971. Filing of judgment—annual return by clerk.

9963. Jurisdiction. Applications for change of names must be heard and determined by the district court.

History: En. Sec. 2260, C. Civ. Proc. 1895; re-en. Sec. 7360, Rev. C. 1907; re-en. Sec. 9963, R. C. M. 1921.

NOTE.—See California Code of Civil Procedure, sections 1275 to 1279, for sections similar to this and the following.

9964. Application for change of name—how made. All applications for change of names must be made to the district court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years, if a female, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name; and must, if the father of such person be not living, name, as

far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, scientific corporation, or any corporation bearing or having for its name, or using or being known by the name of, any benevolent or charitable order or society, may, by petition, apply to the district court of the county in which its articles of incorporation were originally filed, or in which the property of such corporation is situated, for a change of its corporate name. Such petition must be signed by a majority of the directors or trustees of the corporation, and must specify the date of the formation of the corporation, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be had as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any other banking corporation or association, or of any friendly association.

History: En. Sec. 2261, C. Civ. Proc. 1895; re-en. Sec. 7361, Rev. C. 1907; amd. Sec. 1, Ch. 39, L. 1921; re-en. Sec. 9964, R. C. M. 1921.

9965. Notice of hearing. When a petition setting out the matters contained in the preceding section is filed, the court or judge may appoint a time for hearing the said petition. Notice of the time and place of hearing the said petition must be published for four successive weeks in some newspaper published in the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such notice must be posted in at least three public places in the county for a like period.

History: En. Sec. 2262, C. Civ. Proc. 1895; re-en. Sec. 7362, Rev. C. 1907; amd. Sec. 1, Ch. 7, L. 1911; re-en. Sec. 9965, R. C. M. 1921.

9966. Hearing of application and remonstrance. On the day set for the hearing of said petition, or at any time to which the hearing is continued or postponed, due proof of the publication, or posting of the required notice as set out in the preceding section being made, such application must be heard. At any time before such hearing, objections may be filed by any person who can, in such objections, show to the court or judge good reasons against such change of name. On the hearing the court or judge may examine on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name or dismissing the applications, as to the court or judge may seem right and proper.

History: En. Sec. 2263, C. Civ. Proc. 1895; re-en. Sec. 7363, Rev. C. 1907; amd. Sec. 2, Ch. 7, L. 1911; re-en. Sec. 9966, R. C. M. 1921.

9967. Return by clerk of district court. Each clerk of the district court shall, annually, in the month of January, make a return to the office of secretary of state of all changes of names made in the district court of his county under this chapter. Such return shall show the date of the judgment of the court, original name, name decreed, and residence. Such returns shall be published in a tabular form with the statutes first published thereafter.

History: En. Sec. 2264, C. Civ. Proc. 1895; re-en. Sec. 7364, Rev. C. 1907; re-en. Sec. 9967, R. C. M. 1921.

9968. Change of name of watercourses—petition—contents. All applications for the change of names of any watercourse or natural source of

water supply, including natural streams, dry coulees, springs, lakes, rivers, or creeks, which lie wholly within the limits of one county, must be made to the district court of the county where the said watercourse or other natural source of water supply, the name of which is proposed to be changed, or some part thereof, is situated. The petition must state in ordinary and concise language:

1. A description of the said watercourse or other natural source of water supply, the name of which is proposed to be changed, identifying the same as near as may be by natural monuments.

2. The present name of the said stream or other natural source of water supply, and the name to which the petitioners desire the same to be changed, together with the reasons for the desired change of name.

3. The petition must be signed by not less than ten owners of real property abutting upon said watercourse or other natural source of water supply, or owning water rights upon the same.

4. The names of all persons or corporations owning real estate abutting upon, or water rights upon the same, whose titles appear of record in the office of the county clerk and recorder in the county in which the said watercourse or other natural source of water supply, or some part thereof, is situated; provided, however, that the insufficiency of the petition in any of the above respects shall not be held to defeat the jurisdiction of the court.

History: En. Sec. 1, Ch. 101, L. 1911; re-en. Sec. 9968, R. C. M. 1921.

9969. Notice and publication. When such petition is filed in the district court, the court or the judge thereof shall designate some newspaper of general circulation in the county, such as is most likely to give all parties interested notice of the proceedings, and shall order that notice be published therein as hereinafter provided, and, in his discretion, he may require any other and further notice that to him may seem reasonable, and shall fix a time at which objections to the granting of the petition for the change of name shall be heard. A copy of the petition, together with a notice of the time set for hearing objections thereto, shall be published in the newspaper designated by the court or judge for that purpose, at least once a week for four successive weeks, and such other and further notice of the proceedings shall be given as the court or judge may, in his discretion, require.

History: En. Sec. 2, Ch. 101, L. 1911; re-en. Sec. 9969, R. C. M. 1921.

9970. Objections and hearing thereon. At the time set for hearing, or at any time prior thereto, objections may be filed by any person who can, in such objections, show to the court or judge good reason against such change of name. The application and the objections must be heard at such time as the court or judge may appoint. On hearing, the court or judge may examine on oath any of the petitioners, remonstrants, objectors, or other persons, touching the application, and may make an order changing the name or dismissing the application, as to the court or judge may seem right and proper.

History: En. Sec. 3, Ch. 101, L. 1911; re-en. Sec. 9970, R. C. M. 1921.

9971. Filing of judgment—annual return by clerk. If the change of name be ordered, a copy of the judgment, duly certified by the clerk of the court, shall be filed with the county clerk and recorder of the county in which the said watercourse or other natural source of water supply is situated. And the clerk of the court shall annually, in the month of January, make a return to the office of the secretary of state, of all changes of names made in the district court of his county under this section.

History: En. Sec. 4, Ch. 101, L. 1911; re-en. Sec. 9971, R. C. M. 1921.

CHAPTER 106

SUBMISSION TO ARBITRATION

- Section 9972. What may be submitted to arbitration, and when.
 9973. Submission to arbitration to be in writing.
 9974. Submission may be entered as an order of the court—revocation.
 9975. Powers of arbitrators.
 9976. Majority of arbitrators may determine any question—oath of arbitrators.
 9977. Award to be in writing—when judgment to be entered.
 9978. Award may be vacated in certain cases.
 9979. Court may, on motion, modify or correct the award.
 9980. Decision on motion subject to appeal, but not the judgment entered before motion.
 9981. If submission be revoked and an action brought, what to be recovered.

9972. What may be submitted to arbitration, and when. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

History: En. Sec. 302, p. 106, Bannack Stat.; re-en. Sec. 358, p. 207, L. 1867; re-en. Sec. 432, p. 122, Cod. Stat. 1871; re-en. Sec. 459, p. 163, L. 1877; re-en. Sec. 459, 1st Div. Rev. Stat. 1879; re-en. Sec. 472, 1st Div. Comp. Stat. 1887; re-en. Sec. 2270, C. Civ. Proc. 1895; re-en. Sec. 7365, Rev. C. 1907; re-en. Sec. 9972, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1281.

Operation and Effect

Where the parties to a contract of fire insurance, upon destruction of the property, agree to submit the amount of loss to arbitration, the award fixes the amount of loss sustained, and is binding upon

both parties; so that the insured cannot maintain an action upon the policy and have a readjustment of the loss, without first having the award set aside. *Solem v. Connecticut Fire Ins. Co.*, 41 M 351, 353, 109 P 432. See also *Aetna Ins. Co. v. Hefferlin*, 260 F. 695, 700.

The legislature has power to provide a means by which the parties to a controversy may waive a trial by a court and submit the matter to arbitrators selected by themselves, by whose award they are finally concluded in the absence of fraud, gross error, excess of power, and the like. *Shea v. North-Butte Min. Co.*, 55 M 522, 535, 179 P 499.

9973. Submission to arbitration to be in writing. The submission to arbitration must be in writing, and may be to one or more persons.

History: En. Sec. 303, p. 106, Bannack Stat.; re-en. Sec. 359, p. 207, L. 1867; re-en. Sec. 433, p. 122, Cod. Stat. 1871; re-en. Sec. 460, p. 163, L. 1877; re-en. Sec. 460, 1st Div. Rev. Stat. 1879; re-en. Sec. 473,

1st Div. Comp. Stat. 1887; re-en. Sec. 2271, C. Civ. Proc. 1895; re-en. Sec. 7366, Rev. C. 1907; re-en. Sec. 9973, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1282.

9974. Submission may be entered as an order of the court—revocation. It may be stipulated in the submission that it be entered as an order of the district court, for which purpose it must be filed with the clerk of the district court of the county where the parties, or one of them, reside.

The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court or judge to make an award, and the award may be enforced by the court or judge in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

History: En. Sec. 304, p. 107, Bannack Stat.; re-en. Sec. 360, p. 207, L. 1867; re-en. Sec. 434, p. 122, Cod. Stat. 1871; re-en. Sec. 461, p. 163, L. 1877; re-en. Sec. 461, 1st Div. Rev. Stat. 1879; re-en. Sec. 474,

1st Div. Comp. Stat. 1887; re-en. Sec. 2272, C. Civ. Proc. 1895; re-en. Sec. 7367, Rev. C. 1907; re-en. Sec. 9974, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1283.

9975. Powers of arbitrators. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

History: En. Sec. 305, p. 107, Bannack Stat.; re-en. Sec. 361, p. 208, L. 1867; re-en. Sec. 435, p. 122, Cod. Stat. 1871; re-en. Sec. 462, p. 164, L. 1877; re-en. Sec. 462, 1st Div. Rev. Stat. 1879; re-en. Sec. 475,

1st Div. Comp. Stat. 1887; re-en. Sec. 2273, C. Civ. Proc. 1895; re-en. Sec. 7368, Rev. C. 1907; re-en. Sec. 9975, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1284.

9976. Majority of arbitrators may determine any question—oath of arbitrators. All the arbitrators must meet and act together during the investigation, but when met, a majority may determine any question. Before acting, they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

History: En. Sec. 306, p. 107, Bannack Stat.; re-en. Sec. 362, p. 208, L. 1867; re-en. Sec. 436, p. 122, Cod. Stat. 1871; re-en. Sec. 463, p. 164, L. 1877; re-en. Sec. 463, 1st Div. Rev. Stat. 1879; re-en. Sec. 476, 1st Div. Comp. Stat. 1887; re-en. Sec. 2274, C. Civ. Proc. 1895; re-en. Sec. 7369, Rev. C. 1907; re-en. Sec. 9976, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1285.

Operation and Effect

Where one of the arbitrators was absent during part of the investigation, though he may have authorized one of the other arbitrators to sign his name to the award, the investigation could not lawfully proceed, the award was null and void, and no valid judgment could be entered thereon. *Dunphy v. Ford*, 2 M 300.

9977. Award to be in writing—when judgment to be entered. The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

History: En. Sec. 307, p. 108, Bannack Stat.; re-en. Sec. 363, p. 208, L. 1867; re-en. Sec. 437, p. 123, Cod. Stat. 1871; re-en. Sec. 464, p. 164, L. 1877; re-en. Sec. 464, 1st Div. Rev. Stat. 1879; re-en. Sec. 477, 1st Div. Comp. Stat. 1887; re-en. Sec. 2275, C. Civ. Proc. 1895; re-en. Sec. 7370,

Rev. C. 1907; re-en. Sec. 9977, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1286.

References

Cited or applied as section 7370, Revised Codes, in *Huffine v. Lincoln*, 53 M 474, 476, 164 P 888.

9978. Award may be vacated in certain cases. The court or judge, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud.
2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.
3. That the arbitrators exceeded their powers in making the award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

History: En. Sec. 308, p. 108, Bannack Stat.; re-en. Sec. 364, p. 208, L. 1867; re-en. Sec. 438, p. 123, Cod. Stat. 1871; re-en. Sec. 465, p. 165, L. 1877; re-en. Sec. 465, 1st Div. Rev. Stat. 1879; re-en. Sec. 478,

1st Div. Comp. Stat. 1887; re-en. Sec. 2276, C. Civ. Proc. 1895; re-en. Sec. 7371, Rev. C. 1907; re-en. Sec. 9978, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1287.

9979. Court may, on motion, modify or correct the award. The court or judge may, on motion, modify or correct the award, where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein;
2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;
3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

History: En. Sec. 309, p. 108, Bannack Stat.; re-en. Sec. 365, p. 209, L. 1867; re-en. Sec. 439, p. 123, Cod. Stat. 1871; re-en. Sec. 466, p. 165, L. 1877; re-en. Sec. 466, 1st Div. Rev. Stat. 1879; re-en. Sec.

479, 1st Div. Comp. Stat. 1887; re-en. Sec. 2277, C. Civ. Proc. 1895; re-en. Sec. 7372, Rev. C. 1907; re-en. Sec. 9979, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1288.

9980. Decision on motion subject to appeal, but not the judgment entered before motion. The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before motion made cannot be subject to appeal.

History: En. Sec. 310, p. 109, Bannack Stat.; re-en. Sec. 366, p. 209, L. 1867; re-en. Sec. 440, p. 123, Cod. Stat. 1871; re-en. Sec. 467, p. 165, L. 1877; re-en. Sec. 467, 1st Div. Rev. Stat. 1879; re-en. Sec. 480,

1st Div. Comp. Stat. 1887; re-en. Sec. 2278, C. Civ. Proc. 1895; re-en. Sec. 7373, Rev. C. 1907; re-en. Sec. 9980, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1289.

9981. If submission be revoked and an action brought, what to be recovered. If a submission to arbitration be revoked, and an action be

brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

History: En. Sec. 311, p. 109, Bannack Stat.; re-en. Sec. 367, p. 209, L. 1867; re-en. Sec. 441, p. 123, Cod. Stat. 1871; re-en. Sec. 468, p. 165, L. 1877; re-en. Sec. 468, 1st Div. Rev. Stat. 1879; re-en. Sec. 481, 1st

Div. Comp. Stat. 1887; re-en. Sec. 2279, C. Civ. Proc. 1895; re-en. Sec. 7374, Rev. C. 1907; re-en. Sec. 9981, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1290.

9982-9989. Repealed—Chapter 163, laws of 1935.

CHAPTER 107

PUBLIC ADMINISTRATOR

- Section 9990. Duties of public administrator.
9991. Must procure letters of administration—bond and oath.
9992. Duty of persons in whose house any stranger dies.
9993. Must return inventory and administer estate according to this chapter.
9994. When to deliver up estates.
9995. Civil officers to notify public administrator of waste.
9996. Actions for property of decedents.
9997. Order to examine party charged with embezzling estate.
9998. Punishment for refusing to attend.
9999. Order on public administrator to account.
10000. Every six months to make and publish condition of estates.
10001. Moneys of estates in hands of public administrator, deposit and payment of—escheated estates fund.
10002. Must not be interested or have interested partner.
10003. When to settle with clerk of district court.
10004. Proceedings against for failure to pay over money.
10005. Fees—how paid.
10006. May administer oaths.
10007. Reports and additional bonds may be required.
10008. Provisions in Code of Civil Procedure applicable.
10009. Must keep register.
10010. Statements concerning property of decedent.
10011. Refusal to furnish statement a misdemeanor.
10012. Estates less than five hundred dollars.
10013. Summary settlement of such estate.
10014. Reports of property received.
10015. Fixing day for hearing of report.
10016. Order upon hearing of report.
10017. Compensation of public administrator.

9990. Duties of public administrator. Every public administrator, duly elected, commissioned, and qualified, must take charge of estates of persons dying within his county, as follows:

1. Of estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;
2. Of estates of decedents who have no known heirs;
3. Of estates ordered into his hands by the court; and
4. Of estates upon which letters of administration have been issued to him by the court.

History: En. Sec. 333, p. 326, L. 1877; re-en. Sec. 333, 2nd Div. Rev. Stat. 1879; re-en. Sec. 333, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4510, Pol. C. 1895; re-en. Sec. 3073, Rev. C. 1907; re-en. Sec. 9990, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1726.

NOTE.—The only difference in the territorial statutes referred to is the substitution of the probate court for the district court.

Operation and Effect

The district court has jurisdiction to make an order appointing the public ad-

9990
amended
L. 41 c. 77
sec. 1 p. 128

9990
rel. matter
L. 41 c. 4
secs. 1-5
pp. 3, 4

9990
181 P.(2d) 970

ministrator as administrator of an estate, although no petition for his appointment has been filed. *State ex rel. Lancaster v. Woody*, 20 M 413, 416, 51 P 975.

References

Cited or applied as section 4510, Political Code, in *State ex rel. Donovan v. District Court*, 25 M 355, 364, 65 P 120.

9991. Must procure letters of administration—bond and oath. Whenever a public administrator takes charge of an estate, under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath are in lieu of the administrator's bond and oath, but when real estate is ordered to be sold, another bond must be required by the court.

History: En. Sec. 334, p. 326, L. 1877; re-en. Sec. 334, 2nd Div. Rev. Stat. 1879; re-en. Sec. 334, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4511, Pol. C. 1895; re-en. Sec. 3074, Rev. C. 1907; re-en. Sec. 9991, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1727.

Operation and Effect

A public administrator does not become ex-officio administrator of any estate, but must procure letters of administration in like manner as any other applicant for letters. *O'Rourke v. Harper*, 35 M 346, 349, 89 P 65.

Id. The sureties on the official bond of a public administrator for his second term of office are not liable for a conversion of funds of an estate where his letters were issued during his first term of office, although it appears that the conversion occurred during his second term.

A public administrator, by applying for letters of administration, does not acquire a vested right, as against his successor in office, to administer upon the estate or to the fees pertaining thereto. In *re Dewar's Estate*, 10 M 426, 439, 25 P 1026; *State ex rel. Lancaster v. Woody*, 20 M 413, 418, 51 P 975.

9992. Duty of persons in whose house any stranger dies. Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any person interested.

History: En. Sec. 335, p. 326, L. 1877; re-en. Sec. 335, 2nd Div. Rev. Stat. 1879; re-en. Sec. 335, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4512, Pol. C. 1895; re-en. Sec.

3075, Rev. C. 1907; re-en. Sec. 9992, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1728.

9993. Must return inventory and administer estate according to this chapter. The public administrator must make out and return an inventory of all estates taken into his possession, administer and account for the same according to the provisions of this chapter, subject to the control and directions of the court.

History: En. Sec. 336, p. 326, L. 1877; re-en. Sec. 336, 2nd Div. Rev. Stat. 1879; re-en. Sec. 336, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4513, Pol. C. 1895; re-en. Sec.

3076, Rev. C. 1907; re-en. Sec. 9993, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1729.

9994. When to deliver up estates. If, at any time, letters testamentary or of administration are regularly granted to any other person on the estate of which the public administrator has charge, he must, under order of the court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control.

9994
rel. matter
L. 41 c. 4
secs. 1-5
pp. 3, 4

History: En. Sec. 337, p. 327, L. 1877; 3077, Rev. C. 1907; re-en. Sec. 9994, re-en. Sec. 337, 2nd Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. re-en. Sec. 337, 2nd Div. Comp. Stat. 1887; 1730.
re-en. Sec. 4514, Pol. C. 1895; re-en. Sec.

9995. Civil officers to notify public administrator of waste. All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in the possession of the public administrator.

History: En. Sec. 338, p. 327, L. 1877; 3078, Rev. C. 1907; re-en. Sec. 9995, re-en. Sec. 338, 2nd Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. re-en. Sec. 338, 2nd Div. Comp. Stat. 1887; 1731.
re-en. Sec. 4515, Pol. C. 1895; re-en. Sec.

9996. Actions for property of decedents. The public administrator must institute all actions and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.

History: En. Sec. 339, p. 327, L. 1877; 3079, Rev. C. 1907; re-en. Sec. 9996, re-en. Sec. 339, 2nd Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. re-en. Sec. 339, 2nd Div. Comp. Stat. 1887; 1732.
re-en. Sec. 4516, Pol. C. 1895; re-en. Sec.

9997. Order to examine party charged with embezzling estate. When the public administrator complains to the district court, or a judge thereof, on oath, that any person has concealed, embezzled, or disposed of, or has in his possession any money, goods, property, or effects, to the possession of which such administrator is entitled in his official capacity, the court or judge may cite such person to appear, and may examine him on oath touching the matter of such complaint.

History: En. Sec. 340, p. 328, L. 1877; 3080, Rev. C. 1907; re-en. Sec. 9997, re-en. Sec. 340, 2nd Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. re-en. Sec. 340, 2nd Div. Comp. Stat. 1887; 1733.
re-en. Sec. 4517, Pol. C. 1895; re-en. Sec.

9998. Punishment for refusing to attend. All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the court. If the person so cited refuses to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court or judge may commit him to the county jail, there to remain, in close custody, until he submits to the order of the court or judge.

History: En. Sec. 341, p. 328, L. 1877; 3081, Rev. C. 1907; re-en. Sec. 9998, re-en. Sec. 341, 2nd Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. re-en. Sec. 341, 2nd Div. Comp. Stat. 1887; 1734.
re-en. Sec. 4518, Pol. C. 1895; re-en. Sec.

9999. Order on public administrator to account. The court or judge may, at any time, order the public administrator to account for and deliver all the money of an estate in his hands to the heirs, or to the executors or administrators regularly appointed.

History: En. Sec. 342, p. 328, L. 1877; 3082, Rev. C. 1907; re-en. Sec. 9999, re-en. Sec. 342, 2nd Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. re-en. Sec. 342, 2nd Div. Comp. Stat. 1887; 1735.
re-en. Sec. 4519, Pol. C. 1895; re-en. Sec.

10000
amended
L. 39 c. 116
sec. 1 p. 237

10000. Every six months to make and publish condition of estates. The public administrator must, once in every six months, make to the district court or a judge thereof, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the money which has come into his hands from each estate, and what he has done with it, and the amount of his fees and expenses incurred, and the balance, if any, remaining in his hands; publish the same once in each week for six weeks in some newspaper published in the county, or if there is none, then post the same, legibly written or printed, in the office of the clerk of the district court of the county.

History: En. Sec. 343, p. 329, L. 1877; re-en. Sec. 343, 2nd Div. Rev. Stat. 1879; re-en. Sec. 343, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4520, Pol. C. 1895; re-en. Sec. 3083, Rev. C. 1907; re-en. Sec. 10000, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1736.

**Publication of Semi-Annual Report—
Cost Proper Charge Against County**

The expense incident to the publication of the semi-annual report of the public administrator required by this section is a proper charge against the county, and not against the commissions received by that officer. *Gavigan v. Silver Bow County*, 58 M 58, 41 P 2d 409.

10001. Moneys of estates in hands of public administrator, deposit and payment of—escheated estates fund. It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which probate proceedings are pending, all moneys of the estate, and such moneys may be drawn upon the order of the executor or administrator, countersigned by a district judge, when required for the purposes of administration. It is the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by a district judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and for the safe-keeping and payment of all such moneys, as herein provided, the said treasurer and his sureties are liable upon his official bond. The moneys thus deposited may, upon order of the court or judge, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is for the best interests of the estate. At the final settlement of any estate, if there be no heirs or other claimants thereof, the district judge shall make an order directing the administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall credit the same and all other moneys belonging to said estate to the escheated estates fund, and the county treasurer shall forthwith remit all of said money to the state treasurer with a statement as to the estates to which the money belongs.

History: En. Sec. 344, p. 329, L. 1877; re-en. Sec. 344, 2nd Div. Rev. Stat. 1879; re-en. Sec. 344, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4521, Pol. C. 1895; re-en. Sec. 3084, Rev. C. 1907; re-en. Sec. 10001, R. C. M. 1921; amd. Sec. 1, Ch. 119, L. 1929; amd. Sec. 1, Ch. 76, L. 1931. Cal. C. Civ. Proc. Sec. 1737.

Operation and Effect

The mingling of all funds received by a public administrator from different estates in his charge in one general deposit

in a bank, contrary to the provisions of this section, constitutes a conversion. Funds so mingled lose their identity, and cannot be said to belong to any particular estate. *Raban v. Cascade Bank*, 33 M 413, 416, 84 P 72.

References

Cited or applied as section 4521, Political Code, in *State ex rel. Donovan v. District Court*, 25 M 355, 364, 65 P 120; *State v. McGraw*, 74 M 152, 162, 240 P 812.

10002. Must not be interested or have interested partner. The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers; nor must he be associated, in business or otherwise, with any one who is so interested; and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect.

History: En. Sec. 345, p. 329, L. 1877; re-en. Sec. 4522, Pol. C. 1895; re-en. Sec. re-en. Sec. 345, 2nd Div. Rev. Stat. 1879; 3085, Rev. C. 1907; re-en. Sec. 10002, re-en. Sec. 345, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1738.

10003. When to settle with clerk of district court. The public administrator is required to account, under oath, and to settle and adjust his accounts, relating to the care and disbursement of money or property belonging to estates in his hands, with the clerk of the district court, on the first Monday of each month, and he must pay to the county treasurer any money remaining in his hands of an estate unclaimed, as provided in sections 10348 to 10351, inclusive, of this code.

History: En. Sec. 346, p. 329, L. 1877; re-en. Sec. 4523, Pol. C. 1895; re-en. Sec. re-en. Sec. 346, 2nd Div. Rev. Stat. 1879; 3086, Rev. C. 1907; re-en. Sec. 10003, re-en. Sec. 346, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1739.

10004. Proceedings against for failure to pay over money. When it appears, from the returns made in pursuance of the foregoing sections, that any money remains in the hands of the public administrator after final settlement of the estate unclaimed, which should be paid over to the county treasurer; the court or judge must order the same paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the county attorney must immediately institute the requisite proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of the money so withheld, and costs.

History: En. Sec. 347, p. 330, L. 1877; re-en. Sec. 4524, Pol. C. 1895; re-en. Sec. re-en. Sec. 347, 2nd Div. Rev. Stat. 1879; 3087, Rev. C. 1907; re-en. Sec. 10004, re-en. Sec. 347, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1740.

10005. Fees—how paid. The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof, as soon as the same come into his hands.

History: En. Sec. 348, p. 330, L. 1877; re-en. Sec. 4525, Pol. C. 1895; re-en. Sec. re-en. Sec. 348, 2nd Div. Rev. Stat. 1879; 3088, Rev. C. 1907; re-en. Sec. 10005, re-en. Sec. 348, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1741.

10006. May administer oaths. Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.

History: En. Sec. 349, p. 330, L. 1877; re-en. Sec. 4526, Pol. C. 1895; re-en. Sec. re-en. Sec. 349, 2nd Div. Rev. Stat. 1879; 3089, Rev. C. 1907; re-en. Sec. 10006, re-en. Sec. 349, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1742.

10007. Reports and additional bonds may be required. The court or judge may, at any time, require the public administrator to report the amount of moneys and property of any estate in his hands, and may require him at any time to file additional bond or bonds.

History: En. as part of this Act, Sec. 4527, Pol. C. 1895; re-en. Sec. 3090, Rev. C. 1907; re-en. Sec. 10007, R. C. M. 1921.

10008. Provisions in Code of Civil Procedure applicable. When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of sections 10018 to 10464 of this code must govern.

History: En. Sec. 350, p. 330, L. 1877;
re-en. Sec. 350, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 350, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 4528, Pol. C. 1895; re-en. Sec.
3091, Rev. C. 1907; re-en. Sec. 10008,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1743.

Operation and Effect

A public administrator has the same power to compromise claims as an administrator or executor. *Mulville v. Pacific Life Ins. Co.*, 19 M 95, 103, 47 P 650.

10009. Must keep register. It is the duty of the public administrator to keep a book, to be labeled "Register of Public Administrator," in which he must enter the name of every deceased person on whose estate he administers, the date of granting letters, money received, the property and its value, proceeds of all sales of property, the amount of his fees, the expenses of administration, the amount of the estate after all charges and expenses have been paid, the disposition of the property on distribution, the date of discharge of administrator, and such other matters as may be necessary to give a full and complete history of each estate administered by him.

History: En. Sec. 4529, Pol. C. 1895; re-en. Sec. 3092, Rev. C. 1907; re-en. Sec. 10009, R. C. M. 1921.

10010. Statements concerning property of decedent. Whenever any person dies in any county of this state, and no administrator has been appointed to take charge of his estate, the public administrator of such county, prior to the issuance of letters of administration to him, shall have authority to make a written demand upon any person, firm, bank, or corporation, which he believes holds or has in their possession or control any money, evidence of indebtedness, or other personal property, or which owes to such deceased person any money, to furnish to him a written statement, under oath, showing the amount of money, or the evidence of indebtedness, or personal property of such deceased person held by them, fully describing the same, and the total sums of money, if any, due from them to such deceased person. Upon receipt of such written demand, the person, firm, bank, or corporation receiving the same shall immediately furnish, under oath, to such public administrator said statement.

History: En. Sec. 1, Ch. 134, L. 1909; re-en. Sec. 10010, R. C. M. 1921.

10011. Refusal to furnish statement a misdemeanor. Any person, firm, bank, or corporation, or officer, agent, or employee thereof, refusing upon demand, to furnish the statement, as required by the preceding section, shall be guilty of a misdemeanor.

History: En. Sec. 2, Ch. 134, L. 1909; re-en. Sec. 10011, R. C. M. 1921.

10012. Estates less than five hundred dollars. If the statement or statements furnished the public administrator in accordance with the provisions of section 10010 show that the aggregate market value of the estate of such deceased person is five hundred dollars (\$500.00) or less in value, then, upon demand of the public administrator, the person, firm, bank, or corporation holding, controlling, or owning the same, or any

part thereof, shall turn over, indorse, or surrender the same to such public administrator at once, without the issuance of letters of administration to him. The public administrator shall, upon receipt of the money, evidence of indebtedness, or other personal property, issue a receipt to the person, firm, bank, or corporation delivering the same to him fully describing the property received. Such receipt, signed by the public administrator, shall fully discharge the person, firm, bank, or corporation receiving the same from all further liability to the estate of said deceased person, to the amount of money or for the property set out in said receipt.

History: En. Sec. 3, Ch. 134, L. 1909; re-en. Sec. 10012, R. C. M. 1921; amd. Sec. 1, Ch. 38, L. 1929.

10013. Summary settlement of such estate. Upon the receipt of money, evidence of indebtedness, or other property, as provided in this act, the public administrator shall proceed at once to the settlement of the estate of the decedent, in the same manner, and shall have the same power and authority, as in estates where letters of administration have been issued to him; provided, that upon ten days' notice, by posting in three public places in the county, he may sell at public auction the personal property received by him, without procuring an order of court authorizing such sale, and that upon the presentation of claims against the estate, duly itemized and verified by the claimant, the public administrator, upon approval thereof, may pay the same without having the approval of the court.

History: En. Sec. 4, Ch. 134, L. 1909; re-en. Sec. 10013, R. C. M. 1921.

10014. Reports of property received. Upon the settlement of the estate, the public administrator must, within thirty days, make a full report, under oath, showing all money and property received by him, from whom received, and all disbursements made, and the purposes thereof, and file the same in the office of the clerk of the district court of his county.

History: En. Sec. 5, Ch. 134, L. 1909; re-en. Sec. 10014, R. C. M. 1921.

10015. Fixing day for hearing of report. Upon the filing of such report, the clerk of the court must make an order fixing a day for the hearing of the report, giving notice thereof by the posting of notices in three public places in the county for a period of ten days before the date of hearing, at which hearing any and all persons interested therein may appear and object to such report, or to any of the matters contained therein.

History: En. Sec. 6, Ch. 134, L. 1909; re-en. Sec. 10015, R. C. M. 1921.

10016. Order upon hearing of report. Upon such hearing, the court may make such orders with reference to such report as may be necessary and proper.

History: En. Sec. 7, Ch. 134, L. 1909; re-en. Sec. 10016, R. C. M. 1921.

10017. Compensation of public administrator. The public administrator shall receive as full compensation for his services, including attorney's fees, a commission of fifteen per cent. of the total amount of money received by him in any estate provided for in this act; provided, that in no case shall the compensation be less than five dollars.

History: En. Sec. 8, Ch. 134, L. 1909; re-en. Sec. 10017, R. C. M. 1921.

CHAPTER 108

GENERAL JURISDICTION OF DISTRICT COURTS

Section 10018. Jurisdiction of the court over the estate—when exercised.

10019. When jurisdiction decided by first application.

10018. Jurisdiction of the court over the estate—when exercised.

Wills must be proved, and letters testamentary or of administration granted:

1. In the county in which the decedent was a resident at the time of his death, in whatever place he may have died.

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state.

3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death.

4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died.

5. In all other cases, in the county where application for letters is first made.

History: En. Sec. 6, p. 241, L. 1877; re-en. Sec. 6, 2nd Div. Rev. Stat. 1879; re-en. Sec. 2310, C. Civ. Proc. 1895; re-en. Sec. 7883, Rev. C. 1907; re-en. Sec. 10018, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1294.

NOTE.—In these and all the succeeding sections of our probate practice act the codes of 1895 substituted the words "district court" for the words "probate court" throughout.

General Powers of a Probate Court

A district court sitting in probate has only the special and limited powers conferred by statute, and has no power to hear and determine any matters other than those which come within the purview of the statute, or which are implied as necessary to a complete exercise of those expressly conferred. *Chadwick v. Chadwick*, 6 M 566, 579, 13 P 385; *In re Higgins' Estate*, 15 M 474, 502, 39 P 506; *State ex rel. Bartlett v. District Court*, 18 M 481, 484, 46 P 259; *Burns v. Smith*, 21 M 251, 266, 53 P 742; *State ex rel. Shields v. District Court*, 24 M 1, 13, 60 P 489; *State ex rel. Kelly v. District Court*, 25 M 33, 38, 63 P 717; *In re Davis' Estate*, 27 M 490, 495, 71 P 757; *Davidson v. Wampler*, 29 M 61, 67, 74 P 77; *Bullerdick v. Hersmeyer*, 32 M 541, 551, 81 P 334; *In re Tuohy's Estate*, 33 M 230, 244, 83 P 486; *State ex rel. King v. District Court*, 42

M 182, 184, 111 P 717; *In re Dolenty's Estate*, 53 M 33, 43, 161 P 524.

Operation and Effect

Where a special administrator is appointed in the county in which the decedent died, and the public administrator in another county is appointed in violation of statute, so that the special administrator is put to the necessity of defending a suit for his removal, the estate should be charged with his expenses. *In re Williams' Estate*, 55 M 63, 72, 173 P 790.

Will Made by Resident of Montana in Another State

A will made in another state by a resident of Montana is subject to probate under subdivision 1 of this section, relating to domestic wills, though proved and allowed in the foreign state, and not under sections 10039-10041, providing the manner in which a foreign will upon the production of a duly authenticated copy thereof and its probate in another state may be admitted to probate in this state. *In re Mauldin's Estate*, 69 M 132, 135, 220 P 1102.

References

Cited or applied as section 7383, Revised Codes, in *State ex rel. Mannix v. District Court*, 51 M 310, 315, 152 P 753.

10019. When jurisdiction decided by first application. When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such nonresident, and dying within the state, and not leaving

estate in the county where he died, the district court of that county in which the application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

History: En. Sec. 7, p. 241, L. 1877;
re-en. Sec. 7, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 2311, C. Civ. Proc. 1895; re-en.
Sec. 7884, Rev. C. 1907; re-en. Sec. 10019,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1295.

References
In re Mauldin's Estate, 69 M 132, 135,
220 P 1102.

CHAPTER 109

PROBATE OF WILLS—PETITION NOTICE AND PROOF

- Section 10020. Custodian of will to deliver same, to whom—penalty.
10021. Who may petition for probate of will.
10022. Contents of petition.
10023. When executor forfeits right to letters.
10024. Possession of will by third person—production of.
10025. Notice of petition for probate—how given.
10026. Heirs and named executors to be notified, how.
10027. Petition may be presented to judge at chambers, and what judge may do.
10028. Hearing proof of will after proof of service of notice.
10029. Who may appear and contest the will.
10030. Proof required when no contest.
10031. Holographic wills.

10020. Custodian of will to deliver same, to whom—penalty. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the district court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

History: En. Sec. 8, p. 242, L. 1877;
re-en. Sec. 8, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 8, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2320, C. Civ. Proc. 1895; re-en.
Sec. 7385, Rev. C. 1907; re-en. Sec. 10020,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1298.

ing a compromise of such a contest, and ascertaining the share to which the parties are respectively entitled. In re Davis' Estate, 27 M 490, 496, 71 P 757. See also State ex rel. Pauwelyn v. District Court, 34 M 345, 348, 86 P 268.

Operation and Effect

Under the provisions of sections 10020 to 10055, inclusive, giving the district court, while exercising probate jurisdiction, power to entertain a contest of a will, the court has power, on consent of all the parties interested, to enter a decree affirm-

References

Cited or applied as section 2320, Code of Civil Procedure, in Raleigh v. District Court, 24 M 306, 311, 61 P 129; In re Mauldin's Estate, 69 M 132, 136, 220 P 1102.

10021. Who may petition for probate of will. Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.

History: En. Sec. 9, p. 242, L. 1877;
re-en. Sec. 9, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 9, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2321, C. Civ. Proc. 1895; re-en.
Sec. 7386, Rev. C. 1907; re-en. Sec. 10021,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1299.

Operation and Effect

The statute leaves the question open for the propounding of a will at any time, and the admission of a will to probate, ipso facto, supersedes and vacates the grant of letters of general administration. In re Davis-Cummings' Appeal, 11 M 196, 213, 28 P 645.

Where an executor, also named as a beneficiary in a will, entered into an agreement with the sister of testatrix, another beneficiary, whereby in consideration of \$1,000 he sold and assigned to the latter all his rights under the will and renounced his right to act as executor, such renunciation was invalid; hence, the renunciation being void, he, under this section, was a proper person to propound the will for pro-

bate, as against the contention that, no longer having any interest in the will, he had no legal right to offer it for probate. In *re Cummings' Estate*, 89 M 405, 413, 298 P 350.

Id. It has been held that even though a person named as executor in a will has renounced the right to serve as such, he is still entitled to propound the will for probate.

10022. Contents of petition. A petition for the probate of a will must show:

1. The jurisdictional facts;
2. Whether the person named as executor consents to act, or renounces his right to letters testamentary;
3. The names, ages, and residences of the heirs and devisees of the decedent, so far as known to the petitioner;
4. The probable value and character of the property of the estate;
5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will.

History: En. Sec. 10, p. 242, L. 1877; re-en. Sec. 10, 2nd Div. Rev. Stat. 1879; re-en. Sec. 10, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2322, C. Civ. Proc. 1895; re-en. Sec. 7387, Rev. C. 1907; re-en. Sec. 10022, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1300.

References

In *re Baxter's Estate*, 98 M 291, 39 P 2d 186.

10023. When executor forfeits right to letters. If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition to the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court or judge may appoint any other competent person administrator, unless good cause for delay is shown.

History: En. Sec. 11, p. 242, L. 1877; re-en. Sec. 11, 2nd Div. Rev. Stat. 1879; re-en. Sec. 11, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2323, C. Civ. Proc. 1895; re-en. Sec. 7388, Rev. C. 1907; re-en. Sec. 10023, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1301.

10024. Possession of will by third person—production of. If it is alleged in any petition that any will is in the possession of a third person, and the court or judge is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will, or neglects or refuses to produce it in obedience to the order, he may, by warrant from the court or judge, be committed to the jail of the county, and be kept in close confinement until he produces it.

History: En. Sec. 12, p. 243, L. 1877; re-en. Sec. 12, 2nd Div. Rev. Stat. 1879; re-en. Sec. 12, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2324, C. Civ. Proc. 1895; re-en. Sec. 7389, Rev. C. 1907; re-en. Sec. 10024, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1302.

10025. Notice of petition for probate—how given. When the petition is filed and the will produced, the clerk of the court must set the petition for hearing by the court or judge upon some day not less than ten nor more than thirty days from the production of the will. Notice of hearing

shall be given by such clerk by publishing the same in a newspaper in the county; if there is none, then by three written or printed notices, posted at three of the most public places in the county. If the notice is published in a weekly paper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be published on at least three different days of publication, and it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and last day being included. If the notice is by posting, it must be given at least ten days before the hearing.

History: En. Sec. 13, p. 243, L. 1877; re-en. Sec. 13, 2nd Div. Rev. Stat. 1879; re-en. Sec. 13, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2325, C. Civ. Proc. 1895; re-en. Sec. 7390, Rev. C. 1907; re-en. Sec. 10025, E. C. M. 1921; amd. Sec. 1, Ch. 86, L. 1935. Cal. C. Civ. Proc. Sec. 1303.

NOTE.—See in connection with this section, section 10356.

Operation and Effect

Under a statute requiring that notice of the hearing of a petition for the probate of a will shall be published at least three

times, upon three different days of publication, when published in a weekly newspaper, and one similar in its provisions to those contained in section 10028, providing that at the time of hearing the court must require proof of the will, the court has no jurisdiction until these requirements are complied with; and where the notice of hearing is published only twice, in a weekly paper, an order admitting a will to probate and appointing an administrator with the will annexed is void. In re Estate of Charlebois, 6 M 373, 376, 12 P 775.

10026. Heirs and named executors to be notified, how. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the state, at their places of residence, if known to the petitioner, and deposited in the postoffice, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the postoffice at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as coexecutor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing.

10026
77 F. (2d) 39

History: En. Sec. 14, p. 243, L. 1877; re-en. Sec. 14, 2nd Div. Rev. Stat. 1879; re-en. Sec. 14, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2326, C. Civ. Proc. 1895; re-en.

Sec. 7391, Rev. C. 1907; re-en. Sec. 10026, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1304.

References

Montgomery v. Gilbert, 77 F 2d 39.

10027. Petition may be presented to judge at chambers, and what judge may do. A judge of the district court may, at any time, in court and at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills, and the attendance of witnesses, and may appoint special sessions of his court for hearing petitions, trials of issue, and admitting wills to probate.

History: En. Sec. 15, p. 243, L. 1877; re-en. Sec. 2327, C. Civ. Proc. 1895; re-en. Sec. 15, 2nd Div. Rev. Stat. 1879; Sec. 7392, Rev. C. 1907; re-en. Sec. 10027, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1305.

10028. Hearing proof of will after proof of service of notice. At the time appointed for the hearing, or the time to which the hearing may

have been postponed, the court or judge, unless the parties appear, must require proof that the notice has been given, which being made, the court or judge must hear testimony and proof of will.

History: En. Sec. 16, p. 244, L. 1877;
re-en. Sec. 16, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 16, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2328, C. Civ. Proc. 1895; re-en.
Sec. 7393, Rev. C. 1907; re-en. Sec. 10028,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1306.

References

In re Silver's Estate, 98 M 141, 38 P 2d 277.

10029. Who may appear and contest the will. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court or judge for that purpose; but a contest made by an attorney appointed by the court or judge does not bar a contest after probate by the party so represented, if commenced within the time provided in sections 10042 to 10048; nor does the nonappointment of an attorney by the court or judge of itself invalidate the probate of a will.

History: En. Sec. 17, p. 244, L. 1877;
re-en. Sec. 17, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 17, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2329, C. Civ. Proc. 1895; re-en.
Sec. 7394, Rev. C. 1907; re-en. Sec. 10029,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1307.

Operation and Effect

The public administrator has not any interest in an estate which entitles him to object to the probate of a will. State ex rel. Eakins v. District Court, 34 M 226, 229, 85 P 1022.

Under this section, an heir at law may contest a will through an attorney ap-

pointed by him, and the complaint need not allege that the one representing him is his attorney, it being presumed that an attorney at law who represents a client does so with the latter's consent and by virtue of his retainer. In re Miller's Estate, 71 M 330, 338, 229 P 851.

References

Cited or applied as section 2329, Code of Civil Procedure, in State ex rel. Donovan v. District Court, 25 M 355, 364, 65 P 120; In re Hobbins' Estate, 41 M 3, 50, 108 P 7.

10030. Proof required when no contest. If no person appears to contest the probate of a will, the court or judge may admit the same to probate:

(a) On the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

(b) If it appears at the time fixed for the hearing that none of the subscribing witnesses reside in the county, and that the deposition of one of the witnesses to the will can be taken elsewhere, the court may direct it to be taken and may authorize a photographic copy of the will to be made and presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present.

(c) If none of the subscribing witnesses reside in the county at the time appointed for proving the will, and it is made to appear to the court that the execution of the will cannot be proven under either of the foregoing subdivisions of this section, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of such execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

10030
76 P (2d) 60
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10030
Amended
S.L. '49, C. 71
Sec. 1, P. 152

History: En. Sec. 18, p. 244, L. 1877;
re-en. Sec. 18, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 18, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2330, C. Civ. Proc. 1895; re-en.
Sec. 7395, Rev. C. 1907; re-en. Sec. 10030,
R. C. M. 1921; amd. Sec. 1, Ch. 94, L. 1925.
Cal. C. Civ. Proc. Sec. 1308.

References

In re Silver's Estate, 98 M 141, 38 P
2d 277.

10031. Holographic wills. An holographic will may be proved in the same manner that other private writings are proved.

10031
139 P.(2d) 494

History: En. Sec. 19, p. 244, L. 1877;
re-en. Sec. 19, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 19, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2331, C. Civ. Proc. 1895; re-en.
Sec. 7396, Rev. C. 1907; re-en. Sec. 10031,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1309.

References

Cited or applied as section 19, Second
Division Compiled Statutes 1887, in Bar-
ney v. Hayes, 11 M 571, 29 P 282.

CHAPTER 110

CONTESTING PROBATE OF WILLS

- Section 10032. Contestant to file grounds of contest, and petitioner to reply.
10033. How jury obtained and trial had.
10034. Verdict of jury—judgment.
10035. Witnesses—who and how many to be examined—proof of handwriting admitted, when.
10036. Testimony reduced to writing for future evidence.
10037. If proved, certificate to be attached.
10038. Will and proof to be filed and recorded.

10032. Contestant to file grounds of contest, and petitioner to reply.

If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in sections 9131 to 9136 of this code. If the demurrer is sustained, the court or judge must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

10032 et seq.
88 P.(2d) 33

10032
107 P.(2d) 882

10032
194 P.(2d) 627

1. The competency of the decedent to make a last will and testament;
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,

4. Any other questions substantially affecting the validity of the will;

Must, on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.

History: En. Sec. 20, p. 245, L. 1877;
re-en. Sec. 20, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 20, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2340, C. Civ. Proc. 1895; re-en.
Sec. 7397, Rev. C. 1907; re-en. Sec. 10032,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1312.

Burden of Proof in General

One who contests the probate of a will occupies the position of a plaintiff, and, under section 10616, he has the affirmative issue, and must prove it or be defeated. In re Murphy's Estate, 43 M 353, 373, 116 P 1004.

Burden of Proof Where Lost Will Was Last Seen in the Possession of the Testator

It being proved that a lost will was last seen in the possession of the testator, who was in the exercise of his mental faculties, the presumption is that he himself destroyed it *animo revocandi*, and the burden of proof is then on the proponent to overcome such presumption. In *re Colbert's Estate*, 31 M 461, 468, 78 P 971.

Competency of Testator as Grounds for Contest

A will may be contested because of the incompetency of the decedent (this section). In this case, the issue raised and determined was whether the testator was mentally competent at the time he signed the instrument claimed by the proponents to be his last will and testament. In *re Bielenberg's Estate*, 86 M 521, 528, 284 P 546.

Effect of Failure to Demand Jury Trial

Where no written demand for a trial by jury had ever been filed by appellants against whose objections an order, directing the sale of certain real estate, was made by the district court, sitting in probate, a jury trial of the issues presented was properly denied; and a demand at the close of the written objections for a jury, which demand was not called to the attention of the court or judge until the hearing began, did not supply the omission. In *re Tuohy's Estate*, 33 M 230, 242, 83 P 486.

Evidence Admissible as to the Attestation

On the probate of a will, where the subscribing witnesses are out of the state, evidence that they had made statements contradictory of the facts contained in the attestation clause, and evidence that the reputation of such subscribing witnesses for honesty and integrity is bad, is admissible. *Farleigh v. Kelley*, 28 M 421, 430, 72 P 756.

Grounds for Contest Are as Herein Specified

The only specifications of grounds of contest of a domestic will are to be found in this section, and they are not designated as such, but as the issues which may be raised and which the court is required to try and determine. *State ex rel. Ruef v. District Court*, 34 M 96, 99, 85 P 866; In *re Silver's Estate*, 98 M 141, 38 P 2d 277.

Grounds of Contest Unrelated

The grounds of contest of a domestic will enumerated in this section—improper execution, incompetency of testator, undue influence—are unrelated; while they may be joined in one contest, proof of one is in no manner dependent on success or

failure of either of the other two; if undue influence or incompetency is shown, due execution of the will becomes immaterial; if the document was not properly executed, undue influence and incompetency fade from consideration. In *re Silver's Estate*, 98 M 141, 158, 38 P 2d 277.

Pleadings

Where an answer is made to objections interposed to the probate of a will raising issues of fact, it is error for the trial court to entertain a demurrer to such answer and enter judgment thereon, as the court is required to try and determine the issues joined, conducting the trial in accordance with the provisions of the civil practice act, and to render judgment either admitting the will to probate or rejecting it. *Barney v. Hayes*, 11 M 99, 107, 27 P 384.

Proper Allegations Under This Section in a Contest

In a will contest, where contestants alleged that petitioner and others conspired to defraud contestants out of their rights as heirs of deceased, and, pursuant to such conspiracy, had forged the will sought to be probated, evidence that, before this will was offered for probate, petitioner had procured her appointment as administratrix of deceased's estate, falsely alleging that she was his only heir, and, while acting as such administratrix, had sold a large portion of the property of the estate to her husband, and that contestants had instituted an action to have such proceedings set aside, was properly admissible under this section. *Farleigh v. Kelley*, 28 M 421, 429, 72 P 756.

Review by Supreme Court

In a will contest, the supreme court is concluded by findings based upon conflicting evidence. If the evidence had been submitted to a jury, either party having the right to demand a trial by jury under this section, the verdict would have been conclusive, and the fact that the findings were made by the court does not change the rule. In *re Noyes' Estate*, 40 M 178, 189, 105 P 1013; In *re Murphy's Estate*, 43 M 353, 370, 116 P 1004; *Murphy v. Nett*, 47 M 38, 58, 130 P 451.

Right to Open and Close in Trial

In a will contest, the contestants have the burden of proof, and are entitled to open and close. *Farleigh v. Kelley*, 28 M 421, 427, 72 P 756; In *re Colbert's Estate*, 31 M 461, 467, 78 P 871; In *re Murphy's Estate*, 43 M 353, 373, 116 P 1004; In *re Williams' Estate*, 50 M 142, 158, 145 P 957.

Trial Procedure

The proponent of a will must first make out a *prima facie* case; that is, make such

proof as would entitle the will to probate in the absence of a contest. The contestant then attacks its validity, the proponent defends the same, and the contestant rebuts the testimony of the proponent, who may surrebut any new testimony; but the contestant has the right to open and close. In *re Colbert's Estate*, 31 M 461, 467, 78 P 971.

When Case Shall be Tried Without a Jury

Under this section it is clearly the duty of the court or judge to try the issues joined, without a jury, unless one is demanded in the manner and within the time prescribed therein, and it not only requires the issues to be made up before the demand is made, but also that the demand be made a sufficient length of time before the hearing to secure the attendance of a jury. In *re Tuohy's Estate*, 33 M 230, 242, 83 P 486.

10033. How jury obtained and trial had. When a jury is demanded, the district court must impanel a jury to try the case, in the manner provided for impaneling juries in courts of record; and the trial must be conducted in accordance with the provisions of sections 9334 to 9348 of this code. A trial by the court must be conducted as provided in sections 9365 to 9373 of this code.

History: En. Sec. 21, p. 245, L. 1877; re-en. Sec. 21, 2nd Div. Rev. Stat. 1879; re-en. Sec. 21, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2341, C. Civ. Proc. 1895; re-en. Sec. 7398, Rev. C. 1907; re-en. Sec. 10033, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1313.

Operation and Effect

An issue in a probate matter is to be tried and determined as an ordinary ac-

10034. Verdict of jury—judgment. The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will be admitted to probate, the judgment, will, and proofs must be recorded.

History: En. Sec. 22, p. 245, L. 1877; re-en. Sec. 22, 2nd Div. Rev. Stat. 1879; re-en. Sec. 22, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2342, C. Civ. Proc. 1895; re-en. Sec. 7399, Rev. C. 1907; re-en. Sec. 10034, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1314.

Operation and Effect

Under this statute the obligation rested upon the court to submit such issues as would be necessary for the proper disposition of the case. The number and form of special interrogatories to be submitted to the jury in a will contest are matters lodged in the discretion of the trial court, so long as they are sufficient to compre-

When Contestant Shall File Statement in Opposition to Probate of Will

One desiring to contest a will may file a statement of opposition to the probate of the will at any time prior to the hearing of proof of the will, and possibly the right may continue until the admission to probate. *Raleigh v. District Court*, 24 M 306, 311, 61 P 129. See also *State ex rel. Donovan v. District Court*, 25 M 355, 363, 65 P 120.

When Validity of Certain Wills May be Attacked

The validity of a will that provides for the payment of debts and that appoints an executor, but which disposes of the bulk of the estate to charity, cannot be raised in a proceeding for the probate of the will; it can be determined only after the admission of the will to probate. In *re Hobbins' Estate*, 41 M 39, 49, 108 P 7.

References

In *re Cummings' Estate*, 92 M 185, 199, 11 P 2d 968.

10033
107 P. (2d) 882

tion, except that a jury trial is a privilege, and not a matter of right. In *re Estate of Peterson*, 49 M 96, 97, 140 P 237.

References

In *re Harper's Estate*, 98 M 356, 40 P 2d 51.

hend the issues involved in the case; hence, where it submitted one interrogatory on the one issue involved, to-wit, the competency of testator at the time he made the will, refusal of three others offered by contestees on the same subject did not show an abuse of discretion, in view of the instructions given thoroughly covering the issue. In *re Carroll's Estate*, 59 M 403, 414, 196 P 996.

References

Cited or applied as section 7399, Revised Codes, in *re Hobbins' Estate*, 41 M 39, 49, 108 P 7.

10035. Witnesses—who and how many to be examined—proof of handwriting admitted, when. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the court or judge. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

History: En. Sec. 23, p. 246, L. 1877; re-en. Sec. 23, 2nd Div. Rev. Stat. 1879; re-en. Sec. 23, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2343, C. Civ. Proc. 1895; re-en. Sec. 7400, Rev. C. 1907; re-en. Sec. 10035, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1315.

Operation and Effect

The proof of the genuineness of the signature of the dead or absent subscribing witnesses to the attestation clause of a will, when one is appended, is evidence in the case that all the facts recited in it, and which are prerequisites to the due execution of the will, actually took place as therein set forth, and supplies the proof which in many, if not in most, instances it would otherwise be impossible to obtain. This view is further emphasized by the language of this section. *Farleigh v. Kelley*, 28 M 421, 431, 72 P 756.

Id. The provisions defining the term "witnesses," and the circumstances under

which contradictory statements may be shown, are modified by this section to the extent that the exigency of the case permits the statement of the subscribing witnesses contained in the attestation clause, though not made under oath, to be received as primary evidence, or, in other words, permits the dead or absent witnesses to speak through the instrumentality of the statute itself, that its requirements have been fully met.

Where the attesting witnesses to a will are present in the county, they must, in a contest, be called and examined, and other testimony to prove the will cannot be received to the exclusion of theirs. Where, however, one is absent and his deposition is introduced, evidence of one not an attesting witness may properly be received to supplement the testimony of the subscribing witness who is present at the hearing. In *re Williams' Estate*, 50 M 142, 151, 145 P 957.

10036. Testimony reduced to writing for future evidence. The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state.

History: En. Sec. 24, p. 246, L. 1877; re-en. Sec. 24, 2nd Div. Rev. Stat. 1879; re-en. Sec. 24, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2344, C. Civ. Proc. 1895; re-en. Sec. 7401, Rev. C. 1907; re-en. Sec. 10036, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1316.

10037. If proved, certificate to be attached. If the court or judge is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge, and attested by the seal of the court, must be attached to the will.

History: En. Sec. 25, p. 246, L. 1877; re-en. Sec. 25, 2nd Div. Rev. Stat. 1879; re-en. Sec. 25, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2345, C. Civ. Proc. 1895; re-en. Sec. 7402, Rev. C. 1907; re-en. Sec. 10037, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1317.

Operation and Effect

This section shows how the will is admitted to probate. In *re Hobbins' Estate*, 41 M 39, 49, 108 P 7.

10038. Will and proof to be filed and recorded. The will, and a certificate of the proof thereof, must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk.

History: En. Sec. 26, p. 246, L. 1877; re-en. Sec. 26, p. 197, 2nd Div. Rev. Stat. 1879; re-en. Sec. 26, 2nd Div. Comp. Stat. 1887; amd. Sec. 2346, C. Civ. Proc. 1895; re-en. Sec. 7403, Rev. C. 1907; re-en. Sec. 10038, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1318.

References

Cited or applied as section 2346, Code of Civil Procedure, in *Raleigh v. District Court*, 24 M 306, 311, 61 P 129; *Farleigh v. Kelley*, 28 M 421, 427, 72 P 756; In re *Colbert's Estate*, 31 M 461, 467, 78 P 971.

CHAPTER 111

PROBATE OF FOREIGN WILLS

Section 10039. Wills proved in other states to be recorded, when and where.
10040. Proceedings on production of foreign will.
10041. Hearing proofs of probate of foreign will.

10039. Wills proved in other states to be recorded, when and where. All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the district court of any county in which the testator shall have left any estate.

History: En. Sec. 27, p. 246, L. 1877; re-en. Sec. 27, 2nd Div. Rev. Stat. 1879; re-en. Sec. 27, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2350, C. Civ. Proc. 1895; re-en. Sec. 7404, Rev. C. 1907; re-en. Sec. 10039, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1322.

Operation and Effect

A decree of a court admitting a will to probate establishes such instrument as a will, and while the decree may be subject to attack in a proper proceeding, and open to review on appeal, yet, until set aside, such decree is conclusive of all facts necessary to the validity of the will. *State ex rel. Ruef v. District Court*, 34 M 96, 102, 85 P 866.

A will made in another state by a resident of Montana is subject to probate

under section 10018, relating to domestic wills, though proved and allowed in the foreign state, and not under sections 10039-10041, providing the manner in which a foreign will upon the production of a duly authenticated copy thereof and its probate in another state may be admitted to probate in this state. In *re Mauldin's Estate*, 69 M 132, 135 et seq., 220 P 1102.

Id. It is the policy of the state to retain original jurisdiction of the probate of the wills of its residents, and it is not required, under the full faith and credit clause of the Constitution, to permit such a will to be probated first in another state and then grant ancillary administration on the foreign record.

10040. Proceedings on production of foreign will. When a copy of the will and probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must proceed to hear said petition and that no notice of the hearing of said petition need be given.

History: En. Sec. 28, p. 246, L. 1877; re-en. Sec. 28, 2nd Div. Rev. Stat. 1879; re-en. Sec. 28, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2351, C. Civ. Proc. 1895; re-en. Sec. 7405, Rev. C. 1907; re-en. Sec. 10040, R. C. M. 1921; amd. Sec. 1, Ch. 192, L. 1935. Cal. C. Civ. Proc. Sec. 1323.

Operation and Effect

While the Code of Civil Procedure does not in express terms provide for the pro-

bate of a will executed in another state, it does so impliedly by this section, which makes provision for a hearing of such application and notice thereof. *State ex rel. Ruef v. District Court*, 34 M 96, 99, 85 P 866.

Under this section and 10555, an attestation by the clerk of a probate court of another state that papers constituting the record of proceedings in that court

10039
amended
L. 39 c. 44
sec. 1 p. 72

10040
Amended
S.L. '43 c. 187
Sec. 1 p. 356

were true and correct copies of the will and its probate there, without a certificate of the judge "that the attestation is in due form," was insufficient to entitle them to be admitted in evidence in this state, not being duly authenticated as required by this section. *Henderson et al. v. Daniels*, 62 M 363, 376, 205 P 964.

1d. The filing of a petition for the probate of a foreign will unaccompanied

"by a copy of the will duly authenticated" as required by this section, did not confer jurisdiction upon the district court to make an order admitting it to probate in this state.

References

In *re Mauldin's Estate*, 69 M 132, 135 et seq., 220 P 1102; In *re Coppock's Estate*, 72 M 431, 433, 234 P 258.

10041. Hearing proofs of probate of foreign will. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon.

History: En. Sec. 29, p. 247, L. 1877; re-en. Sec. 29, 2nd Div. Rev. Stat. 1879; re-en. Sec. 29, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2352, C. Civ. Proc. 1895; re-en. Sec. 7406, Rev. C. 1907; re-en. Sec. 10041, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1324.

Operation and Effect

While no particular grounds of contesting an application for the probate of a foreign will are expressly designated in the Code of Civil Procedure, this section does

enumerate the findings which the trial court must make before admitting such will to probate, and these may be accepted as questions with respect to which issues may be raised, and therefore the grounds of such contest. *State ex rel. Ruef v. District Court*, 34 M 96, 99, 85 P 866.

References

In *re Mauldin's Estate*, 69 M 132, 135 et seq., 220 P 1102; In *re Coppock's Estate*, 72 M 431, 433, 234 P 258.

CHAPTER 112

CONTESTING WILLS AFTER PROBATE

- Section 10042. The probate may be contested within one year.
 10043. Citation to be issued to parties interested.
 10044. The hearing had on proof of service.
 10045. Petitions to revoke probate of will tried by jury or court—judgment.
 10046. On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith.
 10047. Costs and expenses—by whom paid.
 10048. Probate—when conclusive—one year after removal of disability given to infants and others.

10042. The probate may be contested within one year. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

History: En. Sec. 30, p. 247, L. 1877; re-en. Sec. 30, 2nd Div. Rev. Stat. 1879; re-en. Sec. 30, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2360, C. Civ. Proc. 1895; re-en. Sec. 7407, Rev. C. 1907; re-en. Sec. 10042, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1327.

Operation and Effect

Only those who, but for the will, would succeed in some degree to the decedent's estate, are authorized to contest or seek revocation of the probate of a will. *State ex rel. Donovan v. District Court*, 25 M

355, 365, 65 P 120; In re Pepin's Estate, 53 M 240, 246, 163 P 104.

On the expiration of one year within which a will after probate may be contested, as provided by this section, which is in effect a statute of limitations, the running of which commences with the date of the admission of the will to probate, the probate becomes final and is not open to either direct or collateral attack. In re Estate of Murphy, 57 M 273, 188 P 146.

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. *Montgomery v. Gilbert*, 77 F 2d 39.

References

Cited or applied as section 2360, Code of Civil Procedure, in *Raleigh v. District Court*, 24 M 306, 315, 61 P 129; In re *Toomey's Estate*, 96 M 489, 496, 31 P 2d 729; In re *Silver's Estate*, 98 M 141, 38 P 2d 277.

10043. Citation to be issued to parties interested. Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner, or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court or judge on some day therein specified to show cause why the probate of the will should not be revoked.

History: En. Sec. 31, p. 247, L. 1877; re-en. Sec. 31, 2nd Div. Rev. Stat. 1879; re-en. Sec. 31, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2361, C. Civ. Proc. 1895; re-en. Sec. 7408, Rev. C. 1907; re-en. Sec. 10043, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1328.

Operation and Effect

We hold the executor was a necessary and proper party defendant to this action. The amended complaint herein, it is true seeks to determine heirship but it seeks

also revocation of the probate of the will and to have the will declared invalid. That being the case, citation to the executor to appear should have been issued and served. It was not done but he came in voluntarily and answered and his answer was permitted to stand, as was proper. Being lawfully and properly a defendant, the executor had a right to defend in the trial court. In re *Bernheim's Estate*, 82 M 198, 206, 266 P 378.

10044. The hearing had on proof of service. At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court or judge must proceed to try the issues of fact joined in the same manner as in an original contest of a will.

History: En. Sec. 32, p. 247, L. 1877; re-en. Sec. 2362, C. Civ. Proc. 1895; re-en. Sec. 32, 2nd Div. Rev. Stat. 1879; Sec. 7409, Rev. C. 1907; re-en. Sec. 10044, re-en. Sec. 32, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1329.

10045. Petitions to revoke probate of will tried by jury or court—judgment. In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court or judge shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

History. En. Sec. 33, p. 248, L. 1877; re-en. Sec. 2363, C. Civ. Proc. 1895; re-en. Sec. 33, 2nd Div. Rev. Stat. 1879; Sec. 7410, Rev. C. 1907; re-en. Sec. 10045, re-en. Sec. 33, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1330.

10046. On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith. Upon the revocation being made, the

powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

History: En. Sec. 34, p. 248, L. 1877; re-en. Sec. 34, 2nd Div. Rev. Stat. 1879; re-en. Sec. 34, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2364, C. Civ. Proc. 1895; re-en. Sec. 7411, Rev. C. 1907; re-en. Sec. 10046, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1331.

10047. Costs and expenses—by whom paid. The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

History: En. Sec. 35, p. 248, L. 1877; re-en. Sec. 35, 2nd Div. Rev. Stat. 1879; re-en. Sec. 35, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2365, C. Civ. Proc. 1895; re-en. Sec. 7412, Rev. C. 1907; re-en. Sec. 10047, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1332.

Operation and Effect

Under this section, the trial court may in its discretion order that the costs incident to the revocation of the probate of a will be paid out of the property of the decedent if the revocation was resisted in good faith and upon substantial grounds, or, in case of bad faith and without justification, tax them against the party who resisted revocation. In re Carroll's Estate, 59 M 403, 415, 196 P 996.

Id. Held, under the above rule, that where executors would have been remiss in the performance of their duty had they not made defense against the attack upon the will sought to be set aside, and there was ample justification for the defense, the district court abused its discretion in taxing the costs against executors individually.

Attorneys' fees incurred by a devisee under a will to defend a contest thereof are not allowable as costs and disbursements within the purview of section 9786 et seq., nor under this section and section 10372, out of the assets of the estate. In re Baxter's Estate, 94 M 257, 268 et seq., 22 P 2d 182.

10048. Probate—when conclusive—one year after removal of disability given to infants and others. If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed.

History: En. Sec. 36, p. 249, L. 1877; re-en. Sec. 36, 2nd Div. Rev. Stat. 1879; re-en. Sec. 36, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2366, C. Civ. Proc. 1895; re-en. Sec. 7413, Rev. C. 1907; re-en. Sec. 10048, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1333.

Operation and Effect

Where a testator had no resident heirs, the state was entitled to file objections to the probate of the will before the expiration of five years from testator's death; otherwise the right to contest would be barred by this section. State ex rel. Donovan v. District Court, 25 M 355, 366, 65 P 120. See also State ex rel. Donovan v. Ledwidge, 27 M 197, 203, 70 P 511.

The successful contest of a will, after probate and distribution of the estate, by a minor on coming of age, operates only

in his favor, and not in favor of those heirs who have lost their right to contest by a failure to institute proper proceedings within the time allowed by this section. Spencer v. Spencer, 31 M 631, 637, 79 P 320.

An heir who has acquiesced in the settlement and final distribution of an estate is estopped to call such settlement and distribution in question, or to compel the return of, or an accounting for, the property thus parted with by the executor or administrator in good faith. Spencer v. Spencer, 31 M 631, 638, 79 P 320.

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. Montgomery v. Gilbert, 77 F 2d 39.

CHAPTER 113

PROBATE OF LOST OR DESTROYED WILLS AND OF NUNCUPATIVE WILLS

Section 10049. Proof of lost or destroyed will to be taken.

10050. Must have been in existence at time of death.

- 10051. To be certified, recorded, and letters thereon granted.
- 10052. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.
- 10053. Nuncupative wills—when and how admitted to probate.
- 10054. Additional requirements in probate of nuncupative wills.
- 10055. Contests and appointments to conform to provisions as to other wills.

10049. Proof of lost or destroyed will to be taken. Whenever any will is lost or destroyed, the district court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills as in other cases. All the testimony given must be reduced to writing, and signed by the witnesses.

History: En. Sec. 37, p. 249, L. 1877; re-en. Sec. 37, 2nd Div. Rev. Stat. 1879; re-en. Sec. 37, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2370, C. Civ. Proc. 1895; re-en. Sec. 7414, Rev. C. 1907; re-en. Sec. 10049, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1338.

References

Cited or applied as section 2370, Code of Civil Procedure, in *In re Colbert's Estate*, 31 M 461, 467, 78 P 971.

10050. Must have been in existence at time of death. No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

History: En. Sec. 38, p. 249, L. 1877; re-en. Sec. 38, 2nd Div. Rev. Stat. 1879; re-en. Sec. 38, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2371, C. Civ. Proc. 1895; re-en. Sec. 7415, Rev. C. 1907; re-en. Sec. 10050, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1339.

References

Cited or applied as section 2371, Code of Civil Procedure, in *In re Colbert's Estate*, 31 M 461, 467, 78 P 971.

10051. To be certified, recorded, and letters thereon granted. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence as provided in section 10036.

History: En. Sec. 39, p. 249, L. 1877; re-en. Sec. 39, 2nd Div. Rev. Stat. 1879; re-en. Sec. 39, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2372, C. Civ. Proc. 1895; re-en. Sec. 7416, Rev. C. 1907; re-en. Sec. 10051, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1340.

References

Cited or applied as section 2372, Code of Civil Procedure, in *In re Colbert's Estate*, 31 M 461, 467, 78 P 971.

10052. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will. If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors, so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

History: En. Sec. 40, p. 249, L. 1877; re-en. Sec. 2373, C. Civ. Proc. 1895; re-en. Sec. 40, 2nd Div. Rev. Stat. 1879; Sec. 7417, Rev. C. 1907; re-en. Sec. 10052, re-en. Sec. 40, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1341.

10053. Nuncupative wills—when and how admitted to probate. Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in sections 10020 to 10031 of this code. The petition, in addition to the jurisdictional facts, must allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

History: En. Sec. 41, p. 249, L. 1877; re-en. Sec. 2380, C. Civ. Proc. 1895; re-en. Sec. 41, 2nd Div. Rev. Stat. 1879; Sec. 7418, Rev. C. 1907; re-en. Sec. 10053, re-en. Sec. 41, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1344.

10054. Additional requirements in probate of nuncupative wills. The district court or judge must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife, if any, and all other persons resident in the state or county, interested in the estate, are notified as hereinbefore provided.

History: En. Sec. 42, p. 250, L. 1877; amd. Sec. 2381, C. Civ. Proc. 1895; re-en. Sec. 42, 2nd Div. Rev. Stat. 1879; Sec. 7419, Rev. C. 1907; re-en. Sec. 10054, re-en. Sec. 42, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1345.

10055. Contests and appointments to conform to provisions as to other wills. Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills.

History: En. Sec. 43, p. 250, L. 1877; re-en. Sec. 43, 2nd Div. Rev. Stat. 1879; re-en. Sec. 43, 2nd Div. Comp. Stat. 1887; amd. Sec. 2382, C. Civ. Proc. 1895; re-en. Sec. 7420, Rev. C. 1907; re-en. Sec. 10055, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1346.

References

Cited or applied as section 2382, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 490, 496, 71 P 757.

CHAPTER 114

EXECUTORS AND ADMINISTRATORS—ISSUANCE AND FORM OF LETTERS TESTAMENTARY AND ADMINISTRATION

- Section 10056.** To whom letters on proved will to issue.
10057. Who are incompetent as executors or administrators—letters with will annexed to issue, when.
10058. Interested parties may file objections.
10059. Authority of unmarried woman not extinguished by her marriage—appointment of married woman.
10060. Executor of an executor.
10061. Letters testamentary to a minor or person absent from state.
10062. Acts of a portion of executors valid.
10063. Authority of administrators with will annexed—letters—how issued.
10064. Form of letters testamentary.
10065. Form of letters of administration with the will annexed.
10066. Form of letters of administration.
10067. Transcript of court minutes to be evidence.

10056. To whom letters on proved will to issue. The court or judge admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors, who are competent to discharge the trust, who must appear and qualify, unless objection is made, as provided in section 10058.

10056
207 P.(2d)
1153

History: En. Sec. 44, p. 250, L. 1877; re-en. Sec. 2400, C. Civ. Proc. 1895; re-en. re-en. Sec. 44, 2nd Div. Rev. Stat. 1879; Sec. 7421, Rev. C. 1907; re-en. Sec. 10056, re-en. Sec. 44, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1349.

10057. Who are incompetent as executors or administrators—letters with will annexed to issue, when. No person is competent to serve as executor who, at the time the will is admitted to probate, is:

10057
207 P.(2d)
1153

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court or judge incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration, with the will annexed, must be issued as designated and provided for the grant of letters in cases of intestacy.

History: En. Sec. 45, p. 250, L. 1877; re-en. Sec. 45, 2nd Div. Rev. Stat. 1879; re-en. Sec. 45, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2401, C. Civ. Proc. 1895; re-en. Sec. 7422, Rev. C. 1907; re-en. Sec. 10057, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1350.

References

Cited or applied as section 2401, Code of Civil Procedure, in In re Connor's Estate, 16 M 465, 466, 41 P 271; In re Kern's Estate, 96 M 443, 448, 31 P 2d 313.

10058. Interested parties may file objections. Any person interested in a will may file objections, in writing, to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court or judge; a petition may, at the same time, be filed for letters of administration with the will annexed.

10058
175 P.(2d) 766
(dissent)

History: En. Sec. 46, p. 250, L. 1877; re-en. Sec. 2402, C. Civ. Proc. 1895; re-en. re-en. Sec. 46, 2nd Div. Rev. Stat. 1879; Sec. 7423, Rev. C. 1907; re-en. Sec. 10058, re-en. Sec. 46, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1351.

10059. Authority of unmarried woman not extinguished by her marriage—appointment of married woman. When an unmarried woman appointed executrix marries, her authority is not extinguished. When a married woman is named as executrix, she may be appointed and serve in every respect as an unmarried woman.

History: En. Sec. 47, p. 251, L. 1877; re-en. Sec. 2403, C. Civ. Proc. 1895; re-en. re-en. Sec. 47, 2nd Div. Rev. Stat. 1879; Sec. 7424, Rev. C. 1907; re-en. Sec. 10059, re-en. Sec. 47, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1352.

10060. Executor of an executor. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

History: En. Sec. 48, p. 251, L. 1877; re-en. Sec. 2404, C. Civ. Proc. 1895; re-en. re-en. Sec. 48, 2nd Div. Rev. Stat. 1879; Sec. 7425, Rev. C. 1907; re-en. Sec. 10060, re-en. Sec. 48, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1353.

10061. Letters testamentary to a minor or person absent from state. Where a person absent from the state, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court or judge may, in its or his discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.

History: En. Sec. 49, p. 251, L. 1877; re-en. Sec. 49, 2nd Div. Rev. Stat. 1879; re-en. Sec. 49, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2405, C. Civ. Proc. 1895; re-en. Sec. 7426, Rev. C. 1907; re-en. Sec. 10061, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1354.

10062. Acts of a portion of executors valid. When all the executors named are not appointed by the court or judge, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority, in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid.

History: En. Sec. 50, p. 252, L. 1877; re-en. Sec. 50, 2nd Div. Rev. Stat. 1879; re-en. Sec. 50, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2406, C. Civ. Proc. 1895; re-en. Sec. 7427, Rev. C. 1907; re-en. Sec. 10062, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1355.

References

State v. Daems, 97 M 486, 496, 37 P 2d 322.

10063. Authority of administrators with will annexed—letters—how issued. Administrators with the will annexed have the same authority over estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof.

History: En. Sec. 51, p. 252, L. 1877; re-en. Sec. 51, 2nd Div. Rev. Stat. 1879; re-en. Sec. 51, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2407, C. Civ. Proc. 1895; re-en. Sec. 7428, Rev. C. 1907; re-en. Sec. 10063, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1356.

Operation and Effect

Under a will, executed by a nonresident owning estate in Montana, directing the

executor to sell all the property of the estate at public or private sale at such times as he might deem for the best interests of the estate, an ancillary administrator with the will annexed has, under this section, the same authority over the estate as the executor would have, and may sell the property without an order of court. In re Livingston's Estate, 91 M 584, 595, 9 P 2d 159.

10064. Form of letters testamentary. Letters testamentary must be substantially in the following form:

"State of Montana, county of..... The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the district court of the county of....., C D, who is named therein as such, is hereby appointed executor. Witness, G H, clerk of the district court of the county of, with the seal of the court affixed, the day of, A. D. 19.....

(Seal.) By order of the court.

G H, Clerk."

History: En. Sec. 52, p. 252, L. 1877; re-en. Sec. 2420, C. Civ. Proc. 1895; re-en. re-en. Sec. 52, 2nd Div. Rev. Stat. 1879; Sec. 7429, Rev. C. 1907; re-en. Sec. 10064, re-en. Sec. 52, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1360.

10065. Form of letters of administration with the will annexed. Letters of administration with the will annexed must be substantially in the following form:

"State of Montana, county of The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the district court of the county of, and there being no executor named in the will (or as the case may be), C D is hereby appointed administrator with the will annexed. Witness, G H, clerk of the district court of the county of, with the seal of the court affixed, the day of, A. D. 19.....

(Seal.) By order of the court.

G H, Clerk."

History: En. Sec. 53, p. 252, L. 1877; re-en. Sec. 2421, C. Civ. Proc. 1895; re-en. re-en. Sec. 53, 2nd Div. Rev. Stat. 1879; Sec. 7430, Rev. C. 1907; re-en. Sec. 10065, re-en. Sec. 53, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1361.

10066. Form of letters of administration. Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form:

"State of Montana, County of..... C D is hereby appointed administrator of the estate of A B, deceased. Witness, G H, clerk of the district court of the county of, with the seal thereof affixed, the day of, A. D. 19.....

(Seal.) By order of the court.

G H, Clerk."

History: En. Sec. 54, p. 252, L. 1877; re-en. Sec. 2422, C. Civ. Proc. 1895; re-en. re-en. Sec. 54, 2nd Div. Rev. Stat. 1879; Sec. 7431, Rev. C. 1907; re-en. Sec. 10066, re-en. Sec. 54, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1362.

10067. Transcript of court minutes to be evidence. A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of the court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.

History: En., with Secs. 10114-10119, re-en. Sec. 108, 2nd Div. Comp. Stat. 1887; R. C. M. 1921, in L. 1877. re-en. Sec. 2516, C. Civ. Proc. 1895; re-en.

This section en. Sec. 108, p. 264, L. 1877; Sec. 7483, Rev. C. 1907; re-en. Sec. 10067, re-en. Sec. 108, 2nd Div. Rev. Stat. 1879; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1429.

CHAPTER 115

PERSONS TO WHOM AND ORDER IN WHICH LETTERS OF ADMINISTRATION ARE GRANTED

- Section 10068. Order of persons entitled to administer—partner not to administer.
 10069. Preference of persons equally entitled.
 10070. In discretion of court or judge to appoint administrator, when.
 10071. When minor entitled, who appointed administrator.
 10072. Who are incompetent to act as administrators.
 10073. Married woman may be administratrix.

10068. Order of persons entitled to administer—partner not to administer. Administration of estate of all persons dying intestate must be

granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof, and they are, respectively, entitled therein in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The public administrator.
9. A creditor.
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of the estate.

History: En. Sec. 55, p. 253, L. 1877; re-en. Sec. 55, 2nd Div. Rev. Stat. 1879; amd. Sec. 55, 2nd Div. Comp. Stat. 1887; amd. Sec. 2430, C. Civ. Proc. 1895; re-en. Sec. 7432, Rev. C. 1907; re-en. Sec. 10068, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1365.

Children

Since the acknowledgment of an illegitimate child places him on exactly the same footing as a legitimate one with respect to the estate of the acknowledging father, he also has the right to nominate an administrator to administer the estate. In other words, a child acknowledged in writing by the father, is a "child" within the meaning of this section and 10072. In re Wehr's Estate, 96 M 245, 249 et seq., 29 P 2d 836.

Legally Competent Persons

The executor of the estate of his deceased first wife remarried; he died before the administration of the estate was completed. His second wife and a brother of the first wife petitioned for letters of administration of the estate. There were debts due from the estate and no account had ever been filed by the executor, to whom the property of his first wife had been left, and who had transferred all his interest in the estate to his second wife. Held, that under the facts both applicants were "legally competent persons" within subdivision 10 of this section, and that the court in appointing the male applicant in preference to the female (Sec. 10069) did not abuse the discretion lodged in it under section 10070. In re Kern's Estate, 96 M 443, 31 P 2d 313.

Partner Cannot be Administrator

The law does not favor the administration of estates by a person under conditions likely to result in a conflict of interests in the performance of his duty, as where he administers the estates of two partners and at the same time carries on the partnership business virtually as a surviving partner, and in the meantime fails to ascertain the rights of the estates in the business or make reports required by statute; in such circumstances he is incompetent to serve, as a legal proposition, under this section. In re Rinio's Estate, 93 M 428, 435, 19 P 2d 322.

Preference as to Special Administrator

Where a will, valid on its face, names an executor and it becomes necessary to appoint a special administrator of the estate, preference should be given to the person named as executor, and where an executor is not named in the will, the court should give like preference to the person entitled to letters of administration. State ex rel. McKennan v. District Court, 69 M 340, 344, 222 P 426.

Preference Right of Nonresident Son to Nominate Over Resident Daughter

A decedent with estate in Montana left surviving her five children, two sons and two daughters resident in a foreign country and a daughter residing in Montana. Over the objections of the resident daughter who prayed for letters in her own behalf, the court appointed a resident nominee of the foreign heirs. Held, under this section, sections 10069 and 10072, that the action of the court was correct,

10068, subd. 7
204 P. (2d)
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10068, subd. 8
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the nominee of the sons being entitled to preference over their resident sister, and the court having been without discretion to do otherwise. In re Estate of Welscher, 77 M 164, 166 et seq., 250 P 447.

Qualifications of the Appointee by Surviving Husband or Wife

No condition or limitation is imposed upon the widow's choice of an administrator, except that the nominee be competent; and the fact that she asserts claim to property which the other heirs contend belong to the estate does not render her or her nominee incompetent. In re Blackburn's Estate, 48 M 179, 188, 137 P 381.

The mere fact that a person nominated by decedent's widow as administrator with the will annexed asserts adverse interests against and makes claims upon the estate does not render him incompetent to serve. In re McLure's Estate, 63 M 536, 539, 542, 208 P 900.

Respective Rights May be Irrevocably Waived

The prior right conferred by this section upon those most interested in an intestate's estate to administer it may be waived; and if waived in favor of another, the renunciation, if fairly procured and freely made, is irrevocable. In re Blackburn's Estate, 48 M 179, 188, 137 P 381. See also In re Dolenty's Estate, 53 M 33, 49, 161 P 524.

Right in General

The surviving husband or wife is entitled to letters of administration to the exclusion of any other person unless one of the grounds of incompetency enumerated in section 10072 is shown to exist. State ex rel. Cotter v. District Court, 49 M 146, 148, 140 P 732.

Under this section, the surviving wife of a decedent is prima facie entitled to have letters of administration issued to her or some competent person designated by her, in preference to the mother of decedent. State ex rel. Peel v. District Court, 59 M 505, 514, 197 P 741.

Under this section, relatives of a decedent are entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof. The widow under the will was "endowed in his estate, real and personal." In a proceeding seeking to debar the widow from nominating an administrator with the will annexed, held that the testator by the use of the word "endowed" did not intend that she should be limited to her right of dower—a third part of his real property—but did intend that she should have the same portion of his estate, both real and personal, to which she would

have been entitled had he died intestate. In re McLure's Estate, 63 M 536, 539, 542, 208 P 900.

Section 10068 simply recognizes the right of those having the preponderance of interest in the estate of one dying intestate to administer the estate. (Compare In re Cameron's Estate, 86 M 455, 284 P 143.) In re Wehr's Estate, 96 M 245, 249 et seq., 29 P 2d 836.

Right of a Relative Other Than Husband or Wife to Appoint is Addressed to the Discretion of the Court

The right of a surviving husband or wife to administer or to name the administrator is absolute, but a request by any other relative named in section 10083, is addressed to the sound discretion of the court. Melzner v. Trucano, 51 M 18, 24, 149 P 365.

The request made by children of a decedent for the appointment of an administrator other than the one nominated by the widow was addressed to the sound discretion of the court, the exercise of which will not be disturbed on appeal unless a clear abuse thereof is shown. In re McLure's Estate, 63 M 536, 539, 542, 208 P 900.

Right of Nonresident Relative to Appoint an Administrator Whose Right is Prior to Public Administrator

The district court properly denied the request of a public administrator for letters of administration, and did not commit error in granting such letters to a resident of the state, whose appointment as administrator had been asked by decedent's nonresident brothers and sisters, the law contemplating that those most interested in the administration of the estate, though nonresidents, shall have the right to nominate some person whom they may deem trustworthy to act in that capacity for them. In re Watson's Estate, 31 M 438, 439, 78 P 702.

Right of Wife or Husband to Nominate Party to Act Not Lost by Reason of Minority

A statute providing that letters of administration must be granted, first, to the surviving husband or wife, "or some competent person whom he or she may request to have appointed," preserves to a widow, who is disqualified by reason of minority, the right to nominate a person legally qualified to apply for letters of administration, and such person is entitled to be appointed in preference to the public administrator. In re Stewart's Estate, 18 M 595, 597, 46 P 806.

Right to Nominate Not Affected by Incompetency of Widow

The widow, whether competent or not, still has her right of nomination. In re

Blackburn's Estate, 48 M 179, 195, 137 P 381.

Right to Nominate Not Affected by Withdrawal of Petition for Letters

Withdrawal of her petition for letters of administration, a counter-petition to which had been filed, did not deprive the widow of the decedent of her right, before hearing on the petitions, to nominate a suitable person to act for her as administrator. *State ex rel. Peel v. District Court*, 59 M 505, 514, 197 P 741.

Id. While ordinarily mandamus does not lie to correct an error of the district court, yet where its erroneous action was tantamount to refusal to act—as where, on motion, it struck a petition for letters of administration from the files without affording an opportunity to petitioner to be heard on the merits, a duty specially en-

joined upon it by law—mandamus is the proper remedy to compel restoration of the petition to the files.

When Court May Properly Deny Letters to One Having Superior Right Thereto

Where letters of administration had been issued to one whose right thereto was inferior to that of petitioner for their revocation (nominee of the widow of decedent), who asked for their revocation and that letters be issued to him, but the estate amounted to but \$1,943 and was ready for distribution, the court was justified in denying the petition. *In re Esterly's Estate*, 97 M 206, 208, 34 P 2d 539.

References

In re Cameron's Estate, 86 M 455, 460 et seq., 284 P 143; *In re Rinio's Estate*, 96 M 344, 346, 30 P 2d 803.

10069. Preference of persons equally entitled. Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

History: En. Sec. 56, p. 253, L. 1877; re-en. Sec. 56, 2nd Div. Rev. Stat. 1879; re-en. Sec. 56, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2431, C. Civ. Proc. 1895; re-en. Sec. 7433, Rev. C. 1907; re-en. Sec. 10069, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1366.

Operation and Effect

A decedent with estate in Montana left surviving her five children, two sons and two daughters resident in a foreign country and a daughter residing in Montana. Over the objections of the resident daughter who prayed for letters in her own behalf, the court appointed a resident nominee of the foreign heirs. Held, under this section and the preceding one, and section 10072, that the action of the court was correct, the nominee of the sons being entitled to preference over their resident sister, and the court having been without discretion to do otherwise. *In re Estate of Welscher*, 77 M 164, 168, 250 P 447.

10070. In discretion of court or judge to appoint administrator, when. When there are several persons equally entitled to the administration, the court or judge may grant letters to one or more of them.

History: En. Sec. 57, p. 254, L. 1877; re-en. Sec. 57, 2nd Div. Rev. Stat. 1879; re-en. Sec. 57, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2432, C. Civ. Proc. 1895; re-en. Sec. 7434, Rev. C. 1907; re-en. Sec. 10070, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1367.

Operation and Effect

The executor of the estate of his deceased first wife remarried; he died before the administration of the estate was completed. His second wife and a brother of the first wife petitioned for letters of administration of the estate. There were

The executor of the estate of his deceased first wife remarried; he died before the administration of the estate was completed. His second wife and a brother of the first wife petitioned for letters of administration of the estate. There were debts due from the estate and no account had ever been filed by the executor, to whom the property of his first wife had been left, and who had transferred all his interest in the estate to his second wife. Held, that under the facts both applicants were "legally competent persons" within subdivision 10 of section 10068, and that the court in appointing the male applicant in preference to the female (this section) did not abuse the discretion lodged in it under section 10070. *In re Kern's Estate*, 96 M 443, 449, 31 P 2d 313.

debts due from the estate and no account had ever been filed by the executor, to whom the property of his first wife had been left, and who had transferred all his interest in the estate to his second wife. Held, that under the facts both applicants were "legally competent persons" within subdivision 10 of section 10068, and that the court in appointing the male applicant in preference to the female (Sec. 10069) did not abuse the discretion lodged in it under this section. *In re Kern's Estate*, 96 M 443, 449, 31 P 2d 313.

10071. When minor entitled, who appointed administrator. If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court or judge.

History: En. Sec. 58, p. 254, L. 1877; re-en. Sec. 58, 2nd Div. Rev. Stat. 1879; re-en. Sec. 58, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2433, C. Civ. Proc. 1895; re-en. Sec. 7435, Rev. C. 1907; re-en. Sec. 10071, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1368.

Operation and Effect

This section has application to minors generally other than to a surviving husband or wife under the age of majority, yet old enough to lawfully contract the marital relation. As to minors sustaining such relationship, the statute giving the right to nominate is special and controls. In re Stewart's Estate, 18 M 595, 599, 46 P 806.

10072. Who are incompetent to act as administrators. No person is competent or entitled to serve as administrator or administratrix who is:

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1. Under the age of majority.
2. Not a bona fide resident of the state; but if a person otherwise entitled to serve is not a resident of the state, and either the husband, wife, or child, or parent, or brother, or sister of the deceased, he may request the court or judge to appoint a resident of the state to serve as administrator, and such person may be appointed, but no other nonresident than a surviving husband, wife, or child, or parent, or brother, or sister shall have such right to request an appointment, and the court or judge must order letters issued to the applicant entitled thereto under the provisions of this chapter.
3. Convicted of an infamous crime.
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

History: En. Sec. 59, p. 254, L. 1877; re-en. Sec. 59, 2nd Div. Rev. Stat. 1879; re-en. Sec. 59, 2nd Div. Comp. Stat. 1887; amd. Sec. 2434, C. Civ. Proc. 1895; amd. Sec. 1, p. 137, L. 1899; re-en. Sec. 7436, Rev. C. 1907; re-en. Sec. 10072, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1369.

Assertion of Claim to Property Does Not Render One Incompetent

An assertion of claim to property which the other heirs contend belongs to the estate does not render the widow or her nominee incompetent to administer it. In re Blackburn's Estate, 48 M 179, 188, 137 P 381; In re Dolenty's Estate, 53 M 33, 46, 161 P 524.

The mere fact that a person nominated by decedent's widow as administrator with the will annexed asserts adverse interests against and makes claims upon the estate does not render him incompetent to serve. In re McLure's Estate, 63 M 536, 543, 208 P 900.

The fact that the brother of decedent, who nominated his son to act as administrator of the estate of the intestate had a claim against the estate, did not render

the father incompetent to make the nomination, nor the son from serving; the appointment or rejection of the nominee in such circumstances resting in the sound discretion of the court, its action in this behalf being reversible only in case of a clear abuse of discretion. In re Rinio's Estate, 96 M 344, 346, 30 P 2d 803.

"Bona Fide Resident of the State"

Held, that evidence that the nonresident sister of a decedent moved to Montana for the purpose of petitioning for letters of administration and with the intention of remaining, was sufficient to establish the fact of her residence in the state, in the absence of any declarations or actions showing a contrary intent and in view of the fact that she had no permanent residence anywhere else, and that she therefore was at the time of making petition for letters, about a month after her arrival in the state, a bona fide resident within the meaning of this section, requiring an administrator to be a bona fide resident of the state. In re Estate of Nix, 66 M 559, 565, 213 P 1089.

Under this section, one not a bona fide resident of Montana is disqualified from serving as administrator. In re Myer's Estate, 92 M 474, 476 et seq., 15 P 2d 846.

Id. Evidence in a proceeding to procure letters of administration by one who up to a week before the death of the intestate, his uncle, was a resident of another state, to the effect that he intended making Montana his home because of the state of his health, that he intended purchasing a farm if a suitable one could be found, that he intended thereafter to vote here, etc., held of sufficient substance to justify a finding by the trial court that petitioner on the date of filing the petition was a bona fide resident of the state.

"Drunkeness"

Unless the drunkenness charged as a disqualification is due to the excessive, inveterate, and continued use of intoxicants to such an extent that the applicant would be an unsafe agent, letters of administration will not be denied. Root v. Davis, 10 M 228, 243, 25 P 105.

General Business Experience and Knowledge of Bookkeeping Not Necessary Qualifications

Where the trial court in granting letters of administration found that the petitioner, twenty-four years of age, was possessed of more than ordinary intelligence, it did not err in overruling objections of creditors of the estate on the ground of want of understanding because of lack of sufficient business experience and knowledge of bookkeeping, such qualifications not being required to warrant appointment in the case. In re Rinio's Estate, 96 M 344, 346, 30 P 2d 803.

"Improvidence"

The facts that an applicant does not possess property of considerable value at an age of 65 and has not supported his wife and children for a number of years, from whom he has been separated, does not constitute improvidence, and unless there is evidence of the applicant's indifference, carelessness, prodigality, wastefulness, or negligence in the management of property letters will not be denied. Root v. Davis, 10 M 228, 243, 25 P 105.

Preference Right of Nonresident Son to Nominate Over Resident Daughter

A decedent with estate in Montana left surviving her five children, two sons and two daughters resident in a foreign country and a daughter residing in Montana. Over the objections of the resident daughter who prayed for letters in her own behalf, the court appointed a resident nominee of the foreign heirs. Held, under sections 10068 and 10069, and this section, that the action of the court was correct,

the nominee of the sons being entitled to preference over their resident sister, and the court having been without discretion to do otherwise. In re Estate of Welscher, 77 M 164, 166 et seq., 250 P 447.

Request of Nonresident Heir for Appointment of a Resident Administrator Addressed to the Discretion of the Court

In the absence of statute giving a resident child of a decedent a preference of administration over the resident nominee of a nonresident child, a request preferred by a nonresident under subdivision 2 of this section, for the appointment of a resident administrator is addressed to the judicial discretion of the court. In re Cameron's Estate, 86 M 455, 460 et seq., 284 P 143.

Id. Under the above rule, held, that, where the court had before it two petitions for letters of administration with the will annexed, one filed by a resident daughter of decedent, and one by the resident nominee of three nonresident daughters, it was not mandatory upon it to appoint the resident heir and its action in appointing the nominee of the three nonresidents with whom lay the preponderance of interest in the estate, may not be held an abuse of its discretion in the premises. (Honorable C. W. Pomeroy, District Judge, sitting in place of Mr. Justice Galen, dissenting.)

Right of Foreign Illegitimate Son Acknowledged by Decedent to Nominate Administrator

The evidence held sufficient not only to establish the right of the illegitimate son to inherit his father's estate, but also sufficient to entitle him, as a nonresident and as the decedent's "child," to nominate an administrator of his father's estate under this section. In re Wehr's Estate, 96 M 245, 249 et seq., 29 P 2d 836.

Right of Nonresident Heir to Nominate

Under this section, a person who is incompetent to serve as administrator by reason of nonresidence may, if he or she fall within one of the five favored classes therein enumerated, nominate a resident to serve, the right to nominate being absolute as to all the five classes enumerated in the section, in the order of their priority. In re Estate of Welscher, 77 M 164, 166 et seq., 250 P 447.

"Want of Integrity"

Want of integrity in the applicant, based upon the ground that he had testified falsely on a former occasion, is not supported by proof that three years before, when summoned for jury service, applicant had testified that he was a citizen of another state, and that in the trial of the

case at bar he had testified that he had been a resident of this state for five years, where it clearly appeared that in giving such testimony he made a distinction between residence and citizenship. Root v. Davis, 10 M 228, 248, 25 P 105.

"Want of Understanding"

A charge of disqualification through want of understanding cannot be supported in the absence of evidence, and where such charge is incompatible with another charge affecting the integrity of the applicant, as an alleged design on the part of applicant to defraud certain heirs, and of a conspiracy to carry out such fraudulent purpose. Root v. Davis, 10 M 228, 247, 25 P 105.

The court properly removed an executor who was palpably deficient in the under-

standing necessary to enable one to transact business, who made no sufficient effort to collect the debts due the estate, who never read and did not know the contents of affidavits attached to his report, who was ignorant of his personal business relations with the decedent whose estate he was administering, and who, in short, was incompetent because incapable. In re Courtney's Estate, 31 M 625, 628, 79 P 317.

References

Cited or applied as section 2434, Code of Civil Procedure, before amendment, in In re Craigie's Estate, 24 M 37, 44, 60 P 495; as amended, in In re Watson's Estate, 31 M 438, 439, 78 P 702; as section 7436, Revised Codes, in State ex rel. Cotter v. District Court, 49 M 146, 148, 140 P 732.

10073. Married woman may be administratrix. A married woman may be appointed administratrix. When an unmarried woman marries, her authority continues.

History: Ap. p. Sec. 60, 2nd Div. Comp. Stat. 1887; en. Sec. 2435, C. Civ. Proc. 1895; re-en. Sec. 7437, Rev. C. 1907; re-en. Sec. 10073, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1370.

CHAPTER 116

PETITION FOR LETTERS OF ADMINISTRATION AND ACTION THEREON

- Section 10074. Application—how made.
- 10075. When granted.
- 10076. Notice of application.
- 10077. Contesting application.
- 10078. Hearing of application.
- 10079. Evidence of notice.
- 10080. Grant to any applicant.
- 10081. What proof must be made before granting letters of administration.
- 10082. Letters may be granted to others than those entitled.

10074. Application—how made. Petitions for letters of administration must be in writing, signed by the applicant or his attorney, and filed with the clerk of the court, stating the facts essential to give jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterward proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.

History: En. Sec. 61, p. 254, L. 1877; re-en. Sec. 61, 2nd Div. Rev. Stat. 1879; re-en. Sec. 61, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2440, C. Civ. Proc. 1895; re-en. Sec. 7438, Rev. C. 1907; re-en. Sec. 10074, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1371.

10075. When granted. Letters of administration may be granted by the court or judge at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed.

History: En. Sec. 62, p. 254, L. 1877; re-en. Sec. 62, 2nd Div. Rev. Stat. 1879; re-en. Sec. 62, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2441, C. Civ. Proc. 1895; re-en. Sec. 7439, Rev. C. 1907; re-en. Sec. 10075, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1372.

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10076. Notice of application. When a petition praying for letters of administration is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing.

History: En. Sec. 63, p. 254, L. 1877; re-en. Sec. 63, 2nd Div. Rev. Stat. 1879; re-en. Sec. 63, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2442, C. Civ. Proc. 1895; re-en. Sec. 7440, Rev. C. 1907; re-en. Sec. 10076, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1373.

Computation of Time

The rule declared by section 10707, that the time within which the law requires an act to be done shall be computed by excluding the first and including the last day, applies to the provision of this section, that notice of application for letters of

administration must be posted at least ten days before the hearing—an event; it has no application where the thing is required to be done a certain number of days before a given date. In *re Esterly's Estate*, 97 M 206, 210, 34 P 2d 539.

Id. Under the above rule, held, that where a notice of application for letters of administration was posted on December 21 fixing the hearing at 10 o'clock a. m. on December 31, the day of hearing—an event as distinguished from a certain day—it was sufficient to give the court jurisdiction, and the letters issued were valid.

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131 P.(2d) 972

10077. Contesting application. Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his rights to the administration, and pray that letters be issued to him. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court or judge must hear the two petitions together.

History: En. Sec. 64, p. 254, L. 1877; re-en. Sec. 64, 2nd Div. Rev. Stat. 1879; re-en. Sec. 64, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2443, C. Civ. Proc. 1895; re-en. Sec. 7441, Rev. C. 1907; re-en. Sec. 10077, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1374.

Operation and Effect

In so far as this section does not authorize issues upon pleadings, it negatives the idea of any other character of hearing than a summary one by the court or judge, without any formalities attending the trial of a civil action. In *re Antonioli's Estate*, 42 M 219, 223, 111 P 1033.

Where the district court, sitting in probate, instead of hearing a petition for

letters of administration, a counter petition and a motion to strike the original petition from the files, together, as required by this section, simply heard and granted the motion to strike, its action was without authority of law and void. *State ex rel. Peel v. District Court*, 59 M 505, 515, 197 P 741; *State v. Great Northern Utilities Co.*, 86 M 442, 447, 284 P 772.

References

Cited or applied as section 2443, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 477, 48 P 753; *State ex rel. Lancaster v. Woody*, 20 M 413, 417, 51 P 975.

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10078. Hearing of application. On the hearing, it being first proved that notice has been given, as herein required, the court or judge must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

History: En. Sec. 65, p. 255, L. 1877; re-en. Sec. 65, 2nd Div. Rev. Stat. 1879; re-en. Sec. 65, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2444, C. Civ. Proc. 1895; re-en. Sec. 7442, Rev. C. 1907; re-en. Sec. 10078, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1375.

References

Cited or applied as section 2444, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 477, 48 P 753; *State ex rel. Peel v. District Court*, 59 M 505, 517, 197 P 741.

10079. Evidence of notice. An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

History: En. Sec. 66, p. 255, L. 1877; re-en. Sec. 66, 2nd Div. Rev. Stat. 1879; re-en. Sec. 66, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2445, C. Civ. Proc. 1895; re-en. Sec. 7443, Rev. C. 1907; re-en. Sec. 10079, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1376.

10080. Grant to any applicant. Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

History: En. Sec. 67, p. 255, L. 1877; re-en. Sec. 67, 2nd Div. Rev. Stat. 1879; re-en. Sec. 67, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2446, C. Civ. Proc. 1895; re-en. Sec. 7444, Rev. C. 1907; re-en. Sec. 10080, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1377.

Operation and Effect

Unless a person is a bona fide resident of the state, he is not competent to serve as administrator; and, after letters have been granted to a competent applicant, no person other than the surviving husband or wife, child, father, mother, brother, or

sister of the intestate may obtain the revocation of such letters for the reason that he or she is better entitled to them. In re Craigie's Estate, 24 M 37, 44, 60 P 495.

References

Cited or applied as section 2446, Code of Civil Procedure, in In re Liter's Estate, 19 M 474, 478, 48 P 753; State ex rel. Lancaster v. Woody, 20 M 413, 417, 51 P 975; as section 7444, Revised Codes, in In re Blackburn's Estate, 48 M 179, 187, 137 P 381.

10081. What proof must be made before granting letters of administration. Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court or judge may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

History: En. Sec. 68, p. 255, L. 1877; re-en. Sec. 68, 2nd Div. Rev. Stat. 1879; re-en. Sec. 68, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2447, C. Civ. Proc. 1895; re-en. Sec. 7445, Rev. C. 1907; re-en. Sec. 10081, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1378.

Operation and Effect

Where an alleged will of a decedent is before the court for probate, and a contest pending thereon, it is proper for the court, taking judicial notice of its own proceedings, to refuse to vacate an order for the appointment of a general administrator theretofore made, and to grant general letters of administration to another person upon a petition made for such purposes, as such petition would involve proof of the intestacy of the decedent in advance of the determination of that question by the trial of the contest upon the probate

of the will. In re Davis-Cummings' Appeal, 11 M 196, 211, 213, 28 P 645.

Id. The making of an order for the appointment of a general administrator is not an adjudication of the intestacy of the decedent, binding upon the court until set aside, but a will may be propounded at any time, and its admission to probate ipso facto vacates letters of general administration.

Proof of the intestacy and death must be made, the purpose of which is to ascertain what condition of facts exists. Questions must be answered though no actual issues of fact are involved, and the district court acts simply in behalf of all persons interested in the administration of the estate, and does so in a somewhat ministerial as well as judicial capacity. In re Liter's Estate, 19 M 474, 478, 48 P 753.

10082. Letters may be granted to others than those entitled. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a nonresident of the state, affidavits, taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state,

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may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

History: Ap. p. Sec. 69, p. 256, L. 1877; re-en. Sec. 69, 2nd Div. Rev. Stat. 1879; re-en. Sec. 69, 2nd Div. Comp. Stat. 1887; en. Sec. 2448, C. Civ. Proc. 1895; re-en. Sec. 7446, Rev. C. 1907; re-en. Sec. 10082, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1379.

Operation and Effect

If a decedent's mother, residing in a foreign country, makes a written request for the appointment of a designated person as administrator of her son's estate in this state, and the same is entitled in the court and cause and addressed to the judge of the court, and is accompanied by an affidavit as to the identity of the party making the request, executed before an officer authorized to administer oaths outside

of the United States, such request virtually constitutes a pleading, and, as the request and affidavit are a part of the record in the case, and thus before the court, it is unnecessary to formally offer them in evidence. In re Koller's Estate, 40 M 137, 142, 105 P 549.

Under this section, a request for the revocation of letters of administration by one of the persons named in section 10083, must be filed in the district court, and a petition failing to allege the filing of such request is insufficient. Melzner v. Trucano, 51 M 18, 23, 149 P 365.

References

In re Rinio's Estate, 96 M 344, 346, 30 P 2d 803.

CHAPTER 117

PROCEEDINGS FOR REVOCATION OF LETTERS OF ADMINISTRATION

Section 10083. Revocation of letters of administration.

10084. When petition filed, citation to issue.

10085. Hearing of petition for revocation.

10086. Prior right of relatives entitles them to revoke prior letters.

10083. Revocation of letters of administration. When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration be issued to him.

History: En. Sec. 70, p. 256, L. 1877; re-en. Sec. 70, 2nd Div. Rev. Stat. 1879; re-en. Sec. 70, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2460, C. Civ. Proc. 1895; re-en. Sec. 7447, Rev. C. 1907; re-en. Sec. 10083, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1383.

Operation and Effect

Where letters of administration have been granted to any person, other than those enumerated in this section, any one of the persons therein named, though a resident of a foreign country, may seek the revocation of such letters and nominate someone to act as administrator. Melzner v. Trucano, 51 M 18, 23, 149 P 365.

Id. This section, under which the nominee of a surviving mother may be entitled to letters and to the revocation of prior letters, is not absolute and available at all times, under all conditions. The pleading in such, as in all other cases, must show prima facie that the applicant is entitled to the relief sought.

Id. The right conferred by this section to name a person to administer the estate of a decedent may be waived by refusal or failure to claim the privilege, or by unreasonable delay in claiming it.

The right of petitioning for the revocation of letters of administration given by this section, if granted to one other than the persons named therein, is not absolute and available at all times, under all conditions, but, under it, where one of an inferior class obtains letters, one of a superior class may, the conditions being favorable, invoke and secure its benefit. In re Cameron's Estate, 86 M 455, 462, 284 P 143.

When Court May Dispense With These Provisions

Under section 10149, the district court sitting in probate may, after the issuance of letters of administration, dispense with the regular proceedings in estate matters

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prescribed by sections 10018-10464 of the Codes, where an estate does not exceed the sum of \$3,000, and hence may in such a case in its discretion dispense with all the provisions of sections 10083-10086, relating to revocation of letters. In *re* Esterly's Estate, 97 M 206, 210, 34 P 2d 539.

References

Cited or applied as section 2460, Code of Civil Procedure, in *In re Craigie's Estate*, 24 M 37, 44, 60 P 495; as section 7447, Revised Codes, in *re* Koller's Estate, 40 M 137, 141, 105 P 549; In *re* Blackburn's Estate, 48 M 179, 187, 137 P 381.

10084. When petition filed, citation to issue. When such petition is filed, the clerk must, in addition to the notice provided in section 10076, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

History: En. Sec. 71, p. 256, L. 1877; re-en. Sec. 71, 2nd Div. Rev. Stat. 1879; re-en. Sec. 71, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2461, C. Civ. Proc. 1895; re-en. Sec. 7448, Rev. C. 1907; re-en. Sec. 10084, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1384.

References

Cited or applied as section 7448, Revised Codes, in *In re Blackburn's Estate*, 48 M 179, 187, 137 P 381.

10085. Hearing of petition for revocation. At the time appointed, the citation having been duly served and returned, the court or judge must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

History: En. Sec. 72, p. 256, L. 1877; re-en. Sec. 72, 2nd Div. Rev. Stat. 1879; re-en. Sec. 72, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2462, C. Civ. Proc. 1895; re-en. Sec. 7449, Rev. C. 1907; re-en. Sec. 10085, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1385.

References

Cited or applied as section 7449, Revised Codes, in *In re Blackburn's Estate*, 48 M 179, 187, 137 P 381.

10086. Prior right of relatives entitles them to revoke prior letters. The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have letters before granted revoked in the same manner prescribed in the three preceding sections.

History: En. Sec. 73, p. 256, L. 1877; re-en. Sec. 73, 2nd Div. Rev. Stat. 1879; re-en. Sec. 73, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2463, C. Civ. Proc. 1895; re-en. Sec. 7450, Rev. C. 1907; re-en. Sec. 10086, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1386.

Operation and Effect

It is the policy of the law that the widow shall control in limine the administration of her late husband's estate. To that end she is authorized to either administer it herself, or to nominate some person in whom she places trust and confidence to administer it for her. In *re* Blackburn's Estate, 48 M 179, 188, 137 P

381; In *re* Dolenty's Estate, 53 M 33, 46, 161 P 524.

Where upon the request of a widow and the renunciation of her right to act as administratrix, which was fairly procured and freely given, another was appointed administrator, she has exercised her prior right, and cannot have such appointee removed and letters issued to her whenever she elects. In *re* Blackburn's Estate, 48 M 179, 187, 137 P 381.

References

Cited or applied as section 2463, Code of Civil Procedure, in *In re Craigie's Estate*, 24 M 37, 44, 60 P 495.

CHAPTER 118

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS

Section 10087. Administrator or executor to take oath—letters and bonds to be recorded.

- 10088. Bond of administrators and executors, form and requirement of.
- 10089. Additional bonds—when required.
- 10090. Condition of bonds.
- 10091. Separate bonds, where more than one administrator.
- 10092. Several recoveries may be had on same bond.
- 10093. Bonds and justification of sureties on—must be approved.
- 10094. Citation and requirements of judge on deficient bond—additional security.
- 10095. Right ceases, when.
- 10096. When bond may be dispensed with.
- 10097. Petition showing failing sureties and asking for further bonds.
- 10098. Citation to executor, etc., to show cause against such application.
- 10099. Further security may be ordered.
- 10100. Neglecting to obey order.
- 10101. Suspending powers of executor, etc.
- 10102. Further security without application of party in interest.
- 10103. Release of sureties.
- 10104. New sureties.
- 10105. Neglect to give new sureties forfeits letters.
- 10106. Cost of procuring bonds.

10087. Administrator or executor to take oath—letters and bonds to be recorded. Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors and administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose.

History: En. Sec. 74, p. 256, L. 1877; re-en. Sec. 74, 2nd Div. Rev. Stat. 1879; re-en. Sec. 74, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2470, C. Civ. Proc. 1895; re-en. Sec. 7451, Rev. C. 1907; re-en. Sec. 10087, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1387.

10088. Bond of administrators and executors, form and requirement of. Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Montana, with two or more sufficient sureties, or a sufficient surety company, to be approved by the district court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than the value of the personal property and the annual rents and profits of real property belonging to the estate, nor more than twice the value of such personal property and rents and profits.

History: En. Sec. 75, p. 257, L. 1877; re-en. Sec. 75, 2nd Div. Rev. Stat. 1879; re-en. Sec. 75, 2nd Div. Comp. Stat. 1887; amd. Sec. 2471, C. Civ. Proc. 1895; re-en. Sec. 7452, Rev. C. 1907; amd. Sec. 1, Ch. 173, L. 1919; re-en. Sec. 10088, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1388.

Operation and Effect

The general bond of an administrator given under this section covers all moneys coming into his hands, whether from sale

of real property or otherwise; while the additional bond required by the succeeding section upon sale of real property belonging to the estate is security for his acts in that respect only. *Baker v. Hanson et al*, 72 M 22, 29, 231 P 902.

Id. Since under the preceding rule, the proceeds of a sale of real property of an estate in the hands of an administrator are secured by both his general bond and the additional one required on such a sale,

the sureties on both are equally liable and therefore the contention that liability on the additional bond does not attach until the penalty of the general bond has been exhausted is without merit.

An administrator's general or qualifying bond is liable, so far as accounting for property of the estate is concerned, for that which comes into his hands and that which, in the performance of his duties, he should have reduced to possession but did not. *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761.

Id. The general or qualifying bond of an administrator may in any case be

wholly responsible for the proceeds of the sale of real property of his estate, in contemplation of the statutes which form a part of the contract, and even where an additional bond is required on the sale of such property (Sec. 10089), the qualifying bond is jointly liable with it for the proceeds.

References

Cited or applied as section 75, Second Division Compiled Statutes 1887, in *In re Craigie's Estate*, 24 M 37, 40, 60 P 495; *Huges v. Goodale*, 26 M 93, 98, 66 P 702; *In re Smith's Estate*, 60 M 276, 298, 199 P 696.

10089. Additional bonds—when required. The court or judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court or judge that the penalty of the bond given before receiving letters, or any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

History: En. Sec. 76, p. 257, L. 1877; re-en. Sec. 76, 2nd Div. Rev. Stat. 1879; re-en. Sec. 76, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2472, C. Civ. Proc. 1895; re-en. Sec. 7453, Rev. C. 1907; re-en. Sec. 10089, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1389.

Operation and Effect

The general bond of an administrator given under the preceding section covers all moneys coming into his hands, whether from sale of real property or otherwise; while the additional bond required by this section upon sale of real property belonging to the estate is security for his acts in that respect only. *Baker v. Hanson et al.*, 72 M 22, 29, 231 P 902.

Id. The additional bond which may be exacted from an administrator under this section, upon a sale of real property belonging to the estate in his charge, is distinct from the further security which may be required under sections 10094, 10095,

and 10102, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same measure of liability.

The general or qualifying bond of an administrator may in any case be wholly responsible for the proceeds of the sale of real property of his estate, in contemplation of the statutes which form a part of the contract, and even where an additional bond is required on the sale of such property (this section), the qualifying bond is jointly liable with it for the proceeds. *Swanberg v. National Surety Co.*, 86 M 340, 355, 283 P 761.

References

Cited or applied as section 76, Second Division Compiled Statutes 1887, in *Huges v. Goodale*, 26 M 93, 95, 66 P 702.

10090. Condition of bonds. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

History: En. Sec. 77, p. 257, L. 1877; re-en. Sec. 77, 2nd Div. Rev. Stat. 1879; re-en. Sec. 77, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2473, C. Civ. Proc. 1895; re-en. Sec. 7454, Rev. C. 1907; re-en. Sec. 10090, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1390.

Operation and Effect

The liability of a paid surety on an official bond of an administrator is measured

by his covenant, the conditions of and the statutes relating to the bond and the duties of the administrator; its contract in that behalf is subject to the same rules of construction as any other contract, for the purpose of giving effect to the intention of the parties. *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761.

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L. 37 c. 179
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Sec. 1 p. 248

Id. An administrator's general or qualifying bond is liable, so far as accounting for property of the estate is concerned, for that which comes into his hands and that which, in the performance of his duties, he should have reduced to possession but did not.

References

Cited or applied as section 77, Second Division Compiled Statutes 1887, in *In re Craigie's Estate*, 24 M 37, 41, 60 P 495; *In re Smith's Estate*, 60 M 276, 298, 199 P 696.

10091. Separate bonds, where more than one administrator. When two or more persons are executors or administrators, the court or judge must require and take a separate bond from each of them.

History: En. Sec. 78, p. 257, L. 1877; re-en. Sec. 78, 2nd Div. Rev. Stat. 1879; re-en. Sec. 78, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2474, C. Civ. Proc. 1895; re-en. Sec. 7455, Rev. C. 1907; re-en. Sec. 10091, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1391.

10092. Several recoveries may be had on same bond. The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time by any person aggrieved, in his own name, until the whole penalty is exhausted.

History: En. Sec. 79, p. 257, L. 1877; re-en. Sec. 79, 2nd Div. Rev. Stat. 1879; re-en. Sec. 79, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2475, C. Civ. Proc. 1895; re-en. Sec. 7456, Rev. C. 1907; re-en. Sec. 10092, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1392.

10093. Bonds and justification of sureties on—must be approved. In all cases where bonds or undertakings are required to be given under sections 10018 to 10464 of this code, the sureties must justify thereon in the same manner and in like amounts as required by section 9825 of this code, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by a judge of the district court before being filed or recorded.

History: En. Sec. 80, p. 258, L. 1877; re-en. Sec. 80, 2nd Div. Rev. Stat. 1879; re-en. Sec. 80, 2nd Div. Comp. Stat. 1887; amd. Sec. 2476, C. Civ. Proc. 1895; re-en. Sec. 7457, Rev. C. 1907; re-en. Sec. 10093, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1393.

10094. Citation and requirements of judge on deficient bond—additional security. Before the judge approves the bond required under sections 10018 to 10464 of this code, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator, requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security.

History: En. Sec. 81, p. 258, L. 1877; re-en. Sec. 81, 2nd Div. Rev. Stat. 1879; re-en. Sec. 81, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2477, C. Civ. Proc. 1895; re-en. Sec. 7458, Rev. C. 1907; re-en. Sec. 10094, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1394.

Operation and Effect

The additional bond which may be exacted from an administrator under section 10089, upon a sale of real property belonging to the estate in his charge, is distinct from the further security which may be

required under this section and sections 10099 and 10102, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same

measure of liability. *Baker v. Hanson et al.*, 72 M 22, 31, 231 P 902.

References

Cited or applied as section 7458, Revised Codes, in *State ex rel. King v. District Court*, 42 M 182, 185, 111 P 717.

10095. Right ceases, when. If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who shall execute a sufficient bond, must be appointed to the administration.

History: En. Sec. 82, p. 258, L. 1877; re-en. Sec. 82, 2nd Div. Rev. Stat. 1879; re-en. Sec. 82, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2478, C. Civ. Proc. 1895; re-en. Sec. 7459, Rev. C. 1907; re-en. Sec. 10095, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1395.

10096. When bond may be dispensed with. When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed, without any bond, unless the court or judge, for good cause, require one to be executed; but the executor may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond as in other cases.

History: En. Sec. 83, p. 258, L. 1877; re-en. Sec. 83, 2nd Div. Rev. Stat. 1879; re-en. Sec. 83, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2479, C. Civ. Proc. 1895; re-en. Sec. 7460, Rev. C. 1907; re-en. Sec. 10096, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1396.

Operation and Effect

The right of the court to demand the bond referred to in this section is unquestionable, and conforms with the policy of

the probate laws of the state, which enable the court to exercise a supervision over the affairs of the estate, lest because "of some change in the situation or circumstances of the executor, or for other sufficient cause," the rights of those interested may be endangered. In *re Higgins' Estate*, 15 M 474, 485, 39 P 506.

10097. Petition showing failing sureties and asking for further bonds. Any person interested in an estate may, by verified petition, represent to the court or judge that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or that from any other cause the bond is insufficient, and ask that further security be required.

History: En. Sec. 84, p. 258, L. 1877; re-en. Sec. 84, 2nd Div. Rev. Stat. 1879; re-en. Sec. 84, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2480, C. Civ. Proc. 1895; re-en. Sec. 7461, Rev. C. 1907; re-en. Sec. 10097, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1397.

10098. Citation to executor, etc., to show cause against such application. If the court or judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court or judge may order.

History: En. Sec. 85, p. 259, L. 1877; re-en. Sec. 85, 2nd Div. Rev. Stat. 1879; re-en. Sec. 85, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2481, C. Civ. Proc. 1895; re-en. Sec. 7462, Rev. C. 1907; re-en. Sec. 10098, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1398.

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L. 37 c. 150
sec. 2 p. 487

10099. Further security may be ordered. On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security from any cause is insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond, in the usual form, within a reasonable time, not less than five days.

History: En. Sec. 86, p. 259, L. 1877; re-en. Sec. 86, 2nd Div. Rev. Stat. 1879; re-en. Sec. 86, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2482, C. Civ. Proc. 1895; re-en. Sec. 7463, Rev. C. 1907; re-en. Sec. 10099, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1399.

Operation and Effect

The additional bond which may be exacted from an administrator under section 10089, upon a sale of real property belong-

ing to the estate in his charge, is distinct from the further security which may be required under sections 10094 and 10102, and this section, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same measure of liability. *Baker v. Hanson et al.*, 72 M 22, 31, 231 P 902.

10100. Neglecting to obey order. If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

History: En. Sec. 87, p. 259, L. 1877; re-en. Sec. 87, 2nd Div. Rev. Stat. 1879; re-en. Sec. 87, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2483, C. Civ. Proc. 1895; re-en. Sec. 7464, Rev. C. 1907; re-en. Sec. 10100, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1400.

10101. Suspending powers of executor, etc. When a petition is presented, praying that an executor or administrator be required to give further security, or to give bond, where, by the terms of the will, no bond was originally required, and it is alleged that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

History: En. Sec. 88, p. 259, L. 1877; re-en. Sec. 88, 2nd Div. Rev. Stat. 1879; re-en. Sec. 88, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2484, C. Civ. Proc. 1895; re-en. Sec. 7465, Rev. C. 1907; re-en. Sec. 10101, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1401.

References

Cited or applied as section 7465, Revised Codes, in *State ex rel. King v. District Court*, 42 M 182, 185, 111 P 717.

10102. Further security without application of party in interest. When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

History: En. Sec. 89, p. 260, L. 1877; re-en. Sec. 89, 2nd Div. Rev. Stat. 1879; re-en. Sec. 89, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2485, C. Civ. Proc. 1895; re-en. Sec. 7466, Rev. C. 1907; re-en. Sec. 10102, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1402.

Operation and Effect

The additional bond which may be exacted from an administrator under section 10089, upon the sale of real property belonging to the estate in his charge, is distinct from the further security which

may be required under sections 10094, 10099, and this section, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same measure of liability. *Baker v. Hanson et al.*, 72 M 22, 31, 231 P 902.

References

Cited or applied as section 7466, Revised Codes, in *State ex rel. King v. District Court*, 42 M 182, 185, 111 P 717.

10103. Release of sureties. When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the court or judge for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place, to be therein specified, and to give other security. If he has absconded, left, or removed from the state, or if he cannot be found, after due diligence and inquiry, service may be had as provided in section 10098.

History: En. Sec. 90, p. 260, L. 1877; re-en. Sec. 2486, C. Civ. Proc. 1895; re-en. re-en. Sec. 90, 2nd Div. Rev. Stat. 1879; Sec. 7467, Rev. C. 1907; re-en. Sec. 10103, re-en. Sec. 90, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1403.

10103
124 P.(2d) 1012

10104. New sureties. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

History: En. Sec. 91, p. 260, L. 1877; re-en. Sec. 2487, C. Civ. Proc. 1895; re-en. re-en. Sec. 91, 2nd Div. Rev. Stat. 1879; Sec. 7468, Rev. C. 1907; re-en. Sec. 10104, re-en. Sec. 91, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1404.

10104
124 P.(2d) 1012

10105. Neglect to give new sureties forfeits letters. If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must revoke his letters.

History: En. Sec. 92, p. 260, L. 1877; re-en. Sec. 2488, C. Civ. Proc. 1895; re-en. re-en. Sec. 92, 2nd Div. Rev. Stat. 1879; Sec. 7469, Rev. C. 1907; re-en. Sec. 10105, re-en. Sec. 92, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1405.

10105
124 P.(2d) 1012

10106. Cost of procuring bonds. Any receiver, assignee, guardian, trustee, committee, executor, administrator, curator, or other fiduciary required by law, or the order of any court or the judge thereof, to give a bond or other obligation as such, may include, as a part of the lawful expense of executing his trust, such reasonable sum paid a company authorized under the laws of this state to be or become surety on any such bond, for becoming his surety on such bond or obligation, as may be allowed by the court in which, or a judge before whom, he is required to account, not exceeding one-half of one per cent. per annum on the amount of such bond; and in all actions and proceedings the party entitled to recover costs therein shall be allowed and may tax and recover such sum paid such company for executing any bond, recognizance, undertaking, stipulation, or other obligation therein, not exceeding, however, one-half of one per cent. on the amount of such bond, recognizance, undertaking, stipulation, or other obligation, during each year same has been in force.

History: En. Sec. 1, Ch. 78, L. 1903; re-en. Sec. 7723, Rev. C. 1907; re-en. Sec. 10106, R. C. M. 1921.

CHAPTER 119

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES

- Section 10107. Special administrators—when appointed.
 10108. Special letters may issue at any time.
 10109. Preference given to persons entitled to letters.
 10110. Special administrator to give bond and take oath.
 10111. Duties of special administrator.
 10112. When letters testamentary or of administration are granted, special administrator's powers cease.
 10113. Special administrator to render account.

10107. Special administrators—when appointed. When there is delay in granting letters testamentary or of administration from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended, or removed, the court or judge must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate.

History: En. Sec. 95, p. 261, L. 1887; re-en. Sec. 95, 2nd Div. Rev. Stat. 1879; re-en. Sec. 95, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2500, C. Civ. Proc. 1895; re-en. Sec. 7470, Rev. C. 1907; re-en. Sec. 10107, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1411.

Compensation

The court has a discretionary power to grant a special administrator compensation for his services. In re Ford's Estate, 29 M 283, 286, 74 P 735.

Function of Special Administrator

The functions of a special administrator being limited by this section and section 10111, to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed, an order by a district judge directing a special administrator to pay an indebtedness of the estate is void. State ex rel. Bartlett v. District Court, 18 M 481, 485, 46 P 259. See also In re Ford's Estate, 29 M 283, 287, 74 P 735; In re Williams' Estate, 55 M 63, 67, 173 P 790.

Limitations on Exercise of Power

Special administrators are without power to have appraisers appointed, or give notice to creditors for the presenta-

tion of claims. In re Ford's Estate, 29 M 283, 287, 74 P 735.

The district court is without power to require a special administrator to go beyond the fair import of the terms of the statute governing his actions. In re Williams' Estate, 55 M 63, 67, 173 P 790.

When Authority Ceases

The office of special administrator is statutory, his powers and duties are limited to those enumerated in the statute, and his authority ceases automatically upon the appointment and qualification of the executor or general administrator. In re Williams' Estate, 55 M 63, 67, 173 P 790.

When Special Administrator is Proper

Where the appointment of an administrator is delayed through a contest over the right to letters, the special administrator may be substituted in pending actions brought by decedent, under this section and section 10111. Quinn's Admr. v. Quinn, 22 M 403, 415, 56 P 824.

References

Cited or applied as section 2500, Code of Civil Procedure, in State ex rel. Eakins v. District Court, 34 M 226, 228, 85 P 1022; State ex rel. McKennan v. District Court, 69 M 340, 343, 222 P 426.

10108. Special letters may issue at any time. The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order.

History: En. Sec. 96, p. 261, L. 1877; re-en. Sec. 96, 2nd Div. Rev. Stat. 1879; re-en. Sec. 96, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2501, C. Civ. Proc. 1895; re-en. Sec. 7471, Rev. C. 1907; re-en. Sec. 10108, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1412.

References

State ex rel. McKennan v. District Court, 69 M 340, 343, 222 P 426.

10109. Preference given to persons entitled to letters. In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

10109
76 P (2d) 636
.....Mont.

History: En. Sec. 97, p. 261, L. 1877; re-en. Sec. 97, 2nd Div. Rev. Stat. 1879; re-en. Sec. 97, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2502, C. Civ. Proc. 1895; re-en. Sec. 7472, Rev. C. 1907; re-en. Sec. 10109, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1413.

Operation and Effect

Where there exists a legal cause for the appointment of a special administrator, the district court must appoint some one entitled to such appointment; and the selection of a public administrator to act as such officer, in preference to the widow of decedent, who had been named as legatee and devisee in the will and as executrix thereof, was a violation of the provisions of this section. State ex rel. Eakins v. District Court, 34 M 226, 231, 85 P 1022.

In the absence of a showing of incompetency, the person who is entitled to letters testamentary or of administration must be given preference in the selection of a special administrator, and a refusal

to do so is a direct violation of this section. State ex rel. Cotter v. District Court, 49 M 146, 148, 140 P 732.

A person named as executor in a will is, in a case where it is necessary to appoint a special administrator, entitled to the appointment. In re Williams' Estate, 55 M 63, 66, 173 P 790.

Where a will, valid on its face, names an executor and it becomes necessary to appoint a special administrator of the estate, preference should be given to the person named as executor, and where an executor is not named in the will, the court should give like preference to the person entitled to letters of administration. State ex rel. McKennan v. District Court, 69 M 340, 343, 222 P 426.

References

Cited or applied as section 7472, Revised Codes, in In re Dolenty's Estate, 53 M 33, 47, 161 P 524.

10110. Special administrator to give bond and take oath. Before any letters issue to any special administrator, he must give bonds in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters.

10110
76 P (2d) 636
.....Mont.

History: En. Sec. 98, p. 262, L. 1877; re-en. Sec. 98, 2nd Div. Rev. Stat. 1879; re-en. Sec. 98, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2503, C. Civ. Proc. 1895; re-en. Sec. 7473, Rev. C. 1907; re-en. Sec. 10110, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1414.

10111. Duties of special administrator. The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims, and demands of the estate; must take charge and management of, enter upon, and preserve from damage, waste, and injury, the real estate; and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator; he may sell such perishable property as the court or judge may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

10111
76 P (2d) 636
.....Mont.

History: En. Sec. 99, p. 262, L. 1877; re-en. Sec. 99, 2nd Div. Rev. Stat. 1879; re-en. Sec. 99, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2504, C. Civ. Proc. 1895; re-en. Sec. 7474, Rev. C. 1907; re-en. Sec. 10111, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1415.

Operation and Effect

This code limits the functions of a special administrator to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed. In re Ford's Estate, 29 M 283, 287, 74 P 735.

A special administrator has exclusive control over the estate for the time being, and until he is displaced by the appointment and qualification of an executor or general administrator. Murphy v. Nett, 51 M 82, 87, 149 P 713.

The powers of a special administrator are limited to the preservation and protection of the estate temporarily, until a general administrator or an executor has been appointed. In re Dolenty's Estate, 53 M 33, 44, 161 P 524.

A special administrator by virtue of the provision of this section, conferring upon him the power to commence suits for "all necessary purposes" possessed by an administrator, has the right to maintain an action to recover from a mining partner of the decedent his proportionate share

of debts of the partnership paid by decedent, and may do so without an order of court authorizing him to do so. Bielenberg v. Higgins et al, 85 M 56, 67, 277 P 631.

Though it may have been the part of wisdom to permit a special administrator placed in charge of the estates of two partners who met death simultaneously to continue operation of the partnership business for the purpose of avoiding loss, the arrangement should have been only of a temporary character, it having been the duty of the administrator to take immediate steps to dispose of the property and goodwill of the concern. In re Rinio's Estate, 93 M 428, 431, 432, 19 P 2d 322.

References

Cited or applied as section 2504, Code of Civil Procedure, in State ex rel. Bartlett v. District Court, 18 M 481, 485, 46 P 259; Quinn's Admr. v. Quinn, 22 M 403, 415, 56 P 824; as section 7474, Revised Codes, in In re Williams' Estate, 55 M 63, 72, 173 P 790.

10112
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.....Mont.....

10112. When letters testamentary or of administration are granted, special administrator's powers cease. When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands, and the executor may prosecute to final judgment any suit commenced by the special administrator.

History: En. Sec. 100, p. 262, L. 1877; re-en. Sec. 100, 2nd Div. Rev. Stat. 1879; re-en. Sec. 100, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2505, C. Civ. Proc. 1895; re-en. Sec. 7475, Rev. C. 1907; re-en. Sec. 10112, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1416.

References

Cited or applied as section 7475, Revised Codes, in In re Williams' Estate, 55 M 63, 67, 173 P 790.

10113
76 P (2d) 636
.....Mont.....

10113. Special administrator to render account. The special administrator must render an account, on oath, of his proceedings, in a like manner as other administrators are required to do.

History: En. Sec. 101, p. 262, L. 1877; re-en. Sec. 101, 2nd Div. Rev. Stat. 1879; re-en. Sec. 101, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2506, C. Civ. Proc. 1895; re-en. Sec. 7476, Rev. C. 1907; re-en. Sec. 10113, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1417.

References

Cited or applied as section 2506, Code of Civil Procedure, in In re Ford's Estate, 29 M 283, 286, 74 P 735; as section 7476, Revised Codes, in In re Williams' Estate, 55 M 63, 67, 173 P 790.

CHAPTER 120

**CHANGE IN ADMINISTRATION BY REASON OF SUBSEQUENT DISCOVERY OF
A WILL, DEATH, INCOMPETENCY, OR RESIGNATION OF
EXECUTORS AND ADMINISTRATORS**

Section 10114. On proof of will, after grant of letters of administration, letters revoked.

10115. Power of executor in such case.

10116. Remaining executor or administrator to continue when his colleagues are disqualified.

10117. Who to act when all acting are incompetent.
 10118. Executor or administrator may resign, when—court to appoint successor—liability of outgoer.
 10119. All acts of executor, etc., valid until his power is revoked.

10114. On proof of will, after grant of letters of administration, letters revoked. If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court or judge, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court or judge shall direct.

History: Secs. 10114-10119, with 10067, en. in L. 1877; en. Sec. 102, p. 262, L. 1877; re-en. Sec. 102, 2nd Div. Rev. Stat. 1879; re-en. Sec. 102, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2510, C. Civ. Proc. 1895; re-en. Sec. 7477, Rev. C. 1907; re-en. Sec. 10114, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1423.

Operation and Effect

The admission of a will to probate, ipso facto, supersedes and vacates the grant of letters of general administration. In re Davis-Cummings' Appeal, 11 M 196, 213, 28 P 645.

10115. Power of executor in such case. In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, recover, and collect all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

History: En. Sec. 103, p. 262, L. 1877; re-en. Sec. 103, 2nd Div. Rev. Stat. 1879; re-en. Sec. 103, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2511, C. Civ. Proc. 1895; re-en. Sec. 7478, Rev. C. 1907; re-en. Sec. 10115, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1424.

10116. Remaining executor or administrator to continue when his colleagues are disqualified. In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

History: En. Sec. 104, p. 263, L. 1877; re-en. Sec. 104, 2nd Div. Rev. Stat. 1879; re-en. Sec. 104, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2512, C. Civ. Proc. 1895; re-en. Sec. 7479, Rev. C. 1907; re-en. Sec. 10116, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1425.

10117. Who to act when all acting are incompetent. If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court or judge must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as heretofore required of administrators, and shall have the like power and authority.

History: En. Sec. 105, p. 263, L. 1877; re-en. Sec. 105, 2nd Div. Rev. Stat. 1879; re-en. Sec. 105, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2513, C. Civ. Proc. 1895; re-en. Sec. 7480, Rev. C. 1907; re-en. Sec. 10117, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1426.

References

In re Kern's Estate, 96 M 443, 447, 31 P 2d 313.

10118. Executor or administrator may resign, when—court to appoint successor—liability of outgoer. Any executor or administrator may, at any time, by writing, filed in the court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court or judge shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation.

History: En. Sec. 106, p. 263, L. 1877; re-en. Sec. 106, 2nd Div. Rev. Stat. 1879; re-en. Sec. 106, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2514, C. Civ. Proc. 1895; Sec. 7481, Rev. C. 1907; re-en. Sec. 10118, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1427.

10119. All acts of executor, etc., valid until his power is revoked. All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.

History: En. Sec. 107, p. 264, L. 1877; re-en. Sec. 107, 2nd Div. Rev. Stat. 1879; re-en. Sec. 107, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2515, C. Civ. Proc. 1895; Sec. 7482, Rev. C. 1907; re-en. Sec. 10119, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1428.

CHAPTER 121

DISQUALIFICATION OF JUDGE AND TRANSFER OF ADMINISTRATION

Section 10120. Disqualification of judges.

10121. Transfer of proceedings.

10122. Transfer not to change right to administer—retransfer—how made.

10123. When proceedings to be returned to original court.

10120. Disqualification of judges. No will shall be admitted to probate, or letters testamentary or of administration granted, before any judge who is interested as next of kin to the decedent, or as legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, and any judge who shall have acted as attorney for the decedent in the preparation or drawing of the will, or as the attorney of the executor or administrator of the estate of any deceased person, in the administration of the estate of such deceased person, or as the attorney of any legatee or devisee under the will, or heir of the decedent, or of any person or persons claiming to be such legatee, devisee, or heir, shall, from and after the approval of this act, be disqualified from making any order, or rendering any judgment or decree, or doing anything whatsoever in the matter of the estate of such deceased person. Whenever it shall be made to appear of record that any judge presiding in any court in which proceedings in probate matters have been, or are about to be, instituted, is disqualified from acting therein, it shall be the duty of

such judge to, as soon thereafter as practicable, request the nearest district judge to preside in the place of the judge so disqualified in such proceedings. It shall be the duty of the judge so requested, if he be not himself disqualified, to, from time to time as occasion may require, preside in the place of the disqualified judge in all proceedings in such probate matters.

History: Ap. p. Sec. 109, p. 264, L. 1877; re-en. Sec. 109, 2nd Div. Rev. Stat. 1879; re-en. Sec. 109, 2nd Div. Comp. Stat. 1887; amd. Sec. 2530, C. Civ. Proc. 1895; en. Sec. 1, p. 244, L. 1897; re-en. Sec. 7484, Rev. C. 1907; re-en. Sec. 10120, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1430.

Operation and Effect

The provision of this section declaring that the judge, whenever any of the grounds of disqualification are made to appear of record, shall thereafter call in another judge, who shall from time to time preside in the place of the disqualified

judge, implies that any of the disqualifications enumerated may be made to appear at any time. State ex rel. Nissler v. Donlan, 32 M 256, 266, 80 P 244.

References

Cited or applied as section 2530, Code of Civil Procedure, as amended, in Farleigh v. Kelly, 24 M 369, 375, 62 P 495, 685; State ex rel. Carleton v. District Court, 33 M 138, 141, 82 P 789, 8 Ann Cas. 752; as section 7484, Revised Codes, in State ex rel. Jacobs v. District Court, 48 M 410, 414, 138 P 1091; State ex rel. Mannix v. District Court, 51 M 310, 315, 152 P 753.

10121. Transfer of proceedings. When a petition is filed in the district court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the court for the settlement of an estate, and there is no judge of said court qualified to act, an order must be made transferring the proceeding to the district court of an adjoining county; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred a certified copy of the order, and all the papers on file in his office in the proceeding; and thereafter the court or judge to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction over the estate.

History: En. Sec. 110, p. 264, L. 1877; re-en. Sec. 110, 2nd Div. Rev. Stat. 1879; re-en. Sec. 110, 2nd Div. Comp. Stat. 1887; amd. Sec. 2531, C. Civ. Proc. 1895; re-en. Sec. 7485, Rev. C. 1907; re-en. Sec. 10121, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1431.

References

Cited or applied as section 7485, Revised Codes, in State ex rel. Mannix v. District Court, 51 M 310, 315, 152 P 753.

10122. Transfer not to change right to administer—retransfer—how made. The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order herein provided. If, before the administration is closed on any estate so transferred as herein provided, another person is elected or appointed, and qualified as judge of the court wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have

the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor.

History: En. Sec. 111, p. 265, L. 1877; amd. Sec. 2532, C. Civ. Proc. 1895; re-en. re-en. Sec. 111, 2nd Div. Rev. Stat. 1879; Sec. 7486, Rev. C. 1907; re-en. Sec. 10122, re-en. Sec. 111, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1432.

10123. When proceedings to be returned to original court. On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of the parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it originally commenced, and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced a certified copy of the order, and all the original papers on file in his office in the proceeding, and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.

History: En. Sec. 112, p. 265, L. 1877; re-en. Sec. 2533, C. Civ. Proc. 1895; re-en. re-en. Sec. 112, 2nd Div. Rev. Stat. 1879; Sec. 7487, Rev. C. 1907; re-en. Sec. 10123, re-en. Sec. 112, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1433.

CHAPTER 122

REMOVAL AND SUSPENSION OF EXECUTORS AND ADMINISTRATORS

Section 10124. Suspension of powers of executor.

10125. Executor to have notice of his suspension, and to be cited to appear.

10126. Any party interested may appear on hearing.

10127. Notice to absconding executors and administrators.

10128. May compel attendance.

10124 et seq.
76 P (2d) 638
.....Mont.....

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140 P.(2d) 587

10124. Suspension of powers of executor. Whenever the judge of a district court has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated.

History: En. Sec. 113, p. 266, L. 1877; re-en. Sec. 113, 2nd Div. Rev. Stat. 1879; re-en. Sec. 113, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2540, C. Civ. Proc. 1895; re-en. Sec. 7488, Rev. C. 1907; re-en. Sec. 10124, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1436.

representative, and any other person whose appointment was properly made in the first place; she may be removed for cause. In re Dolenty's Estate, 53 M 33, 48, 161 P 524.

What Constitutes Grounds for Removal

The law does not favor the administration of estates by a person under conditions likely to result in a conflict of interests in the performance of his duty, as where he administers the estates of two partners and at the same time carries on the partnership business virtually as a surviving partner, and in the meantime

Even a Surviving Spouse May be Removed

Even a surviving spouse, acting as representative, may be removed for grave delinquencies. In re Dolenty's Estate, 53 M 33, 47, 161 P 524.

The statute makes no distinction between the surviving spouse, acting as rep-

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(dissent)

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fails to ascertain the rights of the estates in the business or make reports required by statute; in such circumstances he is incompetent to serve, as a legal proposition, under this section. In re Rinio's Estate, 93 M 428, 436, 19 P 2d 322.

What Does Not Constitute Grounds for Removal

The fact that a report was not made for a period of five years, and which when made was approved by the other heirs, and that suit had been instituted by the other heirs to cancel a mortgage executed

by the executrix upon the ground of undue influence, does not constitute ground for the removal or suspension of the executrix. In re Ming, 15 M 79, 85, 38 P 228.

References

Cited or applied as section 7488, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717; Mayger v. St. Louis Min. etc. Co., 68 M 492, 500, 219 P 1102; In re Connolly's Estate, 73 M 35, 44 et seq., 235 P 408.

10125. Executor to have notice of his suspension, and to be cited to appear. When such suspension is made, the notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court or judge is satisfied that there exists cause for his removal, his letters must be revoked and letters of administration granted anew, as the case may require.

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History: En. Sec. 114, p. 267, L. 1877; re-en. Sec. 114, 2nd Div. Rev. Stat. 1879; re-en. Sec. 114, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2541, C. Civ. Proc. 1895; re-en. Sec. 7489, Rev. C. 1907; re-en. Sec. 10125, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1437.

References

Cited or applied as section 7489, Revised Codes, in In re Dolenty's Estate, 53 M 33, 47, 161 P 524; Mayger v. St. Louis Min. etc. Co., 68 M 492, 500, 219 P 1102.

10126. Any party interested may appear on hearing. At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed, to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court or judge.

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History: En. Sec. 115, p. 267, L. 1877; re-en. Sec. 115, 2nd Div. Rev. Stat. 1879; re-en. Sec. 115, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2542, C. Civ. Proc. 1895; re-en. Sec. 7490, Rev. C. 1907; re-en. Sec. 10126, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1438.

10127. Notice to absconding executors and administrators. If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given to him of the pendency of the proceedings by publication, in such manner as the court or judge may direct, and the court or judge may proceed upon such notice as if the citation had been personally served.

10127
204 P.(2d)
1039

History: En. Sec. 116, p. 267, L. 1877; re-en. Sec. 116, 2nd Div. Rev. Stat. 1879; re-en. Sec. 116, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2543, C. Civ. Proc. 1895; re-en. Sec. 7491, Rev. C. 1907; re-en. Sec. 10127, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1439.

10128. May compel attendance. In the proceedings authorized by the preceding sections of this chapter, for the removal of an executor or administrator, the court or judge may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.

10128
204 P.(2d)
1039

History: En. Sec. 117, p. 267, L. 1877; re-en. Sec. 117, 2nd Div. Rev. Stat. 1879; re-en. Sec. 117, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2454, C. Civ. Proc. 1895; re-en. Sec. 7492, Rev. C. 1907; re-en. Sec. 10128, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1440.

Operation and Effect

It is within the power of a court to require an executor or administrator, who has been remiss in his duties, to turn over to his successor all property of the estate which has come into his hands. *State ex.*

rel. Klein v. District Court, 35 M 364, 366, 90 P 161.

If a court goes beyond its powers in holding an executor to account for profits, or in removing him from office, he has the right of appeal. *State ex rel. Klein v. District Court*, 35 M 364, 367, 90 P 161.

CHAPTER 123**INVENTORY AND APPRAISEMENT—POSSESSION OF ESTATE**

- Section 10129. Inventory to be returned, including the homestead.
 10130. Appraisement and pay of appraisers.
 10131. Oath of appraisers and inventory.
 10132. Inventory to account for moneys—if all money, no appraisement necessary.
 10133. Effect of naming a debtor executor.
 10134. Debtor or demand of testator not discharged by terms of will if necessary for payment of debts.
 10135. To make oath to inventory.
 10136. Revocation of letters and liability of representative for failure to make return.
 10137. Inventory of after-discovered property.
 10138. Administrator and executor to possess real and personal estate.
 10139. Executor or administrator to deliver real estate to heirs or devisees, when.

10129. Inventory to be returned, including the homestead. Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge.

History: *En. Sec. 118*, p. 267, *L. 1877*; *re-en. Sec. 118*, 2nd Div. *Rev. Stat. 1879*; *re-en. Sec. 118*, 2nd Div. *Comp. Stat. 1887*; *amd. Sec. 2550*, *C. Civ. Proc. 1895*; *re-en. Sec. 7493*, *Rev. C. 1907*; *re-en. Sec. 10129*, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 1443*.

Operation and Effect

The filing of an inventory and appraisement, as required by this section and section 10137, is not a prerequisite to the taking possession of property of a decedent by an administrator. *Black v. Story*, 7 M 238, 243, 14 P 703.

The object of the inventory is to show creditors and other persons interested of

what the estate may consist. *In re Higgins' Estate*, 15 M 474, 484, 39 P 506.

It is the duty of the administrator to take possession as soon as he is appointed, and to make and return to the court an inventory and appraisement of all the property which comes into his hands. *In re Colbert's Estate*, 44 M 259, 266, 119 P 791.

References

Cited or applied as section 7493, *Revised Codes*, in *State ex rel. Floyd v. District Court*, 41 M 357, 364, 109 P 438; *Swanberg v. National Surety Co.*, 86 M 340, 355, 283 P 761.

10130. Appraisement and pay of appraisers. To make the appraisement, the court or judge must appoint three disinterested persons, any two of whom may act, who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements; if only one day's service is charged, the account need not be verified. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed by the district court or judge having jurisdiction of the estate, or by the district court or judge of such other county, on request of the court or judge having jurisdiction.

History: En. Sec. 119, p. 267, L. 1877; re-en. Sec. 119, 2nd Div. Rev. Stat. 1879; re-en. Sec. 119, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2551, C. Civ. Proc. 1895; re-en. Sec. 7494, Rev. C. 1907; re-en. Sec. 10130, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1444.

10131. Oath of appraisers and inventory. Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt, interest, or security.

History: En. Sec. 120, p. 267, L. 1877; re-en. Sec. 120, 2nd Div. Rev. Stat. 1879; re-en. Sec. 120, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2552, C. Civ. Proc. 1895; re-en. Sec. 7495, Rev. C. 1907; re-en. Sec. 10131, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1445.

References

In re Connolly's Estate, 73 M 35, 57, 235 P 408.

10132. Inventory to account for moneys—if all money, no appraisal necessary. The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

History: En. Sec. 121, p. 267, L. 1877; re-en. Sec. 121, 2nd Div. Rev. Stat. 1879; re-en. Sec. 121, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2553, C. Civ. Proc. 1895; re-en. Sec. 7496, Rev. C. 1907; re-en. Sec. 10132, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1446.

10133. Effect of naming a debtor executor. The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for such money in his hands, when the debt or demand becomes due.

History: En. Sec. 122, p. 268, L. 1877; re-en. Sec. 122, 2nd Div. Rev. Stat. 1879; re-en. Sec. 122, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2554, C. Civ. Proc. 1895; re-en. Sec. 7497, Rev. C. 1907; re-en. Sec. 10133, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1447.

Operation and Effect

An executor who held trust funds of the decedent in his possession at the time he qualified as such at once became liable therefor as for money in his hands, under this section, with interest thereon from the death of decedent, and by thereafter continuing to mingle the funds, as he had done theretofore, with his own moneys and using it in connection with his business

until it was lost, he was bound to account for it with interest. In re Rodgers' Estate, 68 M 46, 53, 217 P 678.

An executor who was indebted to testator at the time of the latter's death was entitled to credit on settlement of his account for partial payments made by him while acting in his representative capacity, and the holding of the trial court that payments on account could not be made under this section, since thereunder the executor was liable for the whole debt as for money in his hands and that the payments made were mere voluntary contributions, was error. In re Connolly's Estate, 73 M 35, 46 et seq., 235 P 408.

Id. Construing this section, which provides that an executor who was indebted to his testator at the time of the latter's death is liable for the amount owing as for money in his hands when the debt becomes due, held that the statute merely abrogates the common-law rule whereby the bare appointment of an executor operated to extinguish any debt due from the executor to testator.

An executor who became indebted to his testator on his promissory note may not be held liable in his representative capacity upon his indebtedness to the decedent as for "money in hand" (this section) where during the progress of administration he can show that he was without means with which to make payment. In *re Connolly's Estate*, 79 M 445, 461, 257 P 418.

10134. Debt or demand of testator not discharged by terms of will if necessary for payment of debts. The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

History: En. Sec. 123, p. 268, L. 1877; re-en. Sec. 123, 2nd Div. Rev. Stat. 1879; re-en. Sec. 123, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2555, C. Civ. Proc. 1895; re-en. Sec. 7498, Rev. C. 1907; re-en. Sec. 10134, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1448.

10135. To make oath to inventory. The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

History: En. Sec. 124, p. 268, L. 1877; re-en. Sec. 124, 2nd Div. Rev. Stat. 1879; re-en. Sec. 124, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2556, C. Civ. Proc. 1895; re-en. Sec. 7499, Rev. C. 1907; re-en. Sec. 10135, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1449.

References

In *re Connolly's Estate*, 73 M 35, 57, 235 P 408.

10136. Revocation of letters and liability of representative for failure to make return. If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court or judge may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

History: En. Sec. 125, p. 269, L. 1877; re-en. Sec. 125, 2nd Div. Rev. Stat. 1879; re-en. Sec. 125, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2557, C. Civ. Proc. 1895; re-en. Sec. 7500, Rev. C. 1907; re-en. Sec. 10136, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1450.

References

Cited or applied as section 7500, Revised Codes, in *State ex rel. King v. District Court*, 42 M 182, 185, 111 P 717.

10137. Inventory of after-discovered property. Whenever property not mentioned in an inventory that is made and filed comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this chapter, and an

inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

History: En. Sec. 126, p. 269, L. 1877; re-en. Sec. 126, 2nd Div. Rev. Stat. 1879; re-en. Sec. 126, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2558, C. Civ. Proc. 1895; re-en. Sec. 7501, Rev. C. 1907; re-en. Sec. 10137, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1451.

10138. Administrator and executor to possess real and personal estate.

The executor or administrator is entitled to the possession of all the real or personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court or judge to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to or for partition of the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do.

History: En. Sec. 127, p. 269, L. 1877; re-en. Sec. 127, 2nd Div. Rev. Stat. 1879; re-en. Sec. 127, 2nd Div. Comp. Stat. 1887; amd. Sec. 2559, C. Civ. Proc. 1895; re-en. Sec. 7502, Rev. C. 1907; re-en. Sec. 10138, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1452.

Administrator or Executor May Bring Action in Own Name as Such

An administrator has a right to the possession of the real estate of the decedent of whose estate he is administrator, and may bring ejectment in his own name as administrator, for the possession of the same, against a trespasser. *Black v. Story*, 7 M 238, 242, 14 P 703. See also *In re Higgins' Estate*, 15 M 474, 485, 39 P 506; *Kohn v. McKinnon*, 90 Fed. 623, 626.

All of the Estate Goes Into Possession of Administrator or Executor

The whole of the estate, both real and personal, goes into the possession of the executor or administrator, first for the payment of debts, and then for distribution under the will or the laws of succession. In *re Tuohy's Estate*, 33 M 230, 246, 83 P 486.

The administration of an estate is an entirety, and extends to the whole of the estate so far as its assets are within the jurisdiction where the appointment is made. The administrator has the exclusive right of control, subject to the orders of the district court for the purpose of administration. *Murphy v. Nett*, 51 M 82, 86, 149 P 713; In *re Smith's Estate*, 60 M 276, 297, 199 P 696.

Heirs May Recover Real Property Also

The right given to an administrator by Section 10258 to maintain an action for the recovery of real property of his in-

testate (if applicable to an action to recover property sold by him under an order of sale) is not exclusive, this section conferring the same right upon the heirs. *Lamont v. Vinger*, 61 M 530, 537, 202 P 769.

Held, that devisees may maintain an action for damages for fraud practiced upon them in the procurement of an agreement to sell the real property of testator, even though at the time the estate was in process of administration and distribution had not been made. *Rumney et al. v. Skinner*, 64 M 75, 208 P 895.

Devisees may bring any proper action against any person (other than the executor in his official capacity) to either obtain possession of, quiet title to, or declare a trust in, any property devised to them, and in such an action the executor (or administrator) is neither a necessary nor an indispensable party. In *re Estate of Deschamps*, 65 M 207, 212 et seq., 212 P 512.

Right of Heirs to Dispose of Property—Limitations

Subject to the possession of a testator's estate by the executor for the purposes of administration, the devisees may at once sell or dispose of the property devised, or handle it as they desire. In *re Estate of Deschamps*, 65 M 207, 212 et seq., 212 P 512.

Title to Property

The property of a testator vests in the devisees from the moment of his death, subject to the right of the executor to its possession for the purposes of administration until the estate is settled or until it is delivered over to them by order of

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court, the decree of distribution simply releasing the property from the conditions it was subject to during the period of administration. In re Estate of Deschamps, 65 M 207, 212 et seq., 212 P 512.

References

In re Bradfield's Estate, 69 M 247, 260, 221 P 531; In re Jennings' Estate, 74 M 449, 455, 241 P 648; Swanberg v. National Surety Co., 86 M 340, 353, 283 P 761.

10139. Executor or administrator to deliver real estate to heirs or devisees, when. Unless it satisfactorily appears to the court or judge that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court or judge, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or the devisees.

History: En. Sec. 128, p. 269, L. 1877; re-en. Sec. 128, 2nd Div. Rev. Stat. 1879; re-en. Sec. 128, 2nd Div. Comp. Stat. 1887; amd. Sec. 2560, C. Civ. Proc. 1895; re-en. Sec. 7503, Rev. C. 1907; re-en. Sec. 10139, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1453.

Operation and Effect

By the express provisions of this section it is the duty of the court, "at the end of the time limited for the presentation of claims against the estate," to direct the executor or administrator to deliver possession of all the real estate to the heirs at law or the devisees, unless it is necessary for him to hold the estate longer and to receive the rents, issues, and profits wherewith to pay the debts of the decedent. In re Bradfield's Estate, 69 M 247, 260, 221 P 531.

Under this section, when the time for the presentation of the claims against an

estate has expired and all the debts of the decedent have been paid, the court is without discretion in the premises but must deliver the real property to the heirs or devisees. In re McGovern's Estate, 77 M 182, 198, 250 P 812.

The fact that plaintiff executor in his action to quiet title may have been derelict in his duty to bring the estate matter to a speedy termination, and that the court failed to require him to deliver possession of all real property (converted into personal property as above recited), in obedience to this section, to the devisee (himself), could not affect his right to prosecute the action. Kern et al. v. Robertson, 92 M 283, 293, 12 P 2d 565.

References

In re Jennings' Estate, 74 M 449, 455, 241 P 648.

CHAPTER 124

PROCEEDINGS TO COMPEL DISCLOSURE OF PROPERTY OF AN ESTATE LIABILITY FOR EMBEZZLEMENT

- Section 10140. Embezzling estate before grant of letters testamentary.
10141. Citation to person suspected to have embezzled estate, etc.
10142. Refusal to obey citation, penalty for, and for embezzlement—may be compelled to disclose by imprisonment—liable for double damages.
10143. Persons entrusted with the estate of decedent may be cited to account.

10140. Embezzling estate before grant of letters testamentary. If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

History: En. Sec. 129, p. 270, L. 1877; re-en. Sec. 129, 2nd Div. Rev. Stat. 1879; re-en. Sec. 129, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2570, C. Civ. Proc. 1895; re-en. Sec. 7504, Rev. C. 1907; re-en. Sec. 10140, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1458.

10141. Citation to person suspected to have embezzled estate, etc. If any executor or administrator, or any person interested in the estate of a decedent, complains to the court or judge, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where such decedent dies, or where letters have been granted, he may be cited and examined either before the district court or judge of the county where the decedent dies, or where letters have been granted. But if he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

History: En. Sec. 130, p. 270, L. 1877; re-en. Sec. 130, 2nd Div. Rev. Stat. 1879; re-en. Sec. 130, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2571, C. Civ. Proc. 1895; re-en. Sec. 7505, Rev. C. 1907; re-en. Sec. 10141, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1459.

Operation and Effect

A petition by an administrator for a citation requiring certain persons to appear and be examined is fatally defective in failing to allege that any of the persons cited had in their possession, or had knowledge of, any deeds or papers containing evidences of the right, title, or interest of the decedent to the property described in the petition. *State ex rel. Chapin v. District Court*, 35 M 318, 320, 89 P 62.

The provisions of this section and the following section are remedial in their nature, and confer power upon the court, when sitting in probate proceedings, analogous in its scope and object to the power of a court in chancery upon bills of discovery. The proceeding authorized by them is of an ancillary character, however, and is confined to securing a discovery of evidence upon which the administrator or executor may recover assets be-

longing to the estate which would otherwise be lost. In *re Roberts' Estate*, 48 M 40, 41, 135 P 909.

Funds of an estate expended by the administrator for attorney's fees are not recoverable on the theory that the attorney has property of the estate in his possession for which he may be called to account under this section and the following section; the jurisdiction of the court, sitting in probate, under these provisions extending no further than to require the accused to appear and submit to an examination, it having no power to adjudge rights which may be asserted or involved. *State ex rel. Cohen v. District Court*, 53 M 210, 213, 162 P 1053.

An order of the district court sitting in probate made pursuant to a citation to a former administrator under this and the following sections, to appear and be examined concerning his disposition of personal property belonging to the estate, cannot go further than require a disclosure to be used in an action pending or to be brought in behalf of the estate; it cannot finally adjudicate any right. *Baker v. Hanson et al.*, 72 M 22, 32, 231 P 902.

10142. Refusal to obey citation, penalty for, and for embezzlement—may be compelled to disclose by imprisonment—liable for double damages. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court or judge may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidence of or

tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court or judge may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for the return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

History: En. Sec. 131, p. 271, L. 1877; re-en. Sec. 131, 2nd Div. Rev. Stat. 1879; re-en. Sec. 131, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2572, C. Civ. Proc. 1895; re-en. Sec. 7506, Rev. C. 1907; re-en. Sec. 10142, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1460.

Operation and Effect

The order authorized by this section can go no further than to require a disclosure which may be used in an action pending or to be brought in behalf of the estate. In *re Roberts' Estate*, 48 M 40, 42, 135 P 909.

An order of the district court sitting in probate made pursuant to a citation to a former administrator under this and the

preceding sections, to appear and be examined concerning his disposition of personal property belonging to the estate, cannot go further than require a disclosure to be used in an action pending or to be brought in behalf of the estate; it cannot finally adjudicate any right. *Baker v. Hanson et al.*, 72 M 22, 32, 34, 231 P 902.

References

Cited or applied as section 2572, Code of Civil Procedure, in *State ex rel. Chapin v. District Court*, 35 M 318, 319, 89 P 62; as section 7506, Revised Codes, in *State ex rel. Cohen v. District Court*, 53 M 210, 213, 162 P 1053.

10143. Persons entrusted with the estate of decedent may be cited to account. The court or judge, upon the complaint, on oath, of any executor or administrator, may cite any person who has been entrusted with any part of the estate of the decedent to appear before such court or judge, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court or judge may proceed against him as provided in the preceding section.

History: En. Sec. 132, p. 271, L. 1877; re-en. Sec. 132, 2nd Div. Rev. Stat. 1879; re-en. Sec. 132, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2573, C. Civ. Proc. 1895; re-en. Sec. 7507, Rev. C. 1907; re-en. Sec. 10143, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1461.

CHAPTER 125

PROVISIONS FOR THE SUPPORT OF THE FAMILY

- Section 10144. Widow and minor children may remain in decedent's house.
 10145. All property exempt from execution to be set apart for use of family.
 10146. May make extra allowance.
 10147. Payment of allowance.
 10148. Property set apart—how apportioned between widow and children.
 10149. Estates less than fifteen hundred dollars to go to wife and child—those less than three thousand to be summarily administered.
 10150. When all property, other than homestead, to go to children.

10144. Widow and minor children may remain in decedent's house, etc.

When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the court or judge.

History: En. Sec. 133, p. 272, L. 1877; re-en. Sec. 133, 2nd Div. Rev. Stat. 1879; re-en. Sec. 133, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2580, C. Civ. Proc. 1895; re-en. Sec. 7508, Rev. C. 1907; re-en. Sec. 10144, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1464.

Construed With Succeeding Section

This section and the two succeeding sections go hand in hand, and when an order is made in pursuance of them, all the findings of fact necessary to support it will be presumed. In re Dougherty's Estate, 34 M 336, 343, 86 P 38.

Formal Application For, Unnecessary

It would seem that a formal application for a widow's allowance is not required. In re Dougherty's Estate, 34 M 336, 343, 86 P 38.

Nature of Claim for Family Allowance

Moneys paid out of an estate for family allowance are charges against the estate created by special statutes in the interest of public policy. In re Dougherty's Estate, 34 M 336, 343, 86 P 38; In re Blackburn's Estate, 51 M 234, 237, 152 P 31.

The widow's allowance is not in the nature of an interest in the property of the decedent, but is merely a preferred claim against the estate in the nature of costs of administration—a demand on the ground of right. In re Oppenheimer's Estate, 73 M 560, 565 et seq., 238 P 599.

Notice of Allowance Unnecessary

The widow of an intestate being entitled to an allowance during the progress of settlement of the estate of deceased as a matter of right, under this section and section 10146, notice of the court's intention to make such allowance is not required. In re Dougherty's Estate, 34 M 336, 343, 86 P 38.

Payment of Family Allowance Without Order of Court

The fact that an administrator paid the widow of decedent a family allowance for the support of herself and minor child without a previous order of the court, thus rendering his conduct irregular, did not deprive him of the right to credit therefor on his final account upon a finding by the court that the amount paid was reasonable and proper, the court being clothed with power to approve his action.

In re Springer's Estate, 79 M 256, 265, 255 P 1058.

Stipulation as to Family Allowance Binding

A stipulation by the parties made at the opening of a hearing on the re-examination of the accounts of an executrix that the court might pass upon all questions of family allowance both as to amount and time for which to be allowed, upon the evidence and all records and files in the case, debarred the unsuccessful party from attacking the order on appeal on the ground that it covered a period of time for which allowance should not have been made. In re Eakins' Estate, 64 M 84, 87, 208 P 956.

Time Over Which Family Allowance is Reasonable

Held, in finding that eight and a half years was a reasonable time in which to close an estate valued at \$40,000 and granting a family allowance for that length of time, the court did not abuse its discretion where a contest of the will under which the executrix was acting was pending in the court for about three and a half years, where the estate was defendant in a number of other cases, some of which were at the time of the order still pending, and where the parties objecting to the allowance, her stepsons, lived at the home of the executrix and participated in the allowance. In re Eakins' Estate, 64 M 84, 87, 208 P 956.

Waiver of Allowance

Held, that where in an antenuptial agreement the wife released her dower rights in all of the real estate then owned or thereafter to be acquired by the husband, and all other rights, title, interest, property, claim and demand whatsoever at law or in equity in such real estate; assigned to him any claim she might be entitled to after becoming his wife or widow in any personal property then owned or which might be acquired by him thereafter, and agreed that in consideration of \$150,000 she would make no further claim against him or his estate for any share therein to which as his widow she might be entitled to, she thereby waived her right to an allowance for her support authorized by this section through section

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10147, during administration of the deceased husband's estate. In re Oppenheimer's Estate, 73 M 560, 565 et seq., 238 P 599.

When Family Allowance is Improper

Where at the time a petition for family allowance was filed the estate was and had been for some time ready to be closed

and a reasonable time had elapsed for the settlement of its affairs, the court abused its discretion in granting the petition. In re Trepp's Estate, 71 M 154, 163, 227 P 1005.

References

Swartz v. Smole, 91 M 90, 95, 5 P 2d 566.

10145. All property exempt from execution to be set apart for use of family. Upon the return of the inventory, or any subsequent time during the administration, the court or judge may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded; if no homestead has been selected, designated and recorded, the court or judge must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided for in sections 10151 to 10157 of this code, out of the real estate belonging to the decedent. It shall be sufficient to entitle any person to receive the benefits of this section, under any court order hereafter made, if such person was a bona fide resident of the state of Montana, at the time of the death of decedent.

History: En. Sec. 134, p. 272, L. 1877; re-en. Sec. 134, 2nd Div. Rev. Stat. 1879; re-en. Sec. 134, 2nd Div. Comp. Stat. 1887; amd. Sec. 2581, C. Civ. Proc. 1895; re-en. Sec. 7509, Rev. C. 1907; re-en. Sec. 10145, R. C. M. 1921; amd. Sec. 1, Ch. 66, L. 1935. Cal. C. Civ. Proc. Sec. 1465.

Operation and Effect

Where a homestead was set apart to a widow by the probate court, it was immaterial whether it acted on petition or on its own motion. Bullerdick v. Hermsmeyer, 32 M 541, 549, 81 P 334.

The homestead authorized to be selected by the probate court under this section, where none was selected prior to the death of decedent, is the homestead provided for by sections 6945-6948, and therefore the value and extent of it must not be any greater than as prescribed by those sections. In re Trepp's Estate, 71 M 154, 160 et seq., 227 P 1005.

This section, authorizing the district court or judge to set apart to a surviving husband or wife, or to the minor children of a decedent, all property exempt from execution, held, to be an exemption statute or one creating a preferred claim against the estate of a deceased person, and not one of succession or inheritance. In re Metcalf's Estate, 93 M 542, 543 et seq., 19 P 2d 905.

Id. The right to have exempt property set aside for the support of a minor child of a deceased person may be waived.

Id. Exemption statutes, such as section 9428, and this section, are primarily intended for the protection of the home as well as for the protection of the state, which is interested in the welfare of the homes within its confines and the throwing of safeguards about them.

Id. Decedent's minor child, living with her divorced mother in another state, through her guardian ad litem petitioned the district court that the proceeds of certain life insurance policies be set aside as exempt property, under this section—an exemption statute. Section 9428 provides that moneys derived from life insurance of the debtor shall be exempt, but that no person not a bona fide resident of the state shall have the benefit of the exemption. Held, that petitioner, being a non-resident, was not entitled to an order granting the petition.

References

Cited or applied as section 2581, Code of Civil Procedure, in In re Dougherty's Estate, 34 M 336, 343, 86 P 38; as section 7509, Revised Codes, in Kerlee v. Smith, 46 M 19, 21, 124 P 777; In re Estate of Bruhns, 58 M 526, 529, 193 P 1114; In re Eakins' Estate, 64 M 84, 87, 208 P 956; In re Oppenheimer's Estate, 73 M 560, 565 et seq., 238 P 599.

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10146. May make extra allowance. If the amount set apart be insufficient for the support of the widow and children, or either, the court or judge must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

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History: En. Sec. 135, p. 273, L. 1877; re-en. Sec. 135, 2nd Div. Rev. Stat. 1879; re-en. Sec. 135, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2582, C. Civ. Proc. 1895; re-en. Sec. 7510, Rev. C. 1907; re-en. Sec. 10146, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1466.

Operation and Effect

A widow can claim the allowance herein mentioned only for such length of time as is reasonably necessary to settle the estate. In re Dougherty's Estate, 34 M 336, 343, 86 P 38.

Held, in finding that eight and a half years was a reasonable time in which to close an estate valued at \$40,000, and granting a family allowance for that length of time, the court did not abuse its discretion where a contest of the will under which the executrix was acting was pending in the court for about three and a half years, where the estate was defendant in a number of other cases, some of which

were at the time of the order still pending, and where the parties objecting to the allowance, her stepsons, lived at the home of executrix and participated in the allowance. In re Eakins' Estate, 64 M 84, 87, 208 P 956.

Where at the time a petition for family allowance was filed the estate was and had been for some time ready to be closed and a reasonable time had elapsed for the settlement of its affairs, the court abused its discretion in granting the petition. In re Trepp's Estate, 71 M 154, 163, 227 P 1005.

References

Cited or applied as section 7510, Revised Codes, in In re Blackburn's Estate, 51 M 234, 237, 152 P 31; In re Oppenheimer's Estate, 73 M 560, 565 et seq., 238 P 599; In re Springer's Estate, 79 M 256, 265, 255 P 1058; In re Metcalf's Estate, 93 M 542, 549, 19 P 2d 905.

10147. Payment of allowance. Any allowance made by the court or judge, in accordance with the provisions of this chapter, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

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History: En. Sec. 136, p. 273, L. 1877; re-en. Sec. 136, 2nd Div. Rev. Stat. 1879; re-en. Sec. 136, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2583, C. Civ. Proc. 1895; re-en. Sec. 7511, Rev. C. 1907; re-en. Sec. 10147, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1467.

Operation and Effect

The widow's allowance is not in the nature of an interest in the property of the decedent, but is merely a preferred claim

against the estate in the nature of costs of administration, a demand on the ground of right. In re Oppenheimer's Estate, 73 M 560, 565, 238 P 599.

References

Cited or applied as section 7511, Revised Codes, in In re Blackburn's Estate, 51 M 234, 237, 152 P 31; In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

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10148. Property set apart—how apportioned between widow and children. When property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court or judge can only set it apart for a limited period,

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to be designated in the order, which shall be a life estate to husband or wife, and the title vests in the heirs of the deceased, subject to such order.

History: En. Sec. 137, p. 274, L. 1877; re-en. Sec. 137, 2nd Div. Rev. Stat. 1879; re-en. Sec. 137, 2nd Div. Comp. Stat. 1887; amd. Sec. 2584, C. Civ. Proc. 1895; re-en. Sec. 7512, Rev. C. 1907; re-en. Sec. 10148, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1468.

Operation and Effect

The purpose of the legislature in enacting this statute was to preserve to the heirs of the decedent the fee of the real property belonging to his separate estate,

but subject to a life estate carved out of it in favor of the surviving husband or wife. Thus the latter is vested with a life estate in the whole property, which may be alienated as could be the fee under the old statute. *Kerlee v. Smith*, 46 M 19, 22, 124 P 777.

References

Cited or applied as section 7512, Revised Codes, in *In re Estate of Bruhns*, 58 M 526, 529, 58 M 1114.

10149. Estates less than fifteen hundred dollars to go to wife and child—those less than three thousand to be summarily administered. If, on the return of the inventory of the estate of an intestate, it appears that the value of the whole estate does not exceed the sum of fifteen hundred dollars, the court or judge, by an order for that purpose, must assign for the use and support of the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children, if there are any, the whole of the estate, after the payment of the expenses of his last illness, funeral charges, and expenses of the administration, and there must be no further proceedings in the administration, unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the court or judge to dispense with the regular proceedings, or any part thereof, prescribed in sections 10018 to 10464 of this code, and there must be had a summary administration of the estate, and order of distribution thereof at the end of six months after the issuing of letters. The notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases.

History: En. Sec. 138, p. 274, L. 1877; re-en. Sec. 138, 2nd Div. Rev. Stat. 1879; re-en. Sec. 138, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2585, C. Civ. Proc. 1895; re-en. Sec. 7513, Rev. C. 1907; re-en. Sec. 10149, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1469.

Operation and Effect

Where the aggregate value of an estate consisting of property in Montana and another state exceeds fifteen hundred dollars, though the value of the property in each state is less than fifteen hundred dollars, in the latter of which the whole estate has been set aside for the widow under a similar section, the children are not entitled to have a distribution of the property upon the basis of the aggregate value,

so that the amount which the widow had received in the other state could be deducted from her distributive share in Montana. In *re Estate of Bruhns*, 58 M 526, 528, 193 P 1114.

Under this section, the district court sitting in probate may, after the issuance of letters of administration, dispense with the regular proceedings in estate matters prescribed by sections 10018-10464 of the codes, where an estate does not exceed the sum of \$3000, and hence may in such a case in its discretion dispense with all the provisions of sections 10083-10086, relating to revocation of letters. In *re Esterly's Estate*, 97 M 206, 210, 34 P 2d 539.

10150. When all property, other than homestead, to go to children. If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this chapter, the

whole property so set apart, other than the homestead, must go to the minor children.

History: En. Sec. 139, p. 274, L. 1877; re-en. Sec. 2586, C. Civ. Proc. 1895; re-en. Sec. 139, 2nd Div. Rev. Stat. 1879; Sec. 7514, Rev. C. 1907; re-en. Sec. 10150, re-en. Sec. 139, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1470.

CHAPTER 126

THE HOMESTEAD—PROCEDURE TO SET APART

- Section 10151. Rights of survivor to homestead.
 10152. Selected and recorded homestead set apart to person entitled—subsisting liens to be paid by solvent estate.
 10153. Appraisers to carve out of the original, exceeding twenty-five hundred dollars in value, a homestead, and report the same.
 10154. Report of the appraisers—majority and minority, which may be confirmed.
 10155. Day to be set for rejecting or confirming the report of the appraisers—reappraisal.
 10156. Costs—to whom chargeable—persons succeeding to rights of homestead owners have all their powers and rights.
 10157. Certified copies of certain orders to be recorded.

10151. Rights of survivor to homestead. If the homestead selected by the husband or wife, or either of them, during their coverture, and recorded while both were living, was selected from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, in the survivor for life.

History: En. Sec. 2590, C. Civ. Proc. 1895; re-en. Sec. 7515, Rev. C. 1907; re-en. Sec. 10151, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1474. **References** In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

10152. Selected and recorded homestead set apart to person entitled—subsisting liens to be paid by solvent estate. If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding twenty-five hundred dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the court or judge must, by order, set it off to the persons in whom title is vested by the preceding sections. If there be subsisting liens or encumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately, with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.

History: En. Sec. 141, p. 274, L. 1877; re-en. Sec. 141, 2nd Div. Rev. Stat. 1879; re-en. Sec. 141, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2591, C. Civ. Proc. 1895; re-en. Sec. 7516, Rev. C. 1907; re-en. Sec. 10152, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1475. **References** In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

10153. Appraisers to carve out of the original, exceeding twenty-five hundred dollars in value, a homestead, and report the same. If the homestead, as selected and recorded, be returned in the inventory appraised

at more than twenty-five hundred dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded twenty-five hundred dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the persons entitled thereto such portion of the premises, including the dwelling-house, as will amount in value to the sum of twenty-five hundred dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of twenty-five hundred dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court or judge may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. Such order of sale must state in what manner the sale shall be conducted, and what notice must be given thereof, and on the return of the sales to the court or judge, and after distribution of the proceeds, the executor or administrator must give a deed of the premises to the purchaser. The proceeds shall be distributed as follows: The liens or encumbrances must be first paid, subject to the provisions hereinbefore stated, and then twenty-five hundred dollars to the persons entitled thereto, and the balance, if any, must be paid into the funds of the estate.

History: Ap. p. Sec. 142, p. 275, L. 1877; re-en. Sec. 142, 2nd Div. Rev. Stat. 1879; re-en. Sec. 142, 2nd Div. Comp. Stat. 1887; en. Sec. 2592, C. Civ. Proc. 1895; re-en. Sec. 7517, Rev. C. 1907; re-en. Sec.

10153, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1476.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

10154. Report of the appraisers—majority and minority, which may be confirmed. Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court or judge in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

History: En. Sec. 143, p. 275, L. 1877; re-en. Sec. 143, 2nd Div. Rev. Stat. 1879; re-en. Sec. 143, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2593, C. Civ. Proc. 1895; re-en. Sec. 7518, Rev. C. 1907; re-en. Sec. 10154, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1477.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

10155. Day to be set for rejecting or confirming the report of the appraisers—reappraisal. When the report of the appraisers is filed, the court or judge must set a day for hearing any objections thereto, from anyone interested in the estate. Notice of hearing must be given for such time, and in such manner, as the court or judge may direct. If the court or judge be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court or judge may

appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report, as upon the first report.

History: En. Sec. 144, p. 275, L. 1877;
re-en. Sec. 144, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 144, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2594, C. Civ. Proc. 1895; re-en.
Sec. 7519, Rev. C. 1907; re-en. Sec. 10155,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1478.

References

In re Trepp's Estate, 71 M 154, 160, 227
P 1005.

10156. Costs—to whom chargeable—persons succeeding to rights of homestead owners have all their powers and rights. The costs of all proceedings provided for in this chapter must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.

History: En. Sec. 145, p. 276, L. 1877;
re-en. Sec. 145, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 145, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2595, C. Civ. Proc. 1895; re-en.
Sec. 7520, Rev. C. 1907; re-en. Sec. 10156,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1485.

References

In re Trepp's Estate, 71 M 154, 160, 227
P 1005.

10157. Certified copies of certain orders to be recorded. A certified copy of every order made in pursuance of this chapter, by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the county clerk of the county where the homestead property is situated.

History: En. Sec. 146, p. 276, L. 1877;
re-en. Sec. 146, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 146, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2596, C. Civ. Proc. 1895; re-en.
Sec. 7521, Rev. C. 1907; re-en. Sec. 10157,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1486.

References

In re Trepp's Estate, 71 M 154, 160, 227
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CHAPTER 127

DOWER—PROCEDURE TO ASSIGN

- Section** 10158. Dower to be assigned widow.
10159. Widow may sue for dower if not set off.
10160. How widow may sue, and proceedings.
10161. Trial of right contested.
10162. Guardians to be appointed for minors.
10163. Judgment for widows to be entered.
10164. Appointment of commissioners, and oath.
10165. Duties of commissioners, and reports.
10166. If lands cannot be divided, widow's interest may be appraised by a jury.
10167. Judgment for yearly value or gross sum.
10168. Damages for withholding dower.
10169. Writ of possession may be issued.

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10158. Dower to be assigned widow. It is the duty of the heirs-at-law, or other person in possession or having the next estate of freehold, or inheritance, in any lands or estate of which the widow is entitled to dower.

to lay off and assign such dower as soon as practicable after the death of the husband of such widow.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3070, C. Civ. Proc. 1895; re-en. Sec. 7817, Rev. C. 1907; re-en. Sec. 10158, R. C. M. 1921.

Operation and Effect

The district court, in the exercise of its probate jurisdiction, has no power with

reference to dower, and can make no orders affecting a widow's dower right. In re Dahlman's Estate, 28 M 379, 380, 72 P 750.

References

Cited or applied as section 3070, Code of Civil Procedure, in Dahlman v. Dahlman, 28 M 373, 374, 72 P 748; Swartz v. Smole, 91 M 90, 96, 5 P 2d 566.

10159. Widow may sue for dower if not set off. If such heirs or other person do not, within one month next after the decease of the husband, assign and set over to the widow to her satisfaction, her dower in and to all lands, tenements, and hereditaments, whereof by law she is or may be dowable, then such widow may sue for and recover the same in the manner hereinafter prescribed against such heirs or other person having the next immediate estate of freehold or inheritance, or tenant in possession, or other person or persons claiming rights or possession in said estate.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3071, C. Civ. Proc. 1895; re-en. Sec. 7818, Rev. C. 1907; re-en. Sec. 10159, R. C. M. 1921.

10160. How widow may sue, and proceedings. Every widow claiming dower may file her complaint in the district court of the proper county, against the parties aforesaid, stating their names, if known, setting forth the nature of her claim, and particularly specifying the lands, tenements, and hereditaments in which she claims dower, and praying that the same may be allowed to her, whereupon the clerk must issue a summons, and the pleadings and proceedings must be as in other cases.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3072, C. Civ. Proc. 1895; re-en. Sec. 7819, Rev. C. 1907; re-en. Sec. 10160, R. C. M. 1921.

10161. Trial of right contested. Where the right of the widow or dower is contested, the court must try the case or direct an issue for that purpose, as the circumstances may require.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3073, C. Civ. Proc. 1895; re-en. Sec. 7820, Rev. C. 1907; re-en. Sec. 10161, R. C. M. 1921.

10162. Guardians to be appointed for minors. When any of the parties defendant are minors and without guardians, the court must appoint guardians ad litem for such minors.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3074, C. Civ. Proc. 1895; re-en. Sec. 7821, Rev. C. 1907; re-en. Sec. 10162, R. C. M. 1921.

10163. Judgment for widows to be entered. When the court adjudges that the widow is entitled to dower, it must be so entered of record, together with a description of the land out of which she is to be endowed.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. This section re-en. Sec. 3075, C. Civ. Proc. 1895; re-en. Sec. 7822, Rev. C. 1907; re-en. Sec. 10163, R. C. M. 1921.

10164. Appointment of commissioners, and oath. The court must thereupon appoint three commissioners not connected with any of the parties by consanguinity or affinity, and entirely disinterested, each of whom must take the following oath: "I do solemnly swear that I will fairly and impartially allot and set off to A B, widow of C D, her dower out of lands and tenements described in the order of the court for that purpose, if the same can be made consistent with the interest of the estate, according to the best of my judgment, so help me God," which must be filed in the proceedings.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. This section re-en. Sec. 3076, C. Civ. Proc. 1895; re-en. Sec. 7823, Rev. C. 1907; re-en. Sec. 10164, R. C. M. 1921.

10165. Duties of commissioners, and reports. The commissioners, after being so sworn, must, as soon as may be, set off the dower by metes and bounds, according to the quantity and quality of all the lands, tenements, and hereditaments, described in said order, and make return in writing with the amount of their charges and expenses to the court, and the same being accepted and recorded, and a certified copy thereof recorded in the office of the county clerk of the county where the lands are situated, remain fixed and certain, unless such confirmation is set aside and reversed on appeal. The costs of such proceedings may be awarded in the discretion of the court.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. This section re-en. Sec. 3077, C. Civ. Proc. 1895; re-en. Sec. 7824, Rev. C. 1907; re-en. Sec. 10165, R. C. M. 1921.

10166. If lands cannot be divided, widow's interest may be appraised by a jury. If the commissioners report that the lands or other estate is not susceptible of division without great injury thereto, a jury must be impaneled to inquire of the yearly value of the widow's dower therein, and assess the same accordingly.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. This section re-en. Sec. 3078, C. Civ. Proc. 1895; re-en. Sec. 7825, Rev. C. 1907; re-en. Sec. 10166, R. C. M. 1921.

10167. Judgment for yearly value or gross sum. The court must thereupon render a judgment that there be paid to such widow as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of her dower, and the like sum on the same day in every year thereafter during her natural life. The widow may at any time consent to a gross sum to be paid to her for her dower in her deceased husband's estate, or the jury may find in lieu of a yearly allowance a gross sum to be paid to the widow, and the court may award a judgment for the same.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. This section re-en. Sec. 3079, C. Civ. Proc. 1895; re-en. Sec. 7826, Rev. C. 1907; re-en. Sec. 10167, R. C. M. 1921.

10168. Damages for withholding dower. Whenever in an action brought for the purpose, the widow recovers the dower in lands of which her husband died seized, she may also recover damages for the withholding of such dower; such damages shall be one-third part of the annual value of the mere profits of the land in which she so recovers her dower, to be estimated in an action against the heirs of her husband from the time of his death; and in actions against other persons, from the time of her demanding dower of such persons, but such damages must not be estimated for the use of any permanent improvements made after the death of her husband, by his heirs or any other person after claiming title to any lands.

History: Secs. 10158-10169, **R. C. M.** 1921, en. as Secs. 10-24, pp. 66-69, **L.** 1876; omitted from Rev. Stat. 1879 and **C. Civ.** Proc. 1887.

This section re-en. **Sec. 3080, C. Civ.** Proc. 1895; re-en. **Sec. 7827, Rev. C.** 1907; re-en. **Sec. 10168, R. C. M.** 1921.

Operation and Effect

Where real property of a decedent was sold by his executor without regard to the widow's dower therein, she in an action against the purchaser to compel assignment of dower to her, was under this section entitled to one-third of the rental value thereof from the date of demand therefor upon the purchaser. *Swartz v. Smole*, 91 M 90, 96, 5 P 2d 566.

10169. Writ of possession may be issued. In all cases where the report of the commissioners assigning dower is approved, the court must forthwith cause the widow to have possession by a writ directed to the sheriff for that purpose.

History: Secs. 10158-10169, **R. C. M.** 1921, en. as Secs. 10-24, pp. 66-69, **L.** 1876; omitted from Rev. Stat. 1879 and **C. Civ.** Proc. 1887.

This section re-en. **Sec. 3081, C. Civ.** Proc. 1895; re-en. **Sec. 7828, Rev. C.** 1907; re-en. **Sec. 10169, R. C. M.** 1921.

References

Cited or applied as section 3081, Code of Civil Procedure, in *State ex rel. Heinze v. District Court*, 28 M 227, 233, 72 P 613; *Dahlman v. Dahlman*, 28 M 373, 374, 72 P 748.

CHAPTER 128

CLAIMS AGAINST ESTATE

- Section 10170. Notice to creditors—additional notice—when notice unnecessary.
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10170. Notice to creditors—additional notice—when notice unnecessary. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation; provided, that in estates where the value of the property is less than the preferred claims against said estate, or in estates wherein the property thereof has been or is set apart to the surviving widow and/or children as provided by law, in which cases no notice to creditors need be given.

History: En. Sec. 147, p. 276, L. 1877; re-en. Sec. 147, 2nd Div. Rev. Stat. 1879; re-en. Sec. 147, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2600, C. Civ. Proc. 1895; re-en. Sec. 7522, Rev. C. 1907; re-en. Sec. 10170, R. C. M. 1921; amd. Sec. 1, Ch. 162, L. 1935. Cal. Civ. C. Proc. Sec. 1490.

Operation and Effect

Claims against the estate are those in existence at the date of the death of the deceased. Other claims against an estate are those incurred by the administrator or executor in settling the estate, and are properly denominated expenses of administration. *Dodson v. Nevitt*, 5 M 518, 520, 6 P 358; *First National Bank v. Collins*, 17 M 433, 438, 43 P 499. See also *In re Williams' Estate*, 47 M 325, 330, 132 P 421.

The notice to creditors of an estate prescribed by this section, and required to be published by the executor or administrator, is in the nature of a process, and its requirements must be complied with in all essentials. *Roche Valley Land Co. v. Barth et al.*, 67 M 353, 356, 215 P 654.

Id. This section provides that the executor or administrator of an estate shall publish a notice to the creditors of the estate to present their claims to him "at the place of his residence or business, to be specified in the notice." The notice

published by defendant executor was to the effect that claims should be presented "to the executor" of decedent's estate "at the city of Billings" without specifying his place of residence or business. Held, under the above rule that the notice was insufficient, and that the court's holding that plaintiff's claim was barred because not presented within the period for presentation fixed in the notice was error.

A notice to creditors of an estate that claims against it were to be presented "at the office of F. S. P. Foss, Glendive, Montana," a city with a population considerably under 5,000, who acted as attorney for the estate, held not insufficient to meet the requirement of this section, that the place of residence or business of the person to whom the claim is to be presented must "be specified in the notice." *State v. District Court*, 90 M 281, 290, 1 P 2d 335.

References

Cited or applied as section 7522, Revised Codes, in *Smith v. Smith*, 224 F. 1, 4, 139 C. C. A. 465; *State v. District Court et al.*, 76 M 143, 147, 245 P 529; *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025; *In re Harper's Estate*, 98 M 356, 40 P 2d 51; *State ex rel. Finley v. District Court*, 99 M 200, 43 P 2d 682.

10171. Time expressed in the notice. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.

History: En. Sec. 148, p. 276, L. 1877; re-en. Sec. 148, 2nd Div. Rev. Stat. 1879; re-en. Sec. 148, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2601, C. Civ. Proc. 1895; re-en. Sec. 7523, Rev. C. 1907; re-en. Sec. 10171, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1491.

Operation and Effect

Until the period of ten months has elapsed, in the case of an estate of the value specified in this section, no final decree can be entered that there are no debts. In re Higgins' Estate, 15 M 474, 487, 39 P 506.

Id. Where creditors have never had the requisite notice to present claims against the estate of a decedent, the ex parte affidavits of persons interested in the estate to the effect that there are no debts cannot be taken as sufficient proof to enable a court in a judicial decree to find the fact to be as stated by the affiants.

References

Cited or applied as section 7523, Revised Codes, in Smith v. Smith, 224 F. 1, 11; 139 C. C. A. 465; State v. District Court et al., 76 M 143, 147, 245 P 529; In re Harper's Estate, 98 M 356, 40 P 2d 51.

10172. Copy and proof of notice to be filed and order made. After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court or judge, an order showing that due notice to creditors has been given, and directing that such order be entered in the minutes and recorded, must be made by the court or judge.

History: En. Sec. 149, p. 276, L. 1877; re-en. Sec. 149, 2nd Div. Rev. Stat. 1879; re-en. Sec. 149, 2nd Div. Comp. Stat. 1887; amd. Sec. 2602, C. Civ. Proc. 1895; re-en. Sec. 7524, Rev. C. 1907; re-en. Sec. 10172, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1492.

10173. Time within which claims against an estate to be presented. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; and, provided, further, that nothing in this chapter contained shall be so construed as to prohibit the right, or limit the time, of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the manner prescribed by the provisions of this code, other than those of this chapter, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debt was presented as required by the provisions of this chapter.

History: En. Sec. 150, p. 277, L. 1877; re-en. Sec. 150, 2nd Div. Rev. Stat. 1879; re-en. Sec. 150, 2nd Div. Comp. Stat. 1887; amd. Sec. 2603, C. Civ. Proc. 1895; re-en. Sec. 7525, Rev. C. 1907; re-en. Sec. 10173, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1493.

Applicable Only to An Estate in Course of Administration

Held, on application for writ of supervisory control, that where after the estate

of a deceased person had been distributed, the holder of a real estate mortgage executed by decedent during his lifetime commenced suit to foreclose without asking for a deficiency judgment, the sole heir not answering, the district court erred in dismissing the suit for want of jurisdiction because of plaintiff's failure to allege that he had presented his claim to the administrator or, in the absence of pres-

entation of such claim, that he waived all recourse against the decedent's property other than that covered by the mortgage, since the provisions of this section and 10180 are applicable only to an estate still in course of administration and not to one that has been closed. *State v. District Court et al.*, 76 M 143, 146 et seq., 245 P 529.

Applicable Only to Claims Existent at Time of Death

Held, that this section, providing that claims against a decedent's estate arising upon contracts, whether due, not due or contingent, are barred unless presented to the executor within the time limited in the notice to creditors, and section 10180, declaring that a creditor cannot maintain suit on his claim (excepting a mortgage debt or claim for funeral expenses) unless so presented, have reference only to indebtedness of the deceased contracted by him in his lifetime and existent at the time of death, and therefore have no application to obligations arising subsequent to his death by reason of breach of an executory contract, such latter obligation becoming by operation of law that of his personal representative. *Nathan v. Freeman et al.*, 70 M 259, 266 et seq., 225 P 1015.

Claim of Surviving Partner Must be Presented as Herein Required

Where a partnership is dissolved by death, and upon liquidation of its affairs, or in course thereof, it appears that the deceased partner was indebted to the survivor in an amount over and above the partnership assets, the latter must present his claim for allowance under the provisions of this section. *Mares v. Mares et al.*, 60 M 36, 55, 199 P 267; *Link v. Haire*, 82 M 406, 419, 267 P 952.

Claims of Executor Against Estate Must be Presented as Herein Required

A claim of an executor against the estate in his charge must be presented for allowance within the same time as the claims of other creditors, and if not so presented is barred under the provisions of this section. In *re Rodgers' Estate*, 68 M 46, 54, 217 P 678.

Id. Held, under the preceding rule, that where an executor neither in the inventory and appraisal nor in his accounts prior to final settlement of the estate had mentioned an alleged indebtedness of decedent to him for taking care of his cattle and paying taxes thereon, and his claim for reimbursement was not made until long after the time for presenting claims had expired and not until his final account was ordered reopened at the instance of

the heirs, it was error to allow such items as an offset against the amount for which he was accountable.

Estate Ceases to Exist Upon Entry Decree of Distribution

The estate of a deceased person dealt with by this section and section 10180, the intent of which is to permit a mortgagee to foreclose his mortgage although the mortgagor has died, provided the mortgagee shall not have recourse against any other property of the decedent's estate unless he first presents his mortgage claim to the executor or administrator in accordance with the statute, ceases to exist upon entry of decree of distribution which is conclusive and has the force of *res adjudicata*; after the estate is declared closed the court has neither jurisdiction over the property of the estate nor the executor or administrator. *State v. District Court et al.*, 76 M 143, 146 et seq., 245 P 529.

Excusable Failure of Nonresident Claimant to Present Claim to Ancillary Administrator No Bar to Presentation to Domiciliary Representative

Where a creditor of an estate resided in California, in which state ancillary administration was granted, but was ignorant of the death of the administrator of the estate of the debtor during the time in which claims against the estate could be presented in that state, he was not estopped from presenting it to the domiciliary representative in Montana under the provision of this section, authorizing its presentation under such state of facts at any time before order of distribution is entered, there being no privity between the two administrations. *State ex rel. Finley v. District Court*, 99 M 200, 205, 43 P 2d 682.

Identical Claim Must be Presented Or It Will be Barred

If the identical claim sued upon was not presented to the executor or administrator, it is forever barred. *Vanderpool v. Vanderpool*, 48 M 448, 455, 138 P 772.

Mandatory Statute

The requirements of this section, that presentment of claims against an estate arising upon contracts must be made within the time limited in the notice to creditors, else they are forever barred, and of section 10177, that if claims be founded upon writings, copies thereof must accompany them, are mandatory, and if not observed the executor or administrators may reject the claims. *State v. District Court et al.*, 90 M 281, 286, 1 P 2d 335.

Not Applicable to Tort Claims

This section is limited to claims arising on contract; it does not apply to a claim against the estate of a deceased guardian, for having, in his lifetime, misappropriated the money of his ward. *Smith v. Smith*, 224 F. 1, 4, 139 C. C. A. 465.

Held, that the statutes of nonclaim which bar claims against an estate or its executor or administrator unless first presented for allowance, and, if rejected, suit brought within three months after rejection, cover only such claims as came into existence by contract, express or implied, prior to the death of the decedent, and therefore do not apply to claims for unliquidated damages arising for a tort committed by the decedent in his lifetime. *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025.

Operation in General

These statutes of nonclaim, such as this section, are special in character; they supersede the general statutes of limitations, and compliance with their requirements is essential to the foundation of any right of action against an estate upon a cause of action which sounds in contract. *Vanderpool v. Vanderpool*, 48 M 448, 454, 138 P 772; *Davis v. Estate of Davis*, 56 M 500, 510, 185 P 559.

Power of Sale May be Exercised Without Reference to the Estate

A trustee in a trust deed given as security for the payment of a debt, and authorizing him to sell the property after default, may, after the death of the grantor, exercise the power of sale without reference to the administration of the grantor's estate. *Muth v. Goddard*, 28 M 237, 255, 72 P 621.

Probate Court Refusing to Permit Non-Resident to Present Claim Against Estate—Writ of Supervisory Control Lies

There being no appeal from an order of the district court sitting in probate refusing to permit a nonresident to present a claim, based on a promissory note of a decedent, to the executor for allowance after the time for presenting claims had expired, on the ground that petitioner did not have notice of the death of the maker, or the administration of the estate, the pe-

tition being based upon this section, the writ of supervisory control lies to review the action of the court. *State ex rel. Finley v. District Court*, 99 M 200, 204, 43 P 2d 682.

Sufficiency of a Complaint to Foreclose a Mortgage Against an Estate

Where the complaint in an action against an administrator to foreclose a mortgage executed by the decedent does not allege a presentation of the claim, it should allege that plaintiff waives all recourse against the other property of the estate. *Jones v. Rich*, 20 M 289, 292, 50 P 936.

When Inapplicable to a Foreign Claim

A resident of California died, leaving real estate in Montana. Administration with the will annexed was there had and an ancillary administrator appointed in Montana. A creditor in California reduced his claim to judgment but the estate proved insufficient to pay it. There were no debts in Montana. In answer to an order requiring the ancillary administrator to present his final report with a petition for final distribution, the domiciliary administrator petitioned that the Montana administrator be required to reduce to cash the property in this state and transmit same, after payment of expenses, etc., to him. The claim of the creditor was not filed with Montana administrator and the time for filing it had expired. Held, that, under the circumstances, the statutes of nonclaim (this section and 10179) were inapplicable, and that the court properly directed transmittal of the funds to the California administrator. *In re Livingston's Estate*, 91 M 584, 9 P 2d 159.

References

Cited or applied as section 7525, Revised Codes, in *Emerson-Brantingham I. Co. v. Anderson*, 58 M 617, 628, 194 P 160; *Nevin-Frank Co. v. Hubert*, 67 M 50, 54, 214 P 959; *Roche Valley Land Co. v. Barth et al.*, 67 M 353, 356, 215 P 654; *Wunderlich v. Holt*, 86 M 260, 269, 283 P 423; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 169 et seq., 22 P 2d 175; *Lefek v. Luedeman*, 95 M 457, 469, 27 P 2d 511.

10174. Claims to be sworn to, and, when allowed, to bear same interest as judgment. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant,

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he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the district court.

History: En. Sec. 151, p. 277, L. 1877; re-en. Sec. 151, 2nd Div. Rev. Stat. 1879; re-en. Sec. 151, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2604, C. Civ. Proc. 1895; re-en. Sec. 7526, Rev. C. 1907; re-en. Sec. 10174, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1494.

Defective Verifications

Where the affidavit in verification of a claim against an estate omitted to set forth that no payments had been made thereon which were not credited as required by this section, it was ineffectual as a basis of legal liability against it, and neither itemization of the claim, in the shape of debits and credits, nor the statement that the claim was lawful, just, true and correct, nor the vouchers and proofs which may be required by the executor or administrator, could supply the defect. *The Ullman Co. v. Adler*, 59 M 232, 234, 237, 196 P 157.

Id. In an action by a corporation on a claim against an estate which had been disallowed by the administratrix, the ruling that it was improperly verified, inasmuch as its bookkeeper made the affidavit required by this section, without setting forth the reason why the claimant himself did not make it, was correct, the recital that the claimant is a corporation being insufficient to cure the defect.

Purpose of Affidavit

The affidavit called for by this section, to accompany a claim against an estate, is not required as evidence of the existence of the debt, but as evidence of good faith to prevent the presentation of spurious or fictitious claims. *The Ullman Co. v. Adler*, 59 M 232, 234, 237, 196 P 157; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 179, 22 P 2d 175.

Substantial Compliance Necessary

There must be a substantial compliance with the requirements of every provision of this section, specifying what the verification of a claim against the estate of the decedent must contain; where there is no such compliance, the claim is ineffectual as a basis for legal liability. *The Ullman Co. v. Adler*, 59 M 232, 234, 237, 196 P 157. See also *Nevin-Frank Co. v. Hubert*, 67 M 50, 54, 214 P 959.

Sufficiency of Affidavits Made by Persons Other Than the Claimant

The provision of this section, that the affidavit supporting a claim against a

decedent's estate, when made by another than claimant, shall set forth the reason why it is not made by claimant, is satisfied by an affidavit, made by one of claimant's attorneys, stating that claimant is a corporation, and none of its officers except its said attorneys reside in the county. *Empire State Min. Co. v. Mitchell*, 29 M 55, 58, 74 P 81.

When claimant acts for himself, the word "claimant" in the affidavit accompanying the claim meets all the requirements of this section; but, when some one acts in behalf of claimant, the statement must be "to the knowledge of the affiant." *Dorais v. Doll*, 33 M 314, 317, 83 P 884.

Verification of Claim by a Corporation

Held, that where the claim of a corporation against an estate as presented to the executrix was otherwise sufficient, the fact that the verification made by its president in its behalf did not contain the statement that the claimant was a corporation, a fact admitted at the trial by defendant executrix, did not render it fatally defective. *Nevin-Frank Co. v. Hubert*, 67 M 50, 54, 214 P 959.

Verification of Claim by Guardian

Where a claim against an estate showed on its face that it was made by claimant as guardian, the fact that the verification required by this section was made by him individually without any reference to his official capacity as guardian did not render the claim fatally defective. In re *Stinger Estate*, 61 M 173, 187, 201 P 693.

Vouchers Are Not a Condition Precedent to the Allowance of a Claim

This section does not make the furnishing of vouchers a condition precedent to the allowance of a claim. The executor or administrator may require satisfactory vouchers in his discretion. *Jones v. Rich*, 20 M 289, 292, 50 P 936.

References

Cited or applied as section 2604, Code of Civil Procedure, in *Harrington v. Butte & Boston Min. Co.*, 35 M 530, 531, 90 P 748; *Burnett v. Neraal*, 67 M 189, 190, 191, 214 P 955; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025; *Wunderlich v. Holt*, 86 M 260, 269, 283 P 423.

10175. Judge may present claim, and action thereon. Any judge of the district court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must in writing designate some judge of the district court of an adjoining county or district, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

History: En. Sec. 152, p. 277, L. 1877; re-en. Sec. 152, 2nd Div. Rev. Stat. 1879; re-en. Sec. 152, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2605, C. Civ. Proc. 1895; re-en. Sec. 7527, Rev. C. 1907; re-en. Sec. 10175, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1495.

10176. Allowance and rejection of claims. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the judge for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be prima facie evidence of such presentation, and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

History: En. Sec. 153, p. 278, L. 1877; re-en. Sec. 153, 2nd Div. Rev. Stat. 1879; re-en. Sec. 153, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2606, C. Civ. Proc. 1895; re-en. Sec. 7528, Rev. C. 1907; re-en. Sec. 10176, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1496.

Claims Separately Rejected Cannot be Sued on Jointly

Where a party and his wife, in an action against the executrix of an estate for the breach of an agreement, entered into with them by decedent, to pay them jointly a certain sum of money, alleged that each had presented to the executrix a separate claim for half the money sued for, and that the claims had been rejected, the plaintiffs, never having presented a joint claim against the estate, could not maintain a joint action based upon the presentation and rejection of their separate claims. *Brown v. Daly*, 33 M 523, 528, 84 P 883.

Duty of Creditors to Ascertain Whether or Not Claim Was Allowed

Creditors of estates, after presentation of their claims, must make inquiry as to the action taken by executor, administra-

tor, or the district judge with reference to them, in order to preserve their rights in case of rejection, the statute, while requiring each to indorse thereon his allowance or rejection, with the day and date thereof, not making it the duty of either to notify claimants of their rejection. *Lindsay v. Hogan*, 56 M 583, 586, 185 P 1118.

Operation and Effect on General Limitations

Under the provisions of this section and of section 10178, a creditor is not given three months after the rejection of his claim by the administrator of an estate within which to begin action thereon, even though the claim was rejected after the time limited for presentation, if otherwise barred by the general statute of limitations, although filed within the time limited for the presentation of claims, and before the bar of the statute had fallen. *Davis v. Estate of Davis*, 56 M 500, 507, 185 P 559.

What is a Sufficient Rejection of a Claim

The presentation of a claim against an estate at the office of the attorney of the

estate, in accordance with a published notice to creditors, and the indorsement of the claim by the attorney, under the direction of the administrator, as having been "rejected," and signing the administrator's name, constitute a sufficient compliance with this section. *Dorais v. Doll*, 33 M 314, 318, 83 P 884.

When Claim May be Acted Upon by Executor

When a claim against an estate is presented before the time limited for its presentation has expired, it may nevertheless be acted upon by the administrator or executor, after the expiration of that period. *Davis v. Estate of Davis*, 56 M 500, 511, 185 P 559.

When Proper to Present Claim

The notice to creditors required by law is for the convenience of the creditors, and there is nothing in the statute to prevent

a creditor from presenting a claim as soon as the administrator is appointed and qualified. *Davis v. Estate of Davis*, 56 M 500, 507, 185 P 559.

Id. Creditors of an estate may present their claims for payment before formal notice for presentation of claims is given, or if no notice at all is given, the administrator or executor, when qualified, having authority to pass upon claims against the estate in either event.

References

Cited or applied as section 2606, Code of Civil Procedure, in *Jones v. Rich*, 20 M 289, 291, 50 P 936; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 179, 22 P 2d 175; *State ex rel. Finley v. District Court*, 99 M 200, 43 P 2d 682.

10177. Approved claims or copies to be filed—claims secured by liens may be described—lost claims. Every claim allowed by the executor or administrator, and approved by the judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by a mortgage or other lien which has been recorded in the office of the county clerk of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left an original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

History: En. Sec. 154, p. 278, L. 1877; re-en. Sec. 154, 2nd Div. Rev. Stat. 1879; re-en. Sec. 154, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2607, C. Civ. Proc. 1895; re-en. Sec. 7529, Rev. C. 1907; re-en. Sec. 10177, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1497.

Operation and Effect

The allowance of a claim against an estate and its approval by the district judge does not render such claim a final judgment so as to protect it from attack by protest against the allowance of the administrator's final account. In *re Mouil-lerat's Estate*, 14 M 245, 250, 36 P 185.

A claim against an estate is not "founded on a bond, bill, note, or other instrument," within the meaning of this section, where it appears to be due upon an oral agreement, the result of which is an account stated. *Dorais v. Doll*, 33 M 314, 318, 83 P 884.

Compliance with the provisions of this section involves no difficulty, and a court cannot say that anything less than substantial compliance upon the part of the claimant meets the requirements. *Vanderpool v. Vanderpool*, 48 M 448, 452, 138 P 772.

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Under this section, a claim against the estate of a decedent founded upon a promissory note which is neither lost nor destroyed must be accompanied either by the original note or a copy of it when presented to the executor or administrator for allowance; where not so accompanied the claim may properly be rejected. *Burnett v. Neraal*, 67 M 189, 191, 192, 214 P 955.

Where a creditor of an estate presents his claim to the administrator who approves it and it is thereupon approved by the district court, the claim, filed in court, is an acknowledged debt of the estate having the same force as a judgment rendered against the administrator (this section and 10185), and the lien secured by attachment in an action against decedent which at the time of her death had not proceeded to judgment is thereby per-

fectured to the amount approved. In re *Stevenson*, 87 M 486, 495, 289 P 566.

The requirements of section 10173, that presentment of claims against an estate arising upon contracts must be made within the time limited in the notice to creditors, else they are forever barred, and of this section, that if claims be founded upon writings, copies thereof must accompany them, are mandatory, and if not observed the executor or administrators may reject the claims. *State v. District Court et al.*, 90 M 281, 286, 1 P 2d 335.

References

Cited or applied as section 2607, Code of Civil Procedure, in *Jones v. Rich*, 20 M 289, 291, 50 P 936; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 179, 22 P 2d 175.

10178. Limitation of actions on rejected claim. When a claim is rejected either by the executor or administrator, or the judge, the holder must bring suit in the proper court against the executor or administrator within three months after the date such claim is filed, with endorsement thereon showing the rejection thereof, in whole or in part, in the office of the clerk of court in which the proceedings are pending, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred.

History: En. Sec. 155, p. 278, L. 1877; re-en. Sec. 155, 2nd Div. Rev. Stat. 1879; re-en. Sec. 155, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2608, C. Civ. Proc. 1895; re-en. Sec. 7530, Rev. C. 1907; re-en. Sec. 10178, R. C. M. 1921; amd. Sec. 1, Ch. 11, L. 1925. Cal. C. Civ. Proc. Sec. 1498.

Claim Once Presented and Rejected is Final

Where a claim against an estate has once been presented to the administrator or executor and rejected, the claimant cannot thereafter, in evasion of this section, again present the same claim, differing from the former only in form and detail. *Lindsay v. Hogan*, 56 M 583, 585, 185 P 1118.

Id. Presentation of a claim against an estate in improper form and consequent rejection by the administrator or executor do not bar a second presentation in due form, provided the time has not elapsed in which claims may be presented.

Exclusive Remedy

This section provides an exclusive remedy, and an order disallowing a claim against an estate is not appealable under the provisions of section 9731. In re *Barker's Estate*, 26 M 279, 283, 67 P 941.

Not Applicable to Actions of Tort

Held that the statutes of nonclaim which bar claims against an estate or its

executor or administrator unless first presented for allowance, and, if rejected, suit brought within three months after rejection, cover only such claims as came into existence by contract, express or implied, prior to the death of the decedent, and therefore do not apply to claims for unliquidated damages arising from a tort committed by the decedent in his lifetime. *Hornbeck et al. v. Richards*, 80 M 27, 31, 257 P 1025.

Notice to Creditors of Rejection Not Necessary

Neither this section nor section 10176, makes it the duty either of the administrator or of the judge to give to the claimant notice of the rejection of his claim. *Lindsay v. Hogan*, 56 M 583, 586, 185 P 1118.

Suit Must be On Identical Claim

Where a claim against an estate is disallowed by the executor or administrator, the suit brought by the claimant must be upon the identical claim presented for payment. *Harwood v. Scott*, 57 M 83, 186 P 693.

When Claim is Sufficient

If the presentation of a claim against an estate, which was rejected, advised the executor or administrator of its nature, the amount claimed, and was explicit enough

to bar another action on the same demand, it was sufficient; an observance of the technical rules of pleading not being required. *Harwood v. Scott*, 57 M 83, 186 P 693.

When Suit Must be Brought

Where a claim against an estate is due at the date of its rejection, suit must be brought thereon within three months thereafter; otherwise it is barred under this section, even though no notice was given of such rejection. *Lindsay v. Hogan*, 56 M 583, 585, 185 P 1118.

10179. Claims barred by statute of limitations—when and whom judge may examine. No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim.

History: En. Sec. 156, p. 279, L. 1877; re-en. Sec. 156, 2nd Div. Rev. Stat. 1879; re-en. Sec. 156, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2609, C. Civ. Proc. 1895; re-en. Sec. 7531, Rev. C. 1907; re-en. Sec. 10179, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1499.

Operation and Effect

Creditors of an estate may, upon the settlement of an administrator's final account, contest an allowed claim as barred by limitation under this section. In re *Mouillerat's Estate*, 14 M 245, 252, 36 P 185. See also *Vanderpool v. Vanderpool*, 48 M 448, 454, 138 P 772.

When claims have been presented and allowed, and are not contestable for the reason that they are barred at the time of presentation, none of the statutory limitations run as against them. In re *Tuohy's Estate*, 33 M 230, 247, 83 P 486.

While it is the general rule that the bar of the statute of limitations can be

References

Cited or applied as section 2608, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 490, 496, 71 P 757; In re *Tuohy's Estate*, 33 M 230, 246, 83 P 486; *Brown v. Daly*, 33 M 523, 528, 84 P 883; as section 7530, Revised Codes, in *Davis v. Estate of Davis*, 56 M 500, 506, 185 P 559; as section 7530, Revised Codes, in *Smith v. Smith*, 224 F. 1, 11, 139 C. C. A. 465; *The Ullman Co. v. Adler*, 59 M 232, 234, 196 P 157; In re *Smith's Estate*, 60 M 276, 298, 199 P 696; *State ex rel. Finley v. District Court*, 99 M 200, 43 P 2d 682.

raised only by answer, where it appears to the court in an action against an executor or administrator to recover on a rejected claim that the claim, or a part of it, is barred, it must so hold though the defendant fails to interpose such defense. *Pincus v. Davis*, 95 M 375, 385, 26 P 2d 986.

References

Cited or applied as section 2609, Code of Civil Procedure, in *Empire State Min. Co. v. Mitchell*, 29 M 55, 58, 74 P 81; as section 7531, Revised Codes, in *Davis v. Estate of Davis*, 56 M 500, 506, 185 P 559.

Cited or applied as section 7531, Revised Codes, in *Smith v. Smith*, 224 F. 1, 11, 139 C. C. A. 465; *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025; *Wunderlich v. Holt*, 86 M 260, 269, 283 P 423; In re *Livingston's Estate*, 91 M 584, 590, 9 P 2d 159; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 92, 10 P 2d 1061.

10180. Claims must be presented before suit. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto where all recourse against other property of the estate is expressly waived in the complaint.

History: En. Sec. 157, p. 279, L. 1877; re-en. Sec. 157, 2nd Div. Rev. Stat. 1879; re-en. Sec. 157, 2nd Div. Comp. Stat. 1887; amd. Sec. 2610, C. Civ. Proc. 1895; re-en. Sec. 7532, Rev. C. 1907; amd. Sec. 1, Ch. 145, L. 1921; re-en. Sec. 10180, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1500.

Applicable Only to Claims Existent at Time of Death

Services performed for the benefit of an estate, at the request of the executor thereof, and subsequent to the death of the testator, are included within the expenses of administration, and are not

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"claims" against the estate. *Dodson v. Nevitt*, 5 M 518, 521, 6 P 358.

Held, that section 10173, providing that claims against a decedent's estate arising upon contracts, whether due, not due or contingent, are barred unless presented to the executor within the time limited in the notice to creditors, and this section, declaring that a creditor cannot maintain suit on his claim (excepting a mortgage debt or claim for funeral expenses) unless so presented, have reference only to indebtedness of the deceased contracted by him in his lifetime and existent at the time of death, and therefore have no application to obligations arising subsequent to his death by reason of a breach of an executory contract, such latter obligation becoming by operation of law that of his personal representative. *Nathan v. Freeman et al.*, 70 M 259, 266, 225 P 1015.

Estates Cease to Exist After Decree of Distribution

The estate of a deceased person dealt with by section 10173, and this section, the intent of which is to permit a mortgagee to foreclose his mortgage although the mortgagor has died, provided the mortgagee shall not have recourse against any other property of the decedent's estate unless he first presents his mortgage claim to the executor or administrator in accordance with the statute, ceases to exist upon entry of decree of distribution which is conclusive and has the force of *res adjudicata*; after the estate is declared closed the court has neither jurisdiction over the property of the estate nor the executor or administrator. *State v. District Court et al.*, 76 M 143, 147 et seq., 245 P 529.

Not Applicable to Closed Estates

Held, on application for writ of supervisory control, that where after the estate of a deceased person had been distributed, the holder of a real estate mortgage executed by decedent during his lifetime commenced suit to foreclose without asking for a deficiency judgment, the sole heir not answering, the district court erred in dismissing the suit for want of jurisdiction because of plaintiff's failure to allege that he had presented his claim to the administrator or, in the absence of presentation of such claim, that he waived all recourse against the decedent's property other than that covered by the mortgage, since the provisions of section 10173 and this section are applicable only to an estate still in course of administration and not to one that has been closed. *State*

v. District Court et al., 76 M 143, 147 et seq., 245 P 529.

Operation and Effect

No action on a claim against the estate of a deceased person for work and labor can be maintained, unless the same has been presented to the executor or administrator for allowance. *Dodson v. Nevitt*, 5 M 518, 521, 6 P 358.

No action can be maintained upon a claim against a decedent's estate unless it has been first presented to the executor or administrator for allowance; neither can it be maintained unless the identical claim sued upon is the one that was presented. A party cannot present a claim founded upon an open account and then maintain an action upon a promissory note, or vice versa; and, if he attempts to do so, the result is such a variance as amounts to a failure of proof. *Vanderpool v. Vanderpool*, 48 M 448, 453, 138 P 772.

Id. A complaint in an action to recover on a claim against an estate fails to state a cause of action unless it expressly alleges that the claim as made was first presented to the executor or administrator.

This section, authorizing an action against an estate to enforce a lien against its property without first presenting a claim to the executor or administrator, on condition that claimant waives recourse against all other property of the estate, rests upon the principle that the property to the extent of the lien is segregated from the general assets of the estate, and carries the inference that the successful lienholder may enforce the judgment by execution upon the property to which the lien attaches. *In re Stevenson*, 87 M 486, 496, 289 P 566.

References

Cited or applied as section 2610, Code of Civil Procedure, in *Jones v. Rich*, 20 M 289, 291, 50 P 936; *Brown v. Daly*, 33 M 523, 528, 84 P 883; *Harrington v. Butte & Boston Min. Co.*, 35 M 530, 531, 90 P 748; *Harwood v. Scott*, 57 M 83, 89, 186 P 693; *Emerson-Brantingham I. Co. v. Anderson*, 58 M 617, 628, 194 P 160.

Cited or applied as section 7532, Revised Codes, in *Smith v. Smith*, 224 F. 1, 4, 139 C. C. A. 465; *The Ullman Co. v. Adler*, 59 M 232, 234, 196 P 157; *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025; *Wunderlich v. Holt*, 86 M 260, 269, 283 P 423; *State v. District Court et al.*, 90 M 281, 289, 1 P 2d 335; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 169, 22 P 2d 175; *Leffek v. Luedeman*, 95 M 457, 469, 27 P 2d 511.

10181. Effective date. This act shall be in full force and effect from and after its passage and approval; provided, however, nothing herein contained shall be construed as affecting any cause of action or litigation now pending in any court in the state of Montana.

History: En. Sec. 3, Ch. 145, L. 1921; re-en. Sec. 10181, R. C. M. 1921.

10182. Time of limitation. The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed.

History: En. Sec. 158, p. 279, L. 1877; re-en. Sec. 158, 2nd Div. Rev. Stat. 1879; re-en. Sec. 158, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2611, C. Civ. Proc. 1895; re-en. Sec. 7533, Rev. C. 1907; re-en. Sec. 10182, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1501.

10183. Claims in action pending at time of decease. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action, unless proof be made of the presentations required.

History: En. Sec. 159, p. 280, L. 1877; re-en. Sec. 159, 2nd Div. Rev. Stat. 1879; re-en. Sec. 159, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2612, C. Civ. Proc. 1895; re-en. Sec. 7534, Rev. C. 1907; re-en. Sec. 10183, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1502.

Operation and Effect

Where defendant's answer admitted that a verified claim for the amount sued for had been duly presented and disallowed by the administrator of one of the defendants, plaintiff was not required to prove the presentation and disallowance of such claim. *Harrington v. Butte & Boston Min. Co.*, 35 M 530, 532, 90 P 748.

Under the rule that where a suitable procedure is not provided by the codes whereby the district court may carry its general jurisdiction into effect, it may adopt any suitable process or mode of proceeding most conformable to the spirit of the codes, held, that where pending action to foreclose a lien the defendant dies before judgment, the plaintiff may present his claim in accordance with this sec-

tion, and prosecute the action to judgment, whereupon the same relief may be afforded as if defendant's death had not occurred; or where the claim has been approved by administrator and judge, he may rest upon that approval as upon a judgment, the duty then devolving upon the administrator to apply the property covered by the lien to the satisfaction of the claim. In *re Stevenson*, 87 M 486, 494, 289 P 566.

This section, which requires presentation of a claim against an estate to the executor or administrator if an action is pending against decedent, applies only to such claims as would require presentation if no action had been commenced against decedent during his lifetime. *Mitchell v. Banking Corp. of Montana*, 94 M 165, 169 et seq., 22 P 2d 175.

References

Cited or applied as section 2612, Code of Civil Procedure, in *Dorais v. Doll*, 33 M 314, 316, 83 P 884; *Leffek v. Luedeman*, 95 M 457, 468, 27 P 2d 511.

10184. Allowance of claim in part. Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed.

History: En. Sec. 160, p. 280, L. 1877; re-en. Sec. 160, 2nd Div. Rev. Stat. 1879; re-en. Sec. 160, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2613, C. Civ. Proc. 1895; re-en. Sec. 7535, Rev. C. 1907; re-en. Sec. 10184, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1503.

10185. Effect of judgment against executor or administrator. A judgment rendered against an executor or administrator, upon any claim for

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money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

History: En. Sec. 161, p. 280, L. 1877; re-en. Sec. 161, 2nd Div. Rev. Stat. 1879; re-en. Sec. 161, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2614, C. Civ. Proc. 1895; re-en. Sec. 7536, Rev. C. 1907; re-en. Sec. 10185, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1504.

Operation and Effect

A judgment in an action against an administratrix to recover for services rendered to deceased, to the effect that plaintiff "have and recover" from the defendant, as administratrix, the amount of the verdict and costs, though defective under this section, does not require a reversal of the judgment. *Gauss v. Trump*, 48 M 92, 102, 135 P 910.

A judgment against an executor or administrator upon a claim against the estate establishes the claim to be paid in due course of administration. In *re Smith's Estate*, 60 M 276, 296, 199 P 696.

Id. A judgment against the executor or administrator of an estate is in effect a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees or creditors, as privies are foreclosed by it on the merits of the claim.

Where a creditor of an estate presents his claim to the administrator who approves it and it is thereupon approved by the district court, the claim, filed in court, is an acknowledged debt of the estate having the same force as a judgment rendered against the administrator (section 10177 and this section), and the lien secured by attachment in an action against decedent which at the time of her death had not proceeded to judgment is thereby perfected to the amount approved. In *re Stevenson*, 87 M 486, 495, 289 P 566.

Judgment in an action against the executors of the estate of a decedent bank stockholder to recover on his statutory liability, held not objectionable as not providing that the amount awarded plaintiff should be paid in due course of administration of the estate. (Mr. Chief Justice Callaway dissenting.) *Mitchell v. Banking Corp. of Montana*, 94 M 165, 182, 22 P 2d 175.

References

Lamont v. Vinger, 61 M 530, 543, 202 P 769; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Leffek v. Luedeman*, 95 M 457, 468, 27 P 2d 511.

10186. Execution not to issue after death—if one is levied the property may be sold. When any judgment has been rendered for or against the testator or intestate, in his lifetime, no execution shall issue thereon after his death, except as provided in section 9422. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

History: En. Sec. 162, p. 281, L. 1877; re-en. Sec. 162, 2nd Div. Rev. Stat. 1879; re-en. Sec. 162, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2615, C. Civ. Proc. 1895; re-en. Sec. 7537, Rev. C. 1907; re-en. Sec. 10186, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1505.

Operation and Effect

Under this section execution may not issue after the death of a party on a judgment rendered against him in his lifetime, except, as provided by section 9422, where the judgment is *inter alia* for the

enforcement of a lien on the property of the decedent. In *re Stevenson*, 87 M 486, 496, 289 P 566.

Quaere: Does section 9274, by providing that the death of a defendant whose property has been attached does not release the attached property and that the attachment may be enforced as in the case of other liens, authorize the enforcement

of the attachment lien by execution? *Davis et al. v. Claxton et al.*, 82 M 574, 584, 268 P 787.

References

Cited or applied as section 7537, Revised Codes, in *Hamilton v. Hamilton*, 51 M 509, 523, 154 P 717; *Leffek v. Luedeman*, 95 M 457, 468, 27 P 2d 511.

10187. What judgment is not a lien on real property of an estate. A judgment rendered against a decedent, dying after a verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

History: En. Sec. 163, p. 281, L. 1877; re-en. Sec. 163, 2nd Div. Rev. Stat. 1879; re-en. Sec. 163, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2616, C. Civ. Proc. 1895; re-en. Sec. 7538, Rev. C. 1907; re-en. Sec. 10187, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1506.

References

Leffek v. Luedeman, 95 M 457, 469, 27 P 2d 511.

10188. May refer doubtful claims—effect of referee's allowance or rejection. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the court or judge. Upon filing the agreement and approval of the court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be had in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been allowed or rejected by the executor or administrator and judge.

History: En. Sec. 164, p. 281, L. 1877; re-en. Sec. 164, 2nd Div. Rev. Stat. 1879; re-en. Sec. 164, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2617, C. Civ. Proc. 1895; re-en. Sec. 7539, Rev. C. 1907; re-en. Sec. 10188, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1507.

10189. Trial by referee—how confirmed and its effect. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control, as in other cases of reference. The court or judge may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the order or judgment thereon shall be as valid and effectual, in all respects, as if the same had been rendered in an action commenced by ordinary process.

History: En. Sec. 165, p. 282, L. 1877; re-en. Sec. 165, 2nd Div. Rev. Stat. 1879; re-en. Sec. 165, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2618, C. Civ. Proc. 1895; re-en. Sec. 7540, Rev. C. 1907; re-en. Sec. 10189, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1508.

10190. Liability of executor or administrator for costs. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him

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in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

History: En. Sec. 166, p. 282, L. 1877; re-en. Sec. 166, 2nd Div. Rev. Stat. 1879; re-en. Sec. 166, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2619, C. Civ. Proc. 1895; re-en. Sec. 7541, Rev. C. 1907; re-en. Sec. 10190, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1509.

Operation and Effect

Where the supreme court in the disposition of an appeal from an order settling an administrator's account remands the cause with directions to require that officer to file a further account and orders,

as it may do under section 10372, that the costs incident to the appeal shall be paid by the administrator personally, the jurisdiction of the district court is limited to the enforcement of the order, except that it may determine disputed questions of costs, or on final settlement of the account allow such portions of the costs incurred as a charge against the estate as justice may require. (Provisions of this section not applicable.) In *re Jennings' Estate*, 79 M 73, 78, 254 P 1067.

10191. Claims of executor or administrator against the estate. If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to the judge, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court or judge.

History: En. Sec. 167, p. 282, L. 1877; re-en. Sec. 167, 2nd Div. Rev. Stat. 1879; re-en. Sec. 167, 2nd Div. Comp. Stat. 1887; amd. Sec. 2620, C. Civ. Proc. 1895; re-en. Sec. 7542, Rev. C. 1907; re-en. Sec. 10191, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1510.

Operation and Effect

Where a claim is presented against an estate by an executrix in her personal capacity and disallowed, she cannot bring an action for the amount of the claim against herself acting as executrix of the estate. *Phillips v. Phillips*, 18 M 305, 45 P 221.

An executor or administrator may, in good faith, make advances to the estate, if suitable and for its benefit. Such advances may be allowed and recovered as claims against the estate. In *re Williams' Estate*, 47 M 325, 331, 132 P 421.

Held that where an executor neither in the inventory and appraisal nor in his accounts prior to final settlement of the estate had mentioned an alleged indebtedness of decedent to him for taking care of his cattle and paying taxes thereon, and his claim for reimbursement was not made until long after the time for presenting claims had expired and not until his final account was ordered reopened at the instance of the heirs, it was error to allow such items as an offset against the amount for which he was accountable. In *re Rodgers' Estate*, 68 M 46, 54, 217 P 678.

References

Cited or applied as section 7542, Revised Codes, in *Davis v. Estate of Davis*, 56 M 500, 506, 185 P 559.

10192. Executor or administrator neglecting to give notice to creditors to be removed. If an executor or administrator neglects, for two months after his appointment, to give notice to creditors, as prescribed by this chapter, the court or judge must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment.

History: En. Sec. 168, p. 283, L. 1877; re-en. Sec. 168, 2nd Div. Rev. Stat. 1879; re-en. Sec. 168, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2621, C. Civ. Proc. 1895; re-en. Sec. 7543, Rev. C. 1907; re-en. Sec. 10192, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1511.

10193. Executor or administrator to return statement of claims. At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court or judge, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court or judge. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him.

History: En. Sec. 169, p. 283, L. 1877; re-en. Sec. 169, 2nd Div. Rev. Stat. 1879; re-en. Sec. 169, 2nd Div. Comp. Stat. 1887; amd. Sec. 2622, C. Civ. Proc. 1895; re-en. Sec. 7544, Rev. C. 1907; re-en. Sec. 10193, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1512.

References

In re Rinio's Estate, 93 M 428, 433, 19 P 2d 322.

10194. Payment of debt to stop running of interest. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court or judge, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid.

History: En. Sec. 170, p. 283, L. 1877; re-en. Sec. 170, 2nd Div. Rev. Stat. 1879; re-en. Sec. 170, 2nd Div. Comp. Stat. 1887; amd. Sec. 2623, C. Civ. Proc. 1895; re-en. Sec. 7545, Rev. C. 1907; re-en. Sec. 10194, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1513.

Operation and Effect

This section relates to the payment of claims during the regular course of ad-

ministration, and does not authorize an order directing the payment of a claim by a special administrator. State ex rel. Bartlett v. District Court, 18 M 481, 486, 46 P 259.

References

In re Jennings' Estate, 74 M 449, 465, 241 P 648.

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CHAPTER 129

SALES OF PROPERTY OF ESTATE IN GENERAL—BORROWING MONEY—SALES OF PERSONAL PROPERTY

- Section 10195. Estate chargeable with debts—no priority.
 10196. Money may be borrowed.
 10197. No sales valid except by order of district court.
 10198. Petitions for orders of sale.
 10199. But one petition, order, and sale must be had when it is possible to do so.
 10200. Perishable and depreciating property to be sold.
 10201. Order to sell personal property.
 10202. Partnership interests and choses in action—how sold.
 10203. Order of sale—what to direct and what to be sold first.
 10204. Sale of personal property.

10195. Estate chargeable with debts—no priority. All the property of the decedent shall be chargeable with the payment of the debts of the deceased, the expenses of the administration, and the allowance to the family, except as otherwise provided in this code and in the Civil Code. And the said property, personal and real, may be sold as the court or judge may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes.

History: En. Sec. 171, p. 283, L. 1877; re-en. Sec. 171, 2nd Div. Rev. Stat. 1879; re-en. Sec. 171, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2640, C. Civ. Proc. 1895; re-en. Sec. 7546, Rev. C. 1907; re-en. Sec. 10195, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1516.

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Operation and Effect

This section, when read in connection with section 7052, indicates that all of the property of the estate is subject to the payment of the debts, using that term in its general sense, to include debts, family allowances, expenses, and charges of administration already accrued and to accrue. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847.

References

Cited or applied as section 2640, Code of Civil Procedure, in *Tuohy's Estate*, 23 M 305, 309, 58 P 722; as section 7546, Revised Codes, in *In re Blackburn's Estate*, 51 M 234, 237, 152 P 31; *Mathews v. Marsden et al.*, 71 M 502, 511, 230 P 775; *In re McGovern's Estate*, 77 M 182, 197, 250 P 812; *Swanberg v. National Surety Co.*, 86 M 340, 354 et seq., 283 P 761; *Leffek v. Luedeman*, 95 M 457, 468, 27 P 2d 511.

10196. Money may be borrowed. In all cases the executor or administrator of an estate, instead of selling the property of the estate to pay the charges and demands against the same, may borrow money at the lowest rate of interest at which it may be had, and for such length of time as the court or judge may allow, to pay such claims, when it shall be made to appear to the court or judge, by petition and evidence, that an immediate sale of the property of the estate will be detrimental to the heirs, devisees, legatees, or other persons having an interest therein; and in such case the estate shall be chargeable with the payment of the sum so borrowed and interest thereon. Such petition may be by the executor or administrator, or by any one of the heirs of the deceased, or other person interested in the estate. Notice shall be given as follows: If by the executor or administrator, to all the heirs, devisees, legatees residing in the state; and if by an heir, devisee, or legatee, to the administrator or executor, and to all other heirs, devisees, and legatees residing in the state. The notice must be given by personal service on all persons residing in the state. If any persons interested in the estate, as above mentioned, are not residents of or cannot be found within the state, then notice must be given by publication in some newspaper published in the county, at least once a week for four successive weeks.

History: En. Sec. 172, p. 284, L. 1877; re-en. Sec. 172, 2nd Div. Rev. Stat. 1879; re-en. Sec. 172, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2641, C. Civ. Proc. 1895; re-en. Sec. 7547, Rev. C. 1907; re-en. Sec. 10196, R. C. M. 1921.

Operation and Effect

Where at the time of the appointment of an administrator there were crops growing upon the lands of the estate, which but for timely care and harvesting might have been lost, he may be allowed the reasonable expense incurred in that behalf, even though he obtained the necessary funds by borrowing upon the credit of the estate without first obtaining an order of court permitting him to do so. *In re Jennings' Estate*, 74 M 449, 241 P 648.

When necessary to pay the debts of an estate it is the duty of the administrator to take the requisite steps for that purpose under either of the three methods provided by sections 10195, this section, 10210 and 10249. *Swanberg v. National Surety Co.*, 86 M 340, 356, 283 P 761.

The rule that an executor is entitled to legal interest on necessary advances made in good faith when beneficial to the estate, applies where he borrows money for the purpose of paying taxes on estate property without previous court order. *In re Kelley's Estate*, 91 M 98, 103, 5 P 2d 559.

References

Lamont v. Vinger, 61 M 530, 542, 202 P 769.

10197. No sales valid except by order of district court. No sale of any property of an estate of a decedent is valid unless made under order of the district court, or a judge thereof, except as otherwise provided in this chapter. All sales must be made under oath reported to and confirmed by the court or judge before the title to the property sold passes.

History: En. Sec. 173, p. 284, L. 1877; re-en. Sec. 173, 2nd Div. Rev. Stat. 1879; re-en. Sec. 173, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2642, C. Civ. Proc. 1895; re-en. Sec. 7548, Rev. C. 1907; re-en. Sec. 10197, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1517.

Operation and Effect

The district court, sitting in probate, has a discretion to refuse to confirm a sale of personal property upon the sole ground that a bid of ten per cent. in ex-

cess of the former bid, together with the costs of resale, has been received; and, where no abuse of such discretion is shown, an application for a writ of supervisory control to compel the confirmation of the sale will be dismissed. State ex rel. King v. District Court, 42 M 182, 187, 111 P 717.

References

In re Jennings' Estate, 74 M 449, 457, 241 P 648.

10198. Petitions for orders of sale. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

History: En. Sec. 174, p. 285, L. 1877; re-en. Sec. 174, 2nd Div. Rev. Stat. 1879; re-en. Sec. 174, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2643, C. Civ. Proc. 1895; re-en. Sec. 7549, Rev. C. 1907; re-en. Sec. 10198, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1518.

10199. But one petition, order, and sale must be had when it is possible to do so. When it appears to the court or judge that the estate is insolvent, or that it will require a sale of all the property of the estate of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in the case of perishable property, which may be sold as provided in section 10200. The court or judge, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and, if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by section 10211.

History: En. Sec. 175, p. 285, L. 1877; re-en. Sec. 175, 2nd Div. Rev. Stat. 1879; re-en. Sec. 175, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2644, C. Civ. Proc. 1895; re-en. Sec. 7550, Rev. C. 1907; re-en. Sec. 10199, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1519.

10200. Perishable and depreciating property to be sold. At any time after receiving letters, the executor or administrator, or special administrator, may apply to the court or judge and obtain an order to sell perishable and other personal property liable to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return or on a proper showing, the court or judge shall approve the same.

History: En. Sec. 176, p. 285, L. 1877; re-en. Sec. 176, 2nd Div. Rev. Stat. 1879; re-en. Sec. 176, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2650, C. Civ. Proc. 1895; re-en. Sec. 7551, Rev. C. 1907; re-en. Sec. 10200, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1522.

References

Cited or applied as section 7551, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717; In re Rinio's Estate, 93 M 428, 431, 19 P 2d 322.

10201. Order to sell personal property. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appears for the best interests of the estate, he may, at any time after filing the inventory, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not.

History: En. Sec. 177, p. 285, L. 1877; re-en. Sec. 177, 2nd Div. Rev. Stat. 1879; re-en. Sec. 177, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2651, C. Civ. Proc. 1895; Sec. 7552, Rev. C. 1907; re-en. Sec. 10201, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1523.

10202. Partnership interests and choses in action—how sold. Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interests in personal property pledged, and choses in action may be sold in the same manner as other personal property, when it appears to be for the best interests of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

History: En. Sec. 178, p. 286, L. 1877; re-en. Sec. 178, 2nd Div. Rev. Stat. 1879; re-en. Sec. 178, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2652, C. Civ. Proc. 1895; Sec. 7553, Rev. C. 1907; re-en. Sec. 10202, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1524.

10203. Order of sale—what to direct and what to be sold first. If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct.

History: En. Sec. 179, p. 286, L. 1877; re-en. Sec. 179, 2nd Div. Rev. Stat. 1879; re-en. Sec. 179, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2653, C. Civ. Proc. 1895; Sec. 7554, Rev. C. 1907; re-en. Sec. 10203, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1525.

10204. Sale of personal property. The sale of personal property must be made at public auction, after public notice given for at least ten days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reason shown the court, or a judge thereof, orders a private sale, or a shorter notice. Public sales of such property must be had at the courthouse door, or at the residence of the decedent, or at some other public place; but no sale shall be made of any personal property which is not present at the time of sale, and the sale must be for cash, unless the court or judge otherwise order.

10204
amended
L. 37 c. 77
sec. 1 p. 141

History: En. Sec. 180, p. 286, L. 1877; amd. Sec. 2654, C. Civ. Proc. 1895; re-en. re-en. Sec. 180, 2nd Div. Rev. Stat. 1879; Sec. 7555, Rev. C. 1907; re-en. Sec. 10204, re-en. Sec. 180, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1526.

CHAPTER 130

SUMMARY SALE OF MINES AND MINING INTERESTS

- Section 10205. Mines may be sold, how.
 10206. Petition for sale—who may file and what to contain.
 10207. Order to show cause—how made and on what notice.
 10208. Order of sale—when and how to be made.
 10209. Further proceedings—how regulated.

10205. Mines may be sold, how. When it appears from the inventory that the estate consists, in whole or in part, of mines or interests in mines, or of shares, interests, or stocks in a mining corporation, such mines, interests, stocks, or shares may be sold under the order of the court or judge.

History: En. Sec. 181, p. 287, L. 1877; re-en. Sec. 2660, C. Civ. Proc. 1895; re-en. re-en. Sec. 181, 2nd Div. Rev. Stat. 1879; Sec. 7556, Rev. C. 1907; re-en. Sec. 10205, re-en. Sec. 181, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1529.

10206. Petition for sale—who may file and what to contain. The executor or administrator, or any heir-at-law, or creditor of the estate, or any partner or member of any mining company or corporation in which interests or shares are held or owned by the estate, may file in the court a petition, in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company or corporation in which such interests or shares are held, and the grounds upon which the sale is asked to be made.

History: En. Sec. 182, p. 287, L. 1877; re-en. Sec. 2661, C. Civ. Proc. 1895; re-en. re-en. Sec. 182, 2nd Div. Rev. Stat. 1879; Sec. 7557, Rev. C. 1907; re-en. Sec. 10206, re-en. Sec. 182, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1530.

10207. Order to show cause—how made and on what notice. Upon the presentation of such petition, the court or judge must make an order directing all persons interested to appear before such court or judge, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mine, mining interests, shares, or stocks, as set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as the court or judge shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with.

History: En. Sec. 183, p. 288, L. 1877; re-en. Sec. 2662, C. Civ. Proc. 1895; re-en. re-en. Sec. 183, 2nd Div. Rev. Stat. 1879; Sec. 7558, Rev. C. 1907; re-en. Sec. 10207, re-en. Sec. 183, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1531.

10208. Order of sale—when and how to be made. If, upon hearing the petition, it appears to the satisfaction of the court or judge that it is

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amended
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10206
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10206
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L. 41 c. 84
sec. 2 p. 143

10207
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10207
repealed
L. 41 c. 84
sec. 3 p. 143

10208
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10208
repealed
L. 41 c. 84
sec. 3 p. 143

to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary in order to secure the just rights or interests of the mining partners or tenants in common, such court or judge must make an order authorizing the executor or administrator to sell such mining interests, mines, or shares, as herein provided.

History: En. Sec. 184, p. 288, L. 1877; re-en. Sec. 2663, C. Civ. Proc. 1895; re-en. Sec. 184, 2nd Div. Rev. Stat. 1879; Sec. 7559, Rev. C. 1907; re-en. Sec. 10208, re-en. Sec. 184, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1532.

10209
106 P.(2d) 343,
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10209
repealed
L. 41 c. 84
sec. 3 p. 143

10209. Further proceedings—how regulated. After the order of sale is made, all further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of sections 10200 to 10204 and 10210 to 10248 of this code.

History: En. Sec. 185, p. 288, L. 1877; re-en. Sec. 2664, C. Civ. Proc. 1895; re-en. Sec. 185, 2nd Div. Rev. Stat. 1879; Sec. 7560, Rev. C. 1907; re-en. Sec. 10209, re-en. Sec. 185, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1533.

CHAPTER 131

SALE OF REAL ESTATE AND OF CONTRACTS FOR PURCHASE OF LANDS.

- Section** 10210. Executor or administrator may sell property, when.
10211. Verified petition for sale—what it may contain and to what it may refer.
10212. Order directing interested persons to appear.
10213. Service and publication of order.
10214. Hearing by court, conduct of.
10215. Administrator, executor, and witnesses may be examined.
10216. To sell real estate, or any part, when.
10217. Order of sale—when to be made.
10218. What the order of sale must contain—may be at public or private sale.
10219. Interested persons may apply for order of sale—form of petition.
10220. Notice of sale.
10221. Time and place.
10222. Private sale of real estate, how made and notice—bids, when and how received.
10223. Ninety per cent. of appraised value must be offered.
10224. Purchase-money on sale on credit—how secured.
10225. Return of proceedings—notice of hearing—setting aside sale—resale.
10226. May file objections, when and who.
10227. When order of confirmation is to be made, and when not.
10228. Conveyances.
10229. Order of confirmation—what to state.
10230. Sale may be postponed.
10231. Notice of postponement.
10232. Where payment of debts, etc., provided for by will.
10233. Sale without order—may require security.
10234. Where provision by will insufficient.
10235. Estate subject to debts, etc.
10236. Contribution among legatees.
10237. Contract for purchase of lands may be sold, how.
10238. Conditions of sale.
10239. Purchaser to give bond.
10240. Executor or administrator to assign contract.
10241. Sales by executor or administrator of lands under mortgage.
10242. The holder of the mortgage or lien may purchase the lands—his receipt to the amount of his claim a valid payment.
10243. Administrator and executor liable for misconduct in sale.
10244. Fraudulent sales.
10245. Limitation of actions for vacating sale, etc.
10246. To what cases preceding section not to apply.
10247. Account of sale to be returned.
10248. Executor, etc., not to be purchaser.

10210. Executor or administrator may sell property, when. When a sale of the property is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate, upon the order of the court or judge; and an application for the sale of real property may also embrace the sale of personal property.

History: En. Sec. 186, p. 288, L. 1877; re-en. Sec. 186, 2nd Div. Rev. Stat. 1879; re-en. Sec. 186, 2nd Div. Comp. Stat. 1887; amd. Sec. 2670, C. Civ. Proc. 1895; re-en. Sec. 7561, Rev. C. 1907; amd. Sec. 1, Ch. 3, L. 1915; re-en. Sec. 10210, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1536.

References

Cited or applied as section 7561, Revised Codes, before amendment, in *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847; *Lamont v. Vinger*, 61 M 530, 538, 539, 202 P 769; In re *McLure's Estate*, 76 M 476, 487, 248 P 362; *Swanberg v. National Surety Co.*, 86 M 340, 351, 356, 283 P 761; *State v. McCracken*, 91 M 157, 163, 6 P 2d 869.

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10211. Verified petition for sale—what it may contain and to what it may refer. To obtain such order for the sale of real property, he must present a verified petition to the court or judge, setting forth the amount of personal property that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner; and if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, that a sale be made, the petition, in addition to the foregoing facts, must set forth in what way an advantage or benefit would accrue to the estate, and those interested therein, by such sale. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the order.

History: En. Sec. 187, p. 289, L. 1877; re-en. Sec. 187, 2nd Div. Rev. Stat. 1879; re-en. Sec. 187, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2671, C. Civ. Proc. 1895; re-en. Sec. 7562, Rev. C. 1907; amd. Sec. 2, Ch. 3, L. 1915; re-en. Sec. 10211, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1537.

Defects in Proceeding Subject Only to Review on Appeal

Where the district court had jurisdiction to make an order of sale of a decedent's real estate, and the order itself was not void, any defects in the proceedings leading up to the sale were errors within jurisdiction, subject to review on appeal

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in the probate proceedings only, and not open to collateral attack by heirs seeking to set aside the sale for errors which amounted only to irregularities in the proceedings. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 289, 99 P 847.

Where the court has jurisdiction to make an order of sale, the remedy for any error committed by it in making such order is by appeal. Such error is not ground for collateral attack. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 290, 99 P 847.

Effect of a Petition so Defective as to Defeat Jurisdiction

If the petition upon which the order of sale was made is so defective that the court did not acquire jurisdiction, the order may be assailed at any time upon a collateral as well as upon a direct attack; but if the facts stated in the petition were sufficient to confer jurisdiction upon the court to hear the application, its order directing a sale cannot be impeached upon a collateral attack. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 290, 99 P 847.

Operation and Effect

If the debts of the estate appear to exceed in amount the available means at hand with which to pay them, it may fairly be said to appear that a sale is necessary; and, if real estate is to be sold, the court or judge may properly consult the recitals of the petition as to the condition of the real estate to determine whether all or only a portion should be sold, and, if only a portion, then what particular portion. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847.

The authority of the probate court to order a sale of real property of an intestate is not included in its general jurisdiction over the administration but is special and limited and can be exercised only in the manner prescribed by the statute. *Lamont v. Vinger*, 61 M 530, 539, 202 P 769.

Requirement That the "Condition" and "Value" of Real Estate be Set Forth is Not Jurisdictional

The requirement of the statute, that the "condition" and "value" of the real estate be set forth in a petition to sell such real property to pay debts, is not jurisdictional; and, upon a collateral attack, defects in the petition with reference to such matters will not operate to set aside the proceedings had on the petition for leave to sell, after the sale has been made and the purchaser has, in good faith, paid the purchase price and gone into possession of the land sold. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 279, 99 P 847.

A petition to sell real estate of a decedent, which in its statement as to the "condition" thereof was so defective as to amount to an entire omission in this regard, and which as to its value set forth that it has been "appraised at the sum of two thousand dollars," the appraisement being had less than one year prior to the presentation of the petition, was not so defective as to render the sale void on a collateral attack, in an action to quiet title brought by heirs of the estate. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 284, 99 P 847.

Scope of Investigation by Court on Order for Sale of Real Estate

The district court, when sitting in probate, on an application for an order of sale of real estate, may not enter into an investigation of questions of title to property included in the order, and alleged by objectors to the granting of such order to have been devised for a valuable consideration, and for that reason exempt from sale until after the disposition of all the other property belonging to the estate. In *re Tuohy's Estate*, 33 M 230, 243, 83 P 486.

Substantial Compliance Sufficient

The petition is sufficient if it substantially complies with the statute. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 277, 99 P 847.

References

In *re McLure's Estate*, 76 M 476, 487, 248 P 362; *State v. McCracken*, 91 M 157, 163, 6 P 2d 869.

10212. Order directing interested persons to appear. If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, to sell the whole or some portion of the real estate, for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed, and an order thereupon made, directing all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than fifteen, nor more than thirty days from the time of making such

order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

History: En. Sec. 188, p. 289, L. 1877; re-en. Sec. 188, 2nd Div. Rev. Stat. 1879; re-en. Sec. 188, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2672, C. Civ. Proc. 1895; re-en. Sec. 7563, Rev. C. 1907; amd. Sec. 3, Ch. 3, L. 1915; re-en. Sec. 10212, R. C. M. 1921; amd. Sec. 1, Ch. 67, L. 1927. Cal. C. Civ. Proc. Sec. 1538.

Operation and Effect

Held, that where the proceedings had before the probate court on application by an administrator for an order of sale of real property disclosed that no order to show cause was ever made, published or served upon the parties interested, the sale was void for want of jurisdiction and

open to collateral attack. *Lamont v. Vinger*, 61 M 530, 538, 539, 202 P 769.

Id. Held, that the matter of procuring an order of sale of real property belonging to the estate of an intestate is one quasi in rem and not strictly in rem, and that therefore failure to make an order to show cause and to serve it substantially in the manner required by the Codes rendered the sale void.

Id. In the absence of waiver, notice to the heirs of an intestate of a contemplated sale of real property is indispensable.

References

In re McGovern's Estate, 77 M 182, 198, 250 P 812.

10213. Service and publication of order. A copy of the order to show cause must be personally served on the heirs of the decedent, and any legatee or devisee, and any general guardian of a minor heir, legatee or devisee, providing they are residents of the county and can be found therein. If any such persons are not residents of the county, or if resident and cannot be found therein, the clerk of the court must forthwith deposit a copy of the order in the post office, registered, postage prepaid, directed to the person to be served, at his place of residence, such service to be at least ten days before the time appointed for hearing the petition. In lieu of such personal service or service by mail such order may be published once a week for two consecutive weeks in such newspaper in the county as the court or judge may direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time.

History: En. Sec. 189, p. 289, L. 1877; re-en. Sec. 189, 2nd Div. Rev. Stat. 1879; re-en. Sec. 189, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2673, C. Civ. Proc. 1895; re-en. Sec. 7564, Rev. C. 1907; re-en. Sec. 10213, R. C. M. 1921; amd. Sec. 2, Ch. 67, L. 1927; amd. Sec. 1, Ch. 159, L. 1929. Cal. C. Civ. Proc. Sec. 1539.

10214. Hearing by court, conduct of. The court or judge, at the time appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service upon the heirs, legatees, devisees or general guardian of any minor heir, devisee or legatee, and satisfactory proof of service by registered mail upon any of such parties not residents of the county, or if resident and cannot be found therein, or by publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application.

History: En. Sec. 190, p. 289, L. 1877; re-en. Sec. 190, 2nd Div. Rev. Stat. 1879; re-en. Sec. 190, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2674, C. Civ. Proc. 1895; re-en. Sec. 7565, Rev. C. 1907; re-en. Sec. 10214, R. C. M. 1921; amd. Sec. 2, Ch. 159, L. 1929. Cal. C. Civ. Proc. Sec. 1540.

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10215. Administrator, executor, and witnesses may be examined. The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the court or judge, in the same manner and with like effect as in other cases.

History: En. Sec. 191, p. 289, L. 1877; re-en. Sec. 191, 2nd Div. Rev. Stat. 1879; re-en. Sec. 191, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2675, C. Civ. Proc. 1895; re-en. Sec. 7566, Rev. C. 1907; re-en. Sec. 10215, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1541.

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10216. To sell real estate, or any part, when. If it appears necessary, or that it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, to sell part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such character, with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold, the court or judge may authorize the sale of the whole estate, or of any part thereof, necessary and for the best interest of all concerned.

History: En. Sec. 192, p. 290, L. 1877; re-en. Sec. 192, 2nd Div. Rev. Stat. 1879; re-en. Sec. 192, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2676, C. Civ. Proc. 1895; re-en. Sec. 7567, Rev. C. 1907; amd. Sec. 4, Ch. 3, L. 1915; re-en. Sec. 10216, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1542.

References

Lamont v. Vinger, 61 M 530, 539, 202 P 769; In re McGovern's Estate, 77 M 182, 198, 250 P 812.

10217. Order of sale—when to be made. If the court or judge is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this chapter, or that a sale of the whole or some portion of the real estate is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, or if such sale be assented to by all of the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition, as the court or judge shall judge necessary or beneficial.

History: En. Sec. 193, p. 290, L. 1877; re-en. Sec. 193, 2nd Div. Rev. Stat. 1879; re-en. Sec. 193, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2677, C. Civ. Proc. 1895; re-en. Sec. 7568, Rev. C. 1907; amd. Sec. 5, Ch. 3, L. 1915; re-en. Sec. 10217, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1543.

10218. What the order of sale must contain—may be at public or private sale. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or on a credit not exceeding one year, payable in gross or in instalments, with interest, as the court or judge may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court or judge otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court or judge must order the

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remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court or judge, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court or judge may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall deem to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell, by order of the court or judge, made on motion, after due notice, by any party interested.

History: En. Sec. 194, p. 290, L. 1877; re-en. Sec. 194, 2nd Div. Rev. Stat. 1879; re-en. Sec. 194, 2nd Div. Comp. Stat. 1887; amd. Sec. 2678, C. Civ. Proc. 1895; re-en. Sec. 7569, Rev. C. 1907; re-en. Sec. 10218, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1544.

Operation and Effect

Where real estate of a deceased person was sold, on the petition of the administratrix, for cash and for considerably more than its appraised value, and the court, after a full hearing, confirmed the sale, the failure of the order of sale to state the

terms thereof was cured by such confirmation. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 285, 99 P 847.

The court may make its order of sale in the alternative. It may grant authority to sell either at public or private sale. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 285, 99 P 847.

References

Cited or applied as section 2678, Code of Civil Procedure, in *In re Tuohy's Estate*, 33 M 230, 245, 83 P 486.

10219. Interested persons may apply for order of sale—form of petition.

If the executor or administrator neglects to apply for an order of sale when it is necessary, or when it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, that the real estate, or some portion thereof, be sold, any person in interest may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator before the hearing. The petition of such applicant must contain as many of the matters set forth in section 10211 as he can ascertain, and the order of sale must fix the period of time within which the executor or administrator must make the sale.

History: En. Sec. 195, p. 291, L. 1877; re-en. Sec. 195, 2nd Div. Rev. Stat. 1879; re-en. Sec. 195, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2679, C. Civ. Proc. 1895; re-en. Sec. 7570, Rev. C. 1907; amd. Sec. 6, Ch.

3, L. 1915; re-en. Sec. 10219, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1545.

References

In *re McLure's Estate*, 76 M 476, 487, 248 P 362.

10220. Notice of sale. When a sale is ordered, and it is to be made at public auction, notice of the time and place must be posted in three of the most public places in the county in which the land is situated, and published once in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court or judge may direct, not less than seven days before the date of sale; the lands and tenements to be sold must be described with common certainty in the notice.

History: En. Sec. 196, p. 291, L. 1877; re-en. Sec. 196, 2nd Div. Rev. Stat. 1879; re-en. Sec. 196, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2680, C. Civ. Proc. 1895; re-en.

Sec. 7571, Rev. C. 1907; re-en. Sec. 10220, R. C. M. 1921; amd. Sec. 3, Ch. 67, L. 1927. Cal. C. Civ. Proc. Sec. 1547.

10221. Time and place. Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or

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more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

History: En. Sec. 197, p. 291, L. 1877; re-en. Sec. 197, 2nd Div. Rev. Stat. 1879; re-en. Sec. 197, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2681, C. Civ. Proc. 1895; re-en. Sec. 7572, Rev. C. 1907; re-en. Sec. 10221, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1548.

10222. Private sale of real estate, how made and notice—bids, when and how received. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, if none, then in such paper as the court or judge may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice, and before the making of the sale. If it be shown that it will be for the best interests of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

History: En. Sec. 198, p. 292, L. 1877; re-en. Sec. 198, 2nd Div. Rev. Stat. 1879; re-en. Sec. 198, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2682, C. Civ. Proc. 1895; re-en. Sec. 7573, Rev. C. 1907; re-en. Sec. 10222, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1549.

10223. Ninety per cent. of appraised value must be offered. No sale of real estate at private sale shall be confirmed by the court or judge, unless the sum offered is at least ninety per cent. of the appraised value thereof, nor unless such real state has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court or judge is satisfied that the appraisalment is too high or too low, appraisers must be appointed, and they must make an appraisalment thereof in the same manner as in case of an original appraisalment of an estate. This may be done at any time before the sale or the confirmation thereof.

History: En. Sec. 199, p. 292, L. 1877; re-en. Sec. 199, 2nd Div. Rev. Stat. 1879; re-en. Sec. 199, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2683, C. Civ. Proc. 1895; re-en. Sec. 7574, Rev. C. 1907; re-en. Sec. 10223, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1550.

10224. Purchase-money on sale on credit—how secured. The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase-money, with a mortgage on the property to secure the payment.

History: En. Sec. 200, p. 292, L. 1877; re-en. Sec. 200, 2nd Div. Rev. Stat. 1879; re-en. Sec. 200, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2684, C. Civ. Proc. 1895; re-en. Sec. 7575, Rev. C. 1907; re-en. Sec. 10224, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1551.

10225. Return of proceedings—notice of hearing—setting aside sale—resale. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court or judge must fix the day for the hearing, of which notice thereof of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court or judge must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court or judge may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent. more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court or judge to accept such offer and confirm the sale to such person, or to order a new sale.

History: En. Sec. 201, p. 293, L. 1877; re-en. Sec. 201, 2nd Div. Rev. Stat. 1879; re-en. Sec. 201, 2nd Div. Comp. Stat. 1887; amd. Sec. 2685, C. Civ. Proc. 1895; re-en. Sec. 7576, Rev. C. 1907; re-en. Sec. 10225, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1552.

Operation and Effect

Where the probate court refuses to confirm an administrator's sale of real property made under its order, it must under this section, order a resale. In *re McLure's Estate*, 76 M 476, 487 et seq., 248 P 362.

Id. The district court, under this section, may set aside an administrator's sale of the decedent's real property if it is made to appear that the proceedings were unfair, or that the bid was disproportionate to its value and that, on a resale, a bid exceeding that received by at least ten per cent. might be had.

Id. If an administrator's sale of real property, may, under this section, be set

aside for inadequacy of consideration alone without a showing that on resale a bid exceeding that received by at least ten per cent. may be had, the rule can exist only in cases where it is made to appear that the bid made is so grossly inadequate as to raise a presumption of fraud and unfairness in the conduct of the sale.

Under this section, the probate court may, if at the hearing upon the return of an executor or administrator of a sale of estate real property an offer of at least ten per cent. exceeding the bid of a purchaser be made, in its discretion accept such higher bid without ordering a resale. *State v. McCracken*, 91 M 157, 163, 6 P 2d 869.

References

Cited or applied as section 2685, Code of Civil Procedure, in *Goodell v. Sanford*, 31 M 163, 172, 77 P 522; as section 7576, Revised Codes, in *State ex rel. King v. District Court*, 42 M 182, 184, 111 P 717.

10226. May file objections, when and who. When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections.

History: En. Sec. 202, p. 293, L. 1877; re-en. Sec. 202, 2nd Div. Rev. Stat. 1879; re-en. Sec. 202, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2686, C. Civ. Proc. 1895; re-en. Sec. 7577, Rev. C. 1907; re-en. Sec. 10226, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1553.

Operation and Effect

While an administrator is not one of the "persons interested in the estate" who may file objections to the confirmation of a sale of the estate under this section,

and his recommendation when making return of the sale that the sale be not confirmed may have been insufficient to give the court jurisdiction to make an order refusing to confirm, where the bidders by a petition filed subsequent to the return asked that a hearing be had thereon as they could do under this section as parties most interested in the confirmation, it was vested with jurisdiction to proceed. In *re McLure's Estate*, 76 M 476, 488, 248 P 362.

10227. When order of confirmation is to be made, and when not. If it appears to the court or judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section 10225 be made and accepted by the court or judge, the court or judge must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it, and directing conveyances to be executed, must be recorded in the office of the county clerk of the county in which the land is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court or judge may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

History: En. Sec. 203, p. 293, L. 1877; re-en. Sec. 203, 2nd Div. Rev. Stat. 1879; re-en. Sec. 203, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2687, C. Civ. Proc. 1895; re-en. Sec. 7578, Rev. C. 1907; re-en. Sec. 10227, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1554.

Operation and Effect

This section, being the only provision of the code respecting the duties of a district court, sitting in probate, on default of a purchaser to comply with the terms of sale, such court had no power to set aside a guardian's sale of the property of the ward, and to authorize the guardian to retake possession thereof, on the failure of the purchaser to comply with the terms of purchase. *State ex rel. Donovan v.*

District Court, 27 M 415, 418, 71 P 401.

It is the order of confirmation which finally operates to divest the heirs of their title and to secure the property to the purchaser. All errors, irregularities, and defects, not jurisdictional, are cured by confirmation. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 286, 99 P 847.

References

Cited or applied as section 2687, Code of Civil Procedure, in *Goodell v. Sanford*, 31 M 163, 172, 77 P 522; In *re McLure's Estate*, 76 M 476, 489, 248 P 362; *Swanberg v. National Surety Co.*, 86 M 340, 351, 283 P 761; *State v. McCracken*, 91 M 157, 164, 6 P 2d 969.

10228. Conveyances. Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county clerk, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise,

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the estate has acquired any right, title, or interest, other than or in addition to that of the decedent, it also passes by such conveyances.

History: En. Sec. 204, p. 294, L. 1877; re-en. Sec. 204, 2nd Div. Rev. Stat. 1879; re-en. Sec. 204, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2688, C. Civ. Proc. 1895; re-en. Sec. 7579, Rev. C. 1907; re-en. Sec. 10228, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1555.

Operation and Effect

Under this section, requiring an executor, after the district court sitting in probate makes an order confirming a sale

of estate real property, to execute a conveyance to the purchaser, execution of the conveyance is a mere ministerial act, performance of which may be compelled by mandamus. State v. McCracken, 91 M 157, 165, 6 P 2d 869.

References

In re McLure's Estate, 76 M 476, 486, 248 P 362.

10229. Order of confirmation—what to state. Before an order is entered confirming the sale, it must be proved to the satisfaction of the court or judge that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

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History: En. Sec. 205, p. 294, L. 1877; re-en. Sec. 205, 2nd Div. Rev. Stat. 1879; re-en. Sec. 205, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2689, C. Civ. Proc. 1895; re-en. Sec. 7580, Rev. C. 1907; re-en. Sec. 10229, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1556.

10230. Sale may be postponed. If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

History: En. Sec. 206, p. 294, L. 1877; re-en. Sec. 206, 2nd Div. Rev. Stat. 1879; re-en. Sec. 206, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2690, C. Civ. Proc. 1895; re-en. Sec. 7581, Rev. C. 1907; re-en. Sec. 10230, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1557.

10231. Notice of postponement. In case of a postponement, notice thereof must be given by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

History: En. Sec. 207, p. 295, L. 1877; re-en. Sec. 207, 2nd Div. Rev. Stat. 1879; re-en. Sec. 207, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2691, C. Civ. Proc. 1895; re-en. Sec. 7582, Rev. C. 1907; re-en. Sec. 10231, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1558.

10232. Where payment of debts, etc., provided for by will. If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

History: En. Sec. 208, p. 295, L. 1877; re-en. Sec. 208, 2nd Div. Rev. Stat. 1879; re-en. Sec. 208, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2692, C. Civ. Proc. 1895; re-en. Sec. 7583, Rev. C. 1907; re-en. Sec. 10232, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1560.

10233. Sale without order—may require security. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court or judge, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold,

such directions must be observed. In either case no title passes unless the sale be confirmed by the court or judge.

History: En. Sec. 209, p. 295, L. 1877; re-en. Sec. 209, 2nd Div. Rev. Stat. 1879; re-en. Sec. 209, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2693, C. Civ. Proc. 1895; re-en. Sec. 7584, Rev. C. 1907; re-en. Sec. 10233, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1561.

Operation and Effect

A private sale by an executrix under a power in the will to manage the estate as she should deem best, and for that purpose to sell any portion or the whole thereof, which is afterwards confirmed by the court, is not a judicial sale, but a sale under the power. *Goodell v. Sanford*, 31 M 163, 171, 77 P 522.

10234. Where provision by will insufficient. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter.

History: En. Sec. 210, p. 296, L. 1877; re-en. Sec. 210, 2nd Div. Rev. Stat. 1879; re-en. Sec. 210, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2694, C. Civ. Proc. 1895; re-en. Sec. 7585, Rev. C. 1907; re-en. Sec. 10234, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1562.

10235. Estate subject to debts, etc. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises, or legacies, but specific devises or legacies are exempt from such liability, if it appears to the court or judge necessary to carry into effect the intention of the testator, and there is other sufficient estate.

History: En. Sec. 211, p. 296, L. 1877; re-en. Sec. 211, 2nd Div. Rev. Stat. 1879; re-en. Sec. 211, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2695, C. Civ. Proc. 1895; re-en. Sec. 7586, Rev. C. 1907; re-en. Sec. 10235, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1563.

References

Montgomery v. Gilbert, 77 F 2d 39.

10236. Contribution among legatees. When an estate given by will has been sold for the payment of debts or expenses, all the devisees or legatees must contribute according to their respective interests to the devisees or legatees whose devise or legacy has been taken therefor, and the court or judge, when distribution is made, must, by order for that purpose, settle the amount of the several liabilities, and order the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution.

History: En. Sec. 212, p. 296, L. 1877; re-en. Sec. 212, 2nd Div. Rev. Stat. 1879; re-en. Sec. 212, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2696, C. Civ. Proc. 1895; re-en. Sec. 7587, Rev. C. 1907; re-en. Sec. 10236, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1564.

10237. Contract for purchase of lands may be sold, how. If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for the purpose as are prescribed in this chapter for the sale of lands of which he died seized, except as hereinafter provided.

History: En. Sec. 213, p. 297, L. 1877; re-en. Sec. 213, 2nd Div. Rev. Stat. 1879; re-en. Sec. 213, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2697, C. Civ. Proc. 1895; re-en. Sec. 7588, Rev. C. 1907; re-en. Sec. 10237, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1565.

10238. Conditions of sale. The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court or judge until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court or judge shall approve.

History: En. Sec. 214, p. 297, L. 1877; re-en. Sec. 214, 2nd Div. Rev. Stat. 1879; re-en. Sec. 214, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2698, C. Civ. Proc. 1895; re-en. Sec. 7589, Rev. C. 1907; re-en. Sec. 10238, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1566.

10239. Purchaser to give bond. The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator, and the persons so entitled, against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract.

History: En. Sec. 215, p. 297, L. 1877; re-en. Sec. 2699, C. Civ. Proc. 1895; re-en. Sec. 215, 2nd Div. Rev. Stat. 1879; re-en. Sec. 7590, Rev. C. 1907; re-en. Sec. 10239, re-en. Sec. 215, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1567.

10240. Executor or administrator to assign contract. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale; and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have if he were living.

History: En. Sec. 216, p. 298, L. 1877; re-en. Sec. 2700, C. Civ. Proc. 1895; re-en. Sec. 216, 2nd Div. Rev. Stat. 1879; re-en. Sec. 7591, Rev. C. 1907; re-en. Sec. 10240, re-en. Sec. 216, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1568.

10241. Sales by executor or administrator of lands under mortgage or lien. When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase-money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase-money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase-money has been actually so applied. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase-money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase-money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was

taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court or judge otherwise directs.

History: En. Sec. 217, p. 298, L. 1877; re-en. Sec. 217, 2nd Div. Rev. Stat. 1879; re-en. Sec. 217, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2701, C. Civ. Proc. 1895; re-en. Sec. 7592, Rev. C. 1907; re-en. Sec. 10241, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1569.

10242. The holder of the mortgage or lien may purchase the lands—his receipt to the amount of his claim a valid payment. At any sale, under order of the court or judge, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses.

History: En. Sec. 218, p. 298, L. 1877; re-en. Sec. 218, 2nd Div. Rev. Stat. 1879; re-en. Sec. 218, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2702, C. Civ. Proc. 1895; re-en. Sec. 7593, Rev. C. 1907; re-en. Sec. 10242, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1570.

10243. Administrator and executor liable for misconduct in sale. If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

History: En. Sec. 219, p. 299, L. 1877; re-en. Sec. 219, 2nd Div. Rev. Stat. 1879; re-en. Sec. 219, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2703, C. Civ. Proc. 1895; re-en. Sec. 7594, Rev. C. 1907; re-en. Sec. 10243, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1571.

Operation and Effect

The general or qualifying bond of an administrator may in any case be wholly responsible for the proceeds of the sale of

real property of his estate, in contemplation of the statutes which form a part of the contract, and even where an additional bond is required on the sale of such property, the qualifying bond is jointly liable with it for the proceeds. *Swanberg v. National Surety Co.*, 86 M 340, 355, 283 P 761.

References

Montgomery v. Gilbert, 77 F. 2d 39.

10244. Fraudulent sales. Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

History: En. Sec. 220, p. 299, L. 1877; re-en. Sec. 220, 2nd Div. Rev. Stat. 1879; re-en. Sec. 220, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2704, C. Civ. Proc. 1895; re-en. Sec. 7595, Rev. C. 1907; re-en. Sec. 10244, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1572.

References

Montgomery v. Gilbert, 77 F. 2d 39.

10245. Limitation of actions for vacating sale, etc. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based.

History: En. Sec. 221, p. 299, L. 1877; re-en. Sec. 221, 2nd Div. Rev. Stat. 1879; re-en. Sec. 221, 2nd Div. Comp. Stat. 1887; amd. Sec. 2705, C. Civ. Proc. 1895; re-en. Sec. 7596, Rev. C. 1907; re-en. Sec. 10245, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1573.

Operation and Effect

An action to recover real property sold by an administrator under an alleged void

order of sale, brought after the limitation prescribed by this section, within which an heir must commence his action had expired, but within the three-year period after reaching his majority (Sec. 10246), was not barred. *Lamont v. Vinger*, 61 M 530, 536 et seq., 202 P 769.

References

Montgomery v. Gilbert, 77 F. 2d 39.

10246. To what cases preceding section not to apply. The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after removal of the disability.

History: En. Sec. 222, p. 300, L. 1877; re-en. Sec. 222, 2nd Div. Rev. Stat. 1879; re-en. Sec. 222, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2706, C. Civ. Proc. 1895; re-en. Sec. 7597, Rev. C. 1907; re-en. Sec. 10246, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1574.

Operation and Effect

An action to recover real property sold by an administrator under an alleged void

order of sale, brought after the limitation prescribed by the preceding section, within which an heir must commence his action had expired, but within the three-year period after reaching his majority (this section), was not barred. *Lamont v. Vinger*, 61 M 530, 536 et seq., 202 P 769.

References

Montgomery v. Gilbert, 77 F. 2d 39.

10247. Account of sale to be returned. When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court or judge, within thirty days thereafter, an account of sales, verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made.

History: En. Sec. 223, p. 300, L. 1877; re-en. Sec. 223, 2nd Div. Rev. Stat. 1879; re-en. Sec. 223, 2nd Div. Comp. Stat. 1887; amd. Sec. 2707, C. Civ. Proc. 1895; re-en. Sec. 7598, Rev. C. 1907; re-en. Sec. 10247, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1575.

References

In re *Rinio's Estate*, 93 M 428, 432, 19 P 2d 322.

10248. Executor, etc., not to be purchaser. No executor or administrator must, either directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

History: En. Sec. 224, p. 300, L. 1877; re-en. Sec. 2708, C. Civ. Proc. 1895; re-en. Sec. 224, 2nd Div. Rev. Stat. 1879; Sec. 7599, Rev. C. 1907; re-en. Sec. 10248, re-en. Sec. 224, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1576.

CHAPTER 132

MORTGAGING AND LEASING REAL ESTATE

- Section 10249. Judge may empower administrator or executor to mortgage or lease real estate.
10250. Manner of obtaining authority to mortgage—petition, contents and filing.
10251. Order to show cause.
10252. Service and publication of order.
10253. Hearing on application to mortgage—order of court directing loan.
10254. Execution and delivery of promissory notes and mortgages—recording of copy of order.
10255. Effect of mortgage—jurisdiction of court—irregularity not to invalidate—deficiency judgment.
10256. Leasing—procedure to procure order—provisions and terms—execution—effect.

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10249. Judge may empower administrator or executor to mortgage or lease real estate. Whenever, in any estate now being administered, or that may hereafter be administered, it shall appear to the district court, or a judge thereof, to be for the advantage of the estate to raise money upon a note or notes, to be secured by mortgage of the real property of any decedent, or any part thereof, or to make a lease of said realty, or any part thereof, the court or judge, as often as occasion therefor shall arise in the administration of any estate, may, on a petition, notice and hearing as provided in this chapter, authorize, empower, and direct the executor or administrator to mortgage such real estate, or any part thereof, and to execute a note or notes to be secured by such mortgage, or to lease such real estate, or any part thereof.

History: En. Sec. 2720, C. Civ. Proc. 1895; re-en. Sec. 7600, Rev. C. 1907; amd. Sec. 1, Ch. 187, L. 1919; amd. Sec. 1, Ch. 18, L. 1921; re-en. Sec. 10249, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1577.

Court Cannot Abrogate a Lease Regular in All Respects for a More Favorable One

The district court has no power, against the objection of the person designated in an order as the lessee, to revoke an order directing the executor to lease land to such person at a fixed rental, where he has accepted and complied with the conditions of the order, though the executor has subsequently had a more favorable offer. State ex rel. Shields v. District Court, 24 M 1, 12, 60 P 489.

Lease Must be Made According to the Terms of the Court Order

After the district court has made an order directing an executor to make a particular lease specified in the order, no discretion is left to the executor; the duty is obligatory upon him to carry out the order according to its terms. State ex rel. Shields v. District Court, 24 M 1, 10, 60 P 489.

Lease or Mortgage to Pay Debts

When necessary to pay the debts of an estate it is the duty of the administrator to take the requisite steps for that purpose under either of the three methods provided by sections 10195, 10196, 10210,

or this section. Swanberg v. National Surety Co., 86 M 340, 356, 283 P 761.

Parties to Lease Must be Before Court

Upon an application for leave to execute a lease to a certain person, the district court cannot grant a lease to other parties who are not before it. State ex rel. Shields v. District Court, 24 M 1, 12, 60 P 489.

Id. The district court cannot, of its own motion, without any application, notice, or hearing, grant a lease to any person making it known that a lease is desired.

Power of Court to Modify Terms of Lease

The district court has power to modify an order, previously made, as to the amount of rental, where the executor and the lessees have agreed to the modification. State ex rel. Shields v. District Court, 24 M 1, 11, 60 P 489.

Power to Lease

The district court has authority to enter an order directing an executor to make a lease of his decedent's lands for the term and rental and to the parties specified in the order. State ex rel. Shields v. District Court, 24 M 1, 9, 60 P 489.

References

Lamont v. Vinger, 61 M 530, 542, 202 P 769.

10250. Manner of obtaining authority to mortgage—petition, contents and filing. To obtain an order to mortgage such realty, the proceedings to be taken and the effect thereof must be as follows:

The executor, administrator, or any person interested in the estate may file a verified petition showing: The particular purpose or purposes for which it is proposed to make the mortgage, which shall be either to pay the debts, legacies, or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said realty, or some part thereof; a statement of the debts, legacies, charges of administration, liens, or mortgages to be paid, reduced, extended, or renewed,

as the case may be; the advantage that may accrue to the estate from raising the required money by mortgage, or providing for the payment, reduction, extension, or renewal of the subsisting liens, or mortgages, as the case may be; the amount to be raised, with a general description of the property proposed to be mortgaged; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Sec. 10250, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1578.

References

Lamont v. Vinger, 61 M 530, 542, 202 P 769.

10251. Order to show cause. Upon filing such petition an order must be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than fifteen (15) nor more than thirty (30) days thereafter, then and there to show cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged for the amount mentioned in the petition (stating such amount), or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Sec. 10251, R. C. M. 1921; amd. Sec. 1, Ch. 70, L. 1927. Cal. C. Civ. Proc. Sec. 1578.

10252. Service and publication of order. The order to show cause may be personally served on the persons interested in the estate, at least ten (10) days before the time appointed for hearing the petition, or it may be published once a week for two (2) successive weeks in such newspaper published in the county, as the court or judge shall direct. If all persons interested in the estate join in the petition or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time; provided, further, that if such petition is for the purpose of extending or renewing any mortgage already subsisting on said realty, or on some part thereof, and the court finds such extension or renewal necessary or to the best interest of the estate, the court may make an order authorizing the extension or renewal of such mortgage without notice.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Sec. 10252, R. C. M. 1921; amd. Sec. 2, Ch. 70, L. 1927. Cal. C. Civ. Proc. Sec. 1578.

10253. Hearing on application to mortgage—order of court directing loan. At the time and place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), having first received satisfactory proof of personal service or publication of the order to show cause, the court or judge must proceed to hear the petition and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to appear and testify, in the manner, and with like effect, as in other cases; and if, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole, or any portion, of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator, or the guardian of such minor or incom-

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petent person, to make such mortgage, and a promissory note or notes to the lender, for the amount of the loan to be secured by said mortgage; the order may direct that a lesser amount than that named in the petition be borrowed, and may prescribe the maximum rate of interest, and the period of the loan, and require that the interest, and the whole or any part of the principal be paid, from time to time, out of the whole estate, or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further security of the lender, and the premiums paid from any moneys in the estate.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; amd. Sec. 2, Ch. 187, L. 1919; re-en. Sec. 10253, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1578.

10254. Execution and delivery of promissory notes and mortgages—recording of copy of order. After the making of the order to mortgage, the executor or administrator, or the guardian of a minor or incompetent person, shall execute and deliver a promissory note or notes for the amount and period specified in the order, and shall execute, acknowledge, and deliver a mortgage of the premises, setting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the encumbered land, or any part thereof, lies. The note or notes and the mortgage shall be signed by the executor, administrator, or guardian as such, and shall create no personal liability against the person or persons so signing.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; amd. Sec. 3, Ch. 187, L. 1919; re-en. Sec. 10254, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1578.

10255. Effect of mortgage—jurisdiction of court—irregularity not to invalidate—deficiency judgment. Every mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest, and estate which the decedent had in the premises described therein, at the time of his death, and any right, title, or interest in said premises, acquired by his estate, by operation of law, or otherwise, since the time of his death. Jurisdiction of the court to administer the decedent's estate shall be effectual to vest such court and judge with jurisdiction to make the order for the mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same, or the mortgage given in pursuance thereof; and the mortgagee, his heirs and assigns, shall have and possess the same rights and remedies on the mortgage, as if it had been made by the decedent prior to his death. Upon any foreclosure, if the proceeds of the encumbered property are insufficient to pay the mortgage, no judgment or claim for any deficiency of such proceeds, to satisfy the mortgage, or the costs or expenses of sale, shall be had or allowed, except in cases where the mortgage was given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate. The part of the indebtedness remaining unsatisfied

must be classed and paid with other demands against the estate, as provided in sections 10307 to 10317, of this code, with respect to mortgages subsisting at the time of death.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Sec. 10255, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1578.

10256. Leasing—procedure to procure order—provisions and terms—execution—effect. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

1. The executor, administrator, or any person interested in the estate, may file a verified petition showing: The advantage or advantages that may accrue to the estate from giving a lease; a general description of the property proposed to be leased; the term, rental, and general conditions of the proposed lease; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner.

2. Upon filing such petition an order must be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

3. The order to show cause must be personally served on the persons residing in the county interested in the estate, at least ten days before the time appointed for hearing the petition, or be published for two successive weeks in a newspaper of general circulation published in the county.

4. At the time and place appointed in the order to show cause, or such other time and place to which the hearing may be postponed, the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court or judge may, in its or his discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for their services, not to exceed five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for five years, except that a lease or contract providing for the exploration of the premises for oil, gas or hydrocarbons may provide for a term of five years or for as long thereafter as oil, gas or hydrocarbons shall be produced in commercial quantities, and may prescribe the other terms and conditions of such lease.

5. After the making of the order to lease, the executor or administrator must execute, acknowledge, and deliver a lease of the premises, for the

rent, and period, and with the conditions specified in the order, such lease before it shall become effective shall be approved by the court or judge thereof before delivery, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county clerk of every county in which the leased land, or any portion thereof, lies.

6. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions prescribed therein, the premises described therein. Jurisdiction of the court to administer the decedent's estate shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings impairs or invalidates the same, or the lease made in pursuance thereof.

History: En. Sec. 2722, C. Civ. Proc. 1895; re-en. Sec. 7602, Rev. C. 1907; re-en. Sec. 10256, R. C. M. 1921; amd. Sec. 1, Ch. 113, L. 1923. Cal. C. Civ. Proc. Sec. 1579.

Operation and Effect

The error, omission, or irregularity, referred to in subdivision 6 of this section,

does not warrant dispensing with a verified petition by some authorized person, and notice to all parties interested, and an order made without such formalities is void. State ex rel. Shields v. District Court, 24 M 1, 13, 60 P 489.

10256.1
new sec.
L. 41 c. 170
sec. 2 p. 349

CHAPTER 133

GENERAL POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS—TO RECOVER PROPERTY—TO MAINTAIN ACTIONS—OTHER POWERS

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|---------|---|
| Section | 10257. Executors or administrator to take possession of the entire estate. |
| | 10258. Executors and administrators may sue and be sued. |
| | 10259. May maintain actions for waste, conversion, and trespass. |
| | 10260. Executor and administrator may be sued for waste, trespass or conversion of decedent. |
| | 10261. Surviving partner to settle up business—interest therein to be appraised—account to be rendered. |
| | 10262. Actions on bond of executor or administrator may be brought by another administrator. |
| | 10263. What executors are not parties to actions. |
| | 10264. May compound. |
| | 10265. Recovery of property fraudulently disposed of by testator. |
| | 10266. When executor or administrator to sue, as provided in preceding section. |
| | 10267. Disposition of estate recovered. |
| | 10267.1. Chattel mortgages, power of representative or guardian to make. |

10257. Executors or administrator to take possession of the entire estate. The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in sections 10018 to 10464 of this code.

History: En. Sec. 225, p. 300, L. 1877; re-en. Sec. 225, 2nd Div. Rev. Stat. 1879; re-en. Sec. 225, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2730, C. Civ. Proc. 1895; re-en. Sec. 7603, Rev. C. 1907; re-en. Sec. 10257, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1581.

Operation and Effect

An administrator has a right to the possession of the real estate of the decedent of whose estate he is administrator, and may bring ejectment in his own name as administrator, for the possession of the

same, against a trespasser. *Black v. Story*, 7 M 238, 242, 14 P 703. See also *In re Higgins' Estate*, 15 M 474, 485, 39 P 506; *Kohn v. McKinnon*, 90 F. 623, 626.

Where a defaulting vendee of farm lands in consideration of being permitted to remain in possession agreed in writing to give the vendor a promissory note secured by a crop mortgage for moneys due, an equitable lien was created though neither note nor mortgage were even given, which lien the administrator of the estate of the vendor, knowing of its existence, was in duty bound to collect, if possible, and for his failure to attempt to collect he was chargeable in his account for the resulting loss. *Scott et al. v. Tuggle*, 74 M 476, 484, 241 P 229.

10258. Executors and administrators may sue and be sued. Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by or against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

History: En. Sec. 226, p. 300, L. 1877; re-en. Sec. 226, 2nd Div. Rev. Stat. 1879; re-en. Sec. 226, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2731, C. Civ. Proc. 1895; re-en. Sec. 7604, Rev. C. 1907; re-en. Sec. 10258, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1582.

Operation and Effect

The right given to an administrator by this section, to maintain an action for the recovery of real property of his intestate (if applicable to an action to recover property sold by him under an order of sale) is not exclusive, section 10138 conferring the same right upon the heirs. *Lamont v. Vinger*, 61 M 530, 537, 202 P 769.

An executor cannot be forced to bring suit to recover possession of property claimed to be part of the estate unless necessity therefor for administrative pur-

Id. An administrator may not excuse his failure to collect a debt due to the estate of his decedent by reliance upon the advice of an attorney that an attempt to collect would result in litigation and delay in settlement of the estate.

References

Cited or applied as section 7603, Revised Codes, in *Tyler v. Tyler*, 50 M 65, 72, 144 P 1090; *In re Dolenty's Estate*, 53 M 33, 39, 161 P 524; *Maygar v. St. Louis Min. etc. Co.*, 68 M 492, 500, 219 P 1102; *In re Bradfield's Estate*, 69 M 247, 260, 221 P 531; *In re Jennings' Estate*, 74 M 449, 455, 241 P 648; *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761.

poses exists; hence where devisees petitioned for the removal of executors for failing to inventory a parcel of realty claimed by the devisees to be part of the estate and have others appointed in their place who would take action, and the record did not show that there were debts or claims unpaid or that the possession of the property was necessary to a proper discharge of the duty of the executors in administering the estate, the court properly refused to order their removal. *In re Estate of Deschamps*, 65 M 207, 215, 212 P 512.

References

Bielenberg v. Higgins et al., 85 M 56, 68, 277 P 631; *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761; *Langston et al. v. Currie et al.*, 95 M 57, 72, 26 P 2d 160.

10259. May maintain actions for waste, conversion, and trespass. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on or damage to the real estate of the decedent in his lifetime.

History: En. Sec. 227, p. 300, L. 1877; re-en. Sec. 227, 2nd Div. Rev. Stat. 1879; re-en. Sec. 227, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2732, C. Civ. Proc. 1895; re-en. Sec. 7605, Rev. C. 1907; re-en. Sec. 10259, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1583.

References

Swanberg v. National Surety Co., 86 M 340, 356, 283 P 761.

10260. Executor and administrator may be sued for waste, trespass or conversion of decedent. Any person or his personal representative may maintain an action against the executor or administrator of any testator or

intestate who, in his lifetime, has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

History: En. Sec. 228, p. 301, L. 1877; re-en. Sec. 228, 2nd Div. Rev. Stat. 1879; re-en. Sec. 228, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2733, C. Civ. Proc. 1895; re-en. Sec. 7606, Rev. C. 1907; re-en. Sec. 10260, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1584.

Operation and Effect

A cause of action for damages for wrongfully procuring the appointment of a receiver survives against the executor of a decedent wrongdoer. *Thornton-Thomas Co. v. Bretherton*, 32 M 80, 89, 80 P 10.

10261. Surviving partner to settle up business—interest therein to be appraised—account to be rendered. When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must give a bond, with sufficient sureties, in favor of the executor or administrator, in a sum at least equal to the value of the interest of the deceased partner in the property of the partnership. The amount of said bond must be fixed and the bond approved by the judge. In case he fails to give such bond, the court or judge may compel its execution by attachment or other proper order. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court or judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. The surviving partner is a trustee of the estate or interest of the deceased partner in the property of the partnership, for every purpose, and the court or judge may require the surviving partner to account at any time.

History: En. Sec. 229, p. 301, L. 1877; re-en. Sec. 229, 2nd Div. Rev. Stat. 1879; re-en. Sec. 229, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 146, L. 1889; amd. Sec. 2734, C. Civ. Proc. 1895; re-en. Sec. 7607, Rev. C. 1907; re-en. Sec. 10261, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1585.

Action Against Partner for Accounting—Circumstances Under Which Defenses of Statute of Limitations or Laches Not Available

One of two copartners in the livestock business died in 1903. By his will he reserved to his wife a life estate in all his property. The remaindermen and the widow agreed that the business should be continued as theretofore, thus creating a new partnership between the surviving partner and the widow. The executor acted until his death in 1918; no successor was appointed. The widow died in 1929. The district court dismissed an action thereafter brought to secure an account-

ing from the surviving partner in connection with the affairs of the original partnership, on the ground that it was barred under the statute of limitations as well as on the theory of laches. Held, that under the agreement to continue the business as it had been run prior to the death of the original partner, the estate remained dormant until the death of the life tenant, the widow; that in the interim no cause of action could arise calling for action on the part of the remaindermen, and that therefore the finding that the action was barred was error. *Thompson et al. v. Flynn*, 95 M 484, 496, 27 P 2d 505.

Administrator May Maintain an Action Against Surviving Partner

An administrator may maintain against a surviving partner any action which the deceased could have maintained. In the matter of relief—aside from the remedy furnished through the probate court—the personal representative of the decedent oc-

cupies the same relative position, with reference to the surviving partners, that the deceased, if alive, would sustain to his copartners. *Boehme v. Fitzgerald*, 43 M 226, 227, 115 P 413.

Duty of Partner to Account to the Estate

Where death dissolves a general trading partnership, the surviving partners are entitled to continue in possession and to settle the partnership affairs. It is their duty to account to the deceased partner's estate, and, upon failure to do so, they may be compelled by summary proceedings. *Boehme v. Fitzgerald*, 43 M 226, 227, 115 P 413.

A surviving partner may be required to make known the amount of partnership debts and the amount of firm assets in his possession, to the end that the court may determine whether the possession of firm property held by the estate of the deceased partner is necessary in order that the surviving partner may discharge the duties imposed upon him by this section. *Silver v. Eakins*, 55 M 210, 216, 175 P 876.

Where the affairs of a general partnership dissolved by death were not fully settled, an action for an accounting by the surviving partner for his sole benefit, against the executrix of the decedent did not lie, in view of the provisions of the section, which inter alia make it the duty of the survivor who, in contemplation of law, is in actual possession of the partnership property, to wind up its affairs, and thereupon account to the personal representative of the decedent. *Mares v. Mares et al.*, 60 M 36, 45 et seq., 199 P 267.

Effect of Failure to Give Bond

The failure of a surviving partner to give the bond required by this section did not affect his right to the possession of the firm property, or defeat his right to maintain any appropriate action concerning it; the bond is required merely to protect the interest of the deceased partner. *Silver v. Eakins*, 55 M 210, 217, 175 P 876.

Failure of Surviving Partner to Account to Representative of Estate—Representative, Not Heirs, Must Sue for Accounting

Where a surviving partner fails to render an account to the personal representative of the deceased partner on settlement of the partnership business, the representative, and not the heirs, must sue for an accounting, it, however, being incumbent upon those interested in the estate to see that the representative performs his duty in that regard. *Thompson et al. v. Flynn*, 95 M 484, 494, 27 P 2d 505.

Not Applicable to Mining Partnerships

The rule declared by this section, that in case of death of one member of a partnership the surviving partner has the right to the possession of all of the partnership property and to settle its business, and that the partnership assets form no part of the individual estate of the deceased partner until the partnership affairs have been wound up by the survivor applies to general trading partnerships only, not to mining partnerships. *Bielenberg v. Higgins et al.*, 85 M 56, 65, 277 P 631.

Power of Surviving Partner in General

A surviving partner has the right to continue in possession of the partnership property, and to settle the partnership business. The authority to settle up the business contemplates the completion of transactions begun before the death of the one partner. The surviving partner not only has the authority, but it is his duty, to expend the partnership means in protecting partnership property. *Weiss v. Hamilton*, 40 M 99, 108, 105 P 74.

While the death of one of two partners dissolves the partnership, it does not affect the partnership property, except to give the surviving partner exclusive control of the property, for the purpose of settling up the partnership business. *First National Bank v. Silver*, 45 M 231, 236, 122 P 584.

The death of a partner dissolves the partnership, under section 8009, and the surviving partner at once becomes entitled to the possession of sufficient firm property to enable him to discharge the duties imposed by this section. *Silver v. Eakins*, 55 M 210, 216, 175 P 876.

Right of Survivor to Bring Action for Accounting Not Abrogated by This Section

This section, relating to the duties of a surviving partner in winding up the affairs of the partnership, does not by implication abrogate the right of the survivor to bring a suit in equity for an accounting against the personal representative of the decedent, in a proper case; if such was the intention the section would be unconstitutional, since district courts may not by legislative action be deprived of jurisdiction in all equity cases granted them by section 11, Article VIII of the state Constitution. *Link v. Haire*, 82 M 406, 420, 426, 267 P 952.

Sufficiency of Complaint in Action by Surviving Partner Against Estate

A complaint in an action by a surviving partner to recover partnership property from the estate of the deceased partner was insufficient, under this section, for

failure to disclose the amount of the firm's debts, if any, or the amount or value of its assets in plaintiff's possession. *Silver v. Eakins*, 55 M 210, 215, 175 P 876.

A surviving partner is not required to join the heirs of his deceased partner as parties plaintiff in his action to recover on promissory notes held by the partnership; he alone has the right to collect claims due the partnership, unaffected by the fact that he made accounting to the administratrix of the estate of the decedent, the purpose of which was merely to show the condition of the partnership af-

fairs, or by the entry of decree of final distribution of the decedent's estate. *White v. Prah*, 94 M 345, 348, 22 P 2d 315.

When Partnership Property Becomes Part of the Estate

Until the affairs of a partnership are settled and the share of one of the partners who has died is paid over to his personal representative, partnership property is in no sense property of the decedent's estate to be administered as a part of the estate. *White v. Prah*, 94 M 345, 348, 22 P 2d 315.

10262. Actions on bond of executor or administrator may be brought by another administrator. An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

History: En. Sec. 230, p. 301, L. 1877; re-en. Sec. 230, 2nd Div. Rev. Stat. 1879; re-en. Sec. 230, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2735, C. Civ. Proc. 1895; re-en. Sec. 7608, Rev. C. 1907; re-en. Sec. 10262, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1586.

10263. What executors are not parties to actions. In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

History: En. Sec. 231, p. 301, L. 1877; re-en. Sec. 231, 2nd Div. Rev. Stat. 1879; re-en. Sec. 231, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2736, C. Civ. Proc. 1895; re-en. Sec. 7609, Rev. C. 1907; re-en. Sec. 10263, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1587.

10264. May compound. Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court or judge, may compound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate.

History: En. Sec. 232, p. 302, L. 1877; re-en. Sec. 232, 2nd Div. Rev. Stat. 1879; re-en. Sec. 232, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2737, C. Civ. Proc. 1895; re-en. Sec. 7610, Rev. C. 1907; re-en. Sec. 10264, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1588.

Operation and Effect

The court having first determined the necessity of a compromise may authorize

the administrator to settle a claim "to the best advantage possible." The public administrator has the same power in this respect as an executor or administrator. *Mulville v. Pacific Life Ins. Co.*, 19 M 95, 102, 103, 47 P 650.

References

Barbarich v. Chicago etc. Ry. Co. et al., 92 M 1, 11, 9 P 2d 797.

10265. Recovery of property fraudulently disposed of by testator. When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditors all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors,

sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

History: En. Sec. 233, p. 302, L. 1877; re-en. Sec. 233, 2nd Div. Rev. Stat. 1879; re-en. Sec. 233, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2738, C. Civ. Proc. 1895; re-en. Sec. 7611, Rev. C. 1907; re-en. Sec. 10265, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1589.

References

Cited or applied as section 7611, Revised Codes, in *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847.

10266. When executor or administrator to sue, as provided in preceding section. No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court or judge shall direct.

History: En. Sec. 234, p. 302, L. 1877; re-en. Sec. 234, 2nd Div. Rev. Stat. 1879; re-en. Sec. 234, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2739, C. Civ. Proc. 1895; re-en. Sec. 7612, Rev. C. 1907; re-en. Sec. 10266, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1590.

10267. Disposition of estate recovered. All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court or judge; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent, in the same manner as other property in the hands of the executor or administrator.

History: En. Sec. 235, p. 302, L. 1877; re-en. Sec. 235, 2nd Div. Rev. Stat. 1879; re-en. Sec. 235, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2740, C. Civ. Proc. 1895; re-en. Sec. 7613, Rev. C. 1907; re-en. Sec. 10267, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1591.

References

Cited or applied as section 7613, Revised Codes, in *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847.

10267.1. Chattel mortgages, power of representative or guardian to make. Whenever in any estate now being administered or that may hereafter be administered or in any guardianship proceeding now pending or that may hereafter be pending it shall appear to the district court, or to a judge thereof, to be for the advantage of the estate to borrow and raise money upon a note or notes, to be secured by chattel mortgage or other lien upon the personal property of any decedent or of a minor or an incompetent person, or any part thereof, for the purpose of paying the debts of such decedent or such minor or incompetent person, the expenses of administration, or the expenses of caring for and preserving the estate of the decedent or ward; or paying, reducing, extending, or renewing some lien or chattel mortgage already existing on said personal property, or any part thereof, or paying the expenses of caring for, preserving and carrying on the business of the decedent or ward during the administration of the estate, the court or judge, as often as occasion therefor shall arise in the administration of any estate or in the course of any guardianship, may authorize, empower and direct the executors or administrators or guardian of such minor or incompetent person to mortgage such personal property, or any part thereof, or to give other security by way of pledge or other

lien upon such personal property, or any part thereof, and to execute a note or notes, to be secured by such mortgage, pledge or lien;

Provided, that in order to obtain such authorization the same proceedings shall be had and taken as set forth in sections 10249 to 10256, inclusive, and which are required therefore to obtain an order to mortgage real property of the estate, and upon such proceedings being had the court shall have power to authorize the executor or administrator or guardian of such minor or incompetent person to borrow and raise money and to execute a note or notes and mortgages or pledge or other lien upon the personal property of the estate of such decedent or minor or incompetent person in the same manner and to the same extent and with the same effect as is provided in sections 10249 to 10256, inclusive, with reference to mortgages of real property.

History: En. Sec. 1, Ch. 22, L. 1933.

CHAPTER 134

CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS

- Section 10268. Executor or administrator to complete contracts for sale of real estate.
 10269. Petition for executor or administrator to make conveyance, and notice of hearing.
 10270. Interested parties may contest.
 10271. Conveyances—when order to be made.
 10272. Execution of conveyance and record thereof—how enforced.
 10273. Rights of petitioner to enforce contract.
 10274. Effect of conveyance.
 10275. Effect of recording a copy of the order.
 10276. Recording order does not supersede power of court to enforce it.
 10277. Where the party to whom conveyance to be made is dead.
 10278. Order may direct possession to be surrendered.
 10279. Validation of sales—curative deeds.
 10280. Record as evidence.

10268. Executor or administrator to complete contracts for sale of real estate. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court or judge may make an order authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

History: En. Sec. 236, p. 302, L. 1877; re-en. Sec. 236, 2nd Div. Rev. Stat. 1879; re-en. Sec. 236, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2750, C. Civ. Proc. 1895; re-en. Sec. 7614, Rev. C. 1907; re-en. Sec. 10268, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1597.

Operation and Effect

A petition to compel an executor or administrator to convey real estate, is sufficient where it sets forth the contract at length and alleges an adequate consideration. It need not contain all the essential averments of a bill in equity for the specific performance of a contract, nor is it necessary for the allegations of the petition to avoid every negative statement contained in section 8721. In re Grogan's Estate, 38 M 540, 542, 100 P 1044.

The district court sitting in probate has but a special and limited jurisdiction, with such powers as are expressly granted by statute or necessarily implied to give effect to those expressly granted; and if such court has jurisdiction to compel the specific performance of a contract of a decedent to convey real property, it may act only in a case falling squarely within the provisions of this section and the following, i. e., where the contract is in writing, and the right of the petitioner is placed beyond doubt by the proof, within its sound legal discretion. In re Bank's Estate, 80 M 159, 166 et seq., 260 P 128.

Quaere: Since the power to enforce specific performance of a contract is vested solely in courts of equity, did the legislative assembly have power to confer upon the

district court, sitting in probate, authority to enforce written contracts for the conveyance of real estate under which decedents bound themselves in their lifetime to make conveyance, as it has done by this section, et seq.? In re Bank's Estate, 80 M 159, 166 et seq., 260 P 128.

References

Cited or applied as section 7614, Revised Codes, in Tyler v. Tyler, 50 M 65, 72, 144 P 1090; Kern et al. v. Robertson, 92 M 283, 292, 12 P 2d 565.

10269. Petition for executor or administrator to make conveyance, and notice of hearing. On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court or judge must appoint a time and place for hearing the petition, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this state as he may designate.

History: En. Sec. 237, p. 302, L. 1877; re-en. Sec. 237, 2nd Div. Rev. Stat. 1879; re-en. Sec. 237, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2751, C. Civ. Proc. 1895; re-en. Sec. 7615, Rev. C. 1907; re-en. Sec. 10269, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1598.

References

In re Bank's Estate, 80 M 159, 166, 260 P 128.

10270. Interested parties may contest. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise, of the due publication of the notice, the court or judge must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court or judge may examine, on oath, the petitioner and all who may be produced before him for that purpose.

History: En. Sec. 238, p. 303, L. 1877; re-en. Sec. 238, 2nd Div. Rev. Stat. 1879; re-en. Sec. 238, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2752, C. Civ. Proc. 1895; re-en. Sec. 7616, Rev. C. 1907; re-en. Sec. 10270, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1599.

contract was in writing, but rather implied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the court had jurisdiction to enforce the same. Bullerdick v. Hermsmeyer, 32 M 541, 552, 81 P 334.

References

In re Bank's Estate, 80 M 159, 166, 260 P 128.

Operation and Effect

Where a petition, filed by an administrator under this section, to enforce a contract by deceased to convey certain water rights, did not show on its face that the

10271. Conveyances—when order to be made. If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court or judge is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, an order, authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner, must be made, entered on the minutes of the court, and recorded.

History: En. Sec. 239, p. 303, L. 1877; re-en. Sec. 239, 2nd Div. Rev. Stat. 1879; re-en. Sec. 239, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2753, C. Civ. Proc. 1895; re-en. Sec. 7617, Rev. C. 1907; re-en. Sec. 10271, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1600.

10272. Execution of conveyance and record thereof—how enforced. The executor or administrator must execute the conveyance according to the directions of the order, a certified copy of which must be recorded with the deed in the office of the county clerk of the county where the

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sec. 1 p. 528

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lands lie, and is prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

History: En. Sec. 240, p. 303, L. 1877; re-en. Sec. 240, 2nd Div. Rev. Stat. 1879; re-en. Sec. 240, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2754, C. Civ. Proc. 1895; re-en. Sec. 7618, Rev. C. 1907; re-en. Sec. 10272, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1601.

10273. Rights of petitioner to enforce contract. If, upon hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court or judge must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce a specific performance thereof.

History: En. Sec. 241, p. 303, L. 1877; re-en. Sec. 241, 2nd Div. Rev. Stat. 1879; re-en. Sec. 241, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2755, C. Civ. Proc. 1895; re-en. Sec. 7619, Rev. C. 1907; re-en. Sec. 10273, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1602.

Operation and Effect

Statutes of nonclaim deal with such debts and demands against a decedent as might have been enforced against him by personal action for the recovery of a money judgment; hence do not apply to a right of action for the specific performance of a contract to convey real property; the owner of such a right of action is not a creditor of the estate and is not required to present a claim to the executor or administrator within the time prescribed by

this section. In re Bank's Estate, 80 M 159, 167 et seq., 260 P 128.

Id. Where the allegations of a petition filed in the probate court in an estate matter pending therein, seeking specific performance of a contract to convey real property made by defendant administrator's intestate prior to his death, and the proof adduced showed a departure from the letter of the agreement in a number of particulars, i. e., nonperformance by petitioner of conditions imposed upon him by the written agreement to convey, the court may not be held to have abused its discretion in dismissing the petition under this section, on the ground that petitioner's right to the relief asked for was doubtful.

10274. Effect of conveyance. Every conveyance, made in pursuance of an order as provided in this chapter, shall pass the title to the estate contracted for, as fully as if the contracting party himself were still living, and executed the conveyance.

History: En. Sec. 242, p. 304, L. 1877; re-en. Sec. 242, 2nd Div. Rev. Stat. 1879; re-en. Sec. 242, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2756, C. Civ. Proc. 1895; re-en. Sec. 7620, Rev. C. 1907; re-en. Sec. 10274, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1603.

10275. Effect of recording a copy of the order. A copy of the order for a conveyance, as provided in this chapter, duly certified and recorded in the office of the county clerk of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the order.

History: En. Sec. 243, p. 304, L. 1877; re-en. Sec. 243, 2nd Div. Rev. Stat. 1879; re-en. Sec. 243, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2757, C. Civ. Proc. 1895; re-en. Sec. 7621, Rev. C. 1907; re-en. Sec. 10275, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1604.

10276. Recording order does not supersede power of court to enforce it. The recording of the order, as provided in the preceding section, shall not prevent the court or judge making the order from enforcing the same by other process.

History: En. Sec. 244, p. 304, L. 1877; re-en. Sec. 244, 2nd Div. Rev. Stat. 1879; re-en. Sec. 244, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2758, C. Civ. Proc. 1895; re-en. Sec. 7622, Rev. C. 1907; re-en. Sec. 10276, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1605.

10277. Where the party to whom conveyance to be made is dead. If the person entitled to the conveyance dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

History: En. Sec. 245, p. 304, L. 1877; re-en. Sec. 245, 2nd Div. Rev. Stat. 1879; re-en. Sec. 245, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2759, C. Civ. Proc. 1895; Sec. 7623, Rev. C. 1907; re-en. Sec. 10277, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1606.

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10278. Order may direct possession to be surrendered. The order provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the order, when, by the terms of the contract, possession is to be surrendered.

History: En. Sec. 246, p. 304, L. 1877; re-en. Sec. 246, 2nd Div. Rev. Stat. 1879; re-en. Sec. 246, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2760, C. Civ. Proc. 1895; Sec. 7624, Rev. C. 1907; re-en. Sec. 10278, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1607.

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10279. Validation of sales—curative deeds. All sales by executors and administrators of their decedent's real and personal property, and all sales by guardians of their ward's real and personal property, in this state, which, previous to the date of this amendatory act, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers to such executors or administrators or guardians, or their successors, in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain an executor's or administrator's or guardian's deed or conveyance to such purchaser for such real or personal property; and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said executor or administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 3, p. 145, L. 1899; re-en. Sec. 7625, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1915; re-en. Sec. 10279, R. C. M. 1921.

Operation and Effect

A curative statute of this nature does not apply to a mortgage by a guardian of land of his ward, given to secure debts contracted for the perfecting of the ward's title thereto. An act of the legislature cannot give life to a judgment void for want of jurisdiction at the time of its rendition. *Davidson v. Wampler*, 29 M

61, 70, 74 P 82. See also *Cooper v. City of Bozeman*, 54 M 277, 285, 169 P 801; *Crawford v. Pierce*, 56 M 371, 376, 185 P 315.

Where a decree of a probate court for specific performance of a contract by decedent in his lifetime to convey certain water rights to his wife was void for want of jurisdiction in the court at the time of its rendition, it was not validated by an act, subsequently passed, to validate judicial sales by executors and administrators. *Bullerdick v. Hermsmeyer*, 32 M 541, 552, 81 P 334.

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amended
L. 39 c. 118
sec. 1 p. 244

A mere clerical error in writing in the wrong range in a description of land in the order of sale is to be disregarded where but one piece of land is involved, where no one was misled by the mistake, and where the heirs reaped the benefit. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 289, 99 P 847.

Under the constitutional provision that no one shall be deprived of property without due process of law, a curative act cannot go to the extent of supplying jurisdiction where there was none in the first instance because of lack of notice and an

opportunity to be heard. *Lamont v. Vinger*, 61 M 530, 544, 202 P 769.

Id. Held, under the preceding rule, that this section, providing that irregularities in obtaining an order of court for the sale of real property of an intestate shall not invalidate the sale was ineffectual to cure the fatal omission of the court to take the steps necessary to give it jurisdiction to make the order.

References

Harwood v. Scott, 65 M 521, 530, 211 P 316.

10280. Record as evidence. When such deeds or conveyances so executed shall have been recorded in the records of deeds in the proper county, such record, duly certified by the county clerk, shall be evidence in all courts, and have the same effect as the original.

History: En. Sec. 4, p. 146, L. 1899; re-en. Sec. 7626, Rev. C. 1907; re-en. Sec. 10280, R. C. M. 1921.

References

Cited or applied as section 7626, Revised Codes, in *Tyler v. Tyler*, 50 M 65, 72, 144 P 1090.

CHAPTER 135

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS

Section 10281. When executor or administrator personally liable.

10282. Executor or administrator to be charged with all estate, etc.

10283. Not to profit or lose by estate.

10284. Uncollected debts without fault.

10285. Expenses allowed executor or administrator—attorney's fees—compensation of executor provided in will.

10286. Not to purchase claims against the estate.

10287. Compensation of executors and administrators.

10281. When executor or administrator personally liable. No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto especially authorized.

History: En. Sec. 247, p. 304, L. 1877; re-en. Sec. 247, 2nd Div. Rev. Stat. 1879; re-en. Sec. 247, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2770, C. Civ. Proc. 1895; re-en. Sec. 7627, Rev. C. 1907; re-en. Sec. 10281, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1612.

10282. Executor or administrator to be charged with all estate, etc. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisal contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate.

History: En. Sec. 248, p. 305, L. 1877; re-en. Sec. 248, 2nd Div. Rev. Stat. 1879; re-en. Sec. 248, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2771, C. Civ. Proc. 1895; re-en. Sec. 7628, Rev. C. 1907; re-en. Sec. 10282, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1613.

Operation and Effect

The employment and payment of counsel is a personal matter between the administrator and the attorney, over which the court has no authority, except for allowance or disallowance of the amount paid

when presented as other claims. *State ex rel. Kelly v. District Court*, 25 M 33, 37, 63 P 717.

An executor or administrator is chargeable not only with the assets of the estate which actually came into his hands, but also with those—including rents and profits of real estate which in the exercise of ordinary care and diligence ought to have been received from it—which by reason of his neglect he has failed to get into his hands. *In re Dolenty's Estate*, 53 M 33, 39, 161 P 524.

Where at the time of the appointment of an administrator there were crops growing upon the lands of the estate, which but for timely care and harvesting might have been lost, he may be allowed the reasonable expense incurred in that behalf, even though he obtained the necessary funds by borrowing upon the credit of the estate without first obtaining an order of court permitting him to do so. *In re Jennings' Estate*, 74 M 449, 463, 241 P 648.

Id. Where an administrator himself occupies the real property of the decedent's estate or by his negligence fails to secure from it such rents and profits as it ought to yield, he is chargeable with such reasonable revenue as the property should have brought, as well as with interest at the legal rate upon the annual rentals, from the time they should have been paid.

Id. Estate funds used by an administrator in purchasing farm machinery used by him in operating a farm owned by the estate as his own, he is chargeable with the amount paid therefor, with interest, as well as with produce of livestock not accounted for and stock killed for his own use while so operating the property.

Id. Without an order of court to that effect, an administrator may not borrow

money and pledge the credit of the estate therefor (unless, perhaps, in case of emergency), and where he does so he is personally liable for interest thereon.

Where an executor invests estate funds without authority of court in the purchase of a note, he is properly chargeable with any loss sustained by the estate resulting therefrom. *In re Connolly's Estate*, 79 M 445, 457, 257 P 418.

An administrator is not an insurer of the assets of the estate represented by him, and if he deposits its funds with a responsible bank, acting in good faith in the exercise of his best judgment, he is not liable for loss occasioned by its failure. *In re Mullen's Estate*, 97 M 144, 152, 33 P 2d 270.

Id. To charge an administrator with the loss of estate funds in a closed bank, of which he was cashier, the evidence must show that he was negligent in not removing them before its closing, negligence in that behalf being the failure to do what a reasonable and prudent person would ordinarily have done in the circumstances of the situation.

Id. Where cashier's checks drawn against the savings account of an estate were not paid owing to the bank's closing, although their amount was deducted from the account, and the administrator failed to present a claim to the receiver for its allowance within the proper time and the estate lost the amount through his neglect, he should be charged therewith.

References

Maygar v. St. Louis Min. etc. Co., 68 M 492, 500, 219 P 1102; *In re Bradfield's Estate*, 69 M 247, 500, 221 P 531; *In re Connolly's Estate*, 73 M 35, 55, 235 P 408; *Swanberg v. National Surety Co.*, 86 M 340, 355, 283 P 761.

10283. Not to profit or lose by estate. He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

History: En. Sec. 249, p. 305, L. 1877; re-en. Sec. 249, 2nd Div. Rev. Stat. 1879; re-en. Sec. 249, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2772, C. Civ. Proc. 1895; re-en. Sec. 7629, Rev. C. 1907; re-en. Sec. 10283, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1614.

Operation and Effect

An executor or administrator is not liable for losses to the estate occurring through no fault of his, and is entitled to compensation for his services. *In re Dolenty's Estate*, 53 M 33, 39, 161 P 524.

An executor fulfills his trust obligation to the estate for which he acts when he deposits its funds temporarily with a responsible bank, and where he acts in good faith and in the exercise of his best judgment in making the deposit, he is not liable for loss occasioned by the subsequent failure of such bank. *In re Connolly's Estate*, 79 M 445, 457, 257 P 418.

References

In re Connolly's Estate, 73 M 35, 45, 235 P 408; *In re Mullen's Estate*, 97 M 144, 152, 33 P 2d 270.

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10284. Uncollected debts without fault. No executor or administrator is accountable for any debts due the decedent, if it appears that they remain uncollected without his fault.

History: En. Sec. 250, p. 305, L. 1877; re-en. Sec. 250, 2nd Div. Rev. Stat. 1879; re-en. Sec. 250, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2773, C. Civ. Proc. 1895; re-en. Sec. 7630, Rev. C. 1907; re-en. Sec. 10284, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1615.

Operation and Effect

Where a defaulting vendee of farm lands in consideration of being permitted to remain in possession agreed in writing to give the vendor a promissory note secured by a crop mortgage for moneys due, an equitable lien was created though neither note nor mortgage were ever given, which lien the administrator of the estate of the vendor knowing of its existence, was in duty bound to collect, if possible, and for his failure to attempt to collect he was chargeable in his account for the resulting loss. *Scott et al. v. Tuggle*, 74 M 476, 482, 483, 241 P 229.

Id. An administrator may not excuse his failure to collect a debt due to the estate of his decedent by reliance upon the advice of an attorney that an attempt

to collect would result in litigation and delay in settlement of the estate.

Where indebtedness due an estate remains unpaid, the burden rests upon the executor or administrator, if he would escape liability, to show that his failure to make collection was not the result of his own neglect. In *re Connolly's Estate*, 79 M 445, 462, 257 P 418.

Id. Where an executor became indebted to his testator during the latter's lifetime on a joint note secured by pledge of corporate stock which after maturity and after the estate came into his hands was worth around par and payment of which note could have been secured but for his failure to take timely action, the executor was properly held liable for the balance due on the instrument.

References

Maygar v. St. Louis Min. etc. Co., 68 M 492, 500, 219 P 1102; In *re Connolly's Estate*, 73 M 35, 45, 235 P 408; *Swanberg v. National Surety Co.*, 86 M 340, 355, 283 P 761.

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136 P.(2d) 776

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161 P. 2d
644-647

10285. Expenses allowed executor or administrator—attorney's fees—compensation of executor provided in will. The executor and administrator shall be allowed all necessary expenses in the care, management, and settlement of the estate, including a reasonable fee paid to attorneys for conducting the necessary proceedings and for conducting necessary actions in courts, or incurred therefor, the amount of which attorneys' fees shall be in all cases, in the absence of agreement, fixed and determined by the court having jurisdiction of the settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument filed in court, he renounces all claims for compensation provided for by the will.

History: En. Sec. 251, p. 305, L. 1877; re-en. Sec. 251, 2nd Div. Rev. Stat. 1879; re-en. Sec. 251, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2774, C. Civ. Proc. 1895; re-en. Sec. 7631, Rev. C. 1907; amd. Sec. 1, Ch. 55, L. 1919; re-en. Sec. 10285, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1616.

Attorney's Fees

If an administrator pays his attorney, in anticipation of an allowance by the court for attorney's fees, he acts at his peril; he can be allowed only necessary expenses in the care, management, and settlement of the estate, and his judgment may be rejected by the court on the score of the amount as well as of necessity. *State ex rel. Cohen v. District Court*, 53 M 210, 212, 162 P 1053.

The amendment of this section made by Chapter 55, Laws of 1919, goes no further than to expressly authorize the district court sitting in probate to do what under the section before amendment it could do only under its implied power, viz.: to fix the amount to be allowed to the personal representative of an estate as compensation for the services of an attorney in advance of the actual payment of the fee by him, and therefore under it the court has not the power on the petition of an attorney to fix and allow to him directly the compensation due him from an administrator in his representative capacity, to be paid out of the funds of the estate as a legal claim against it. In *re McLure's Estate*, 68 M 556, 565, 220 P 527; In *re Jennings' Estate*, 74 M 468, 475, 241 P 655.

Allowance of payment made by an administrator to his attorney for services in the amount of \$270, and of a like amount to himself as compensation for his own services, held not improper where the estate amounted to some \$6,100, in view of the finding that there was no unreasonable delay in closing it, that the administrator acted in good faith throughout and was not subject to criticism for any action taken by him in the premises. In re Springer's Estate, 79 M 256, 267, 255 P 1058.

Id. In making an order fixing or allowing fees paid by an administrator to his counsel, the court must find that services of counsel were needed and that they were rendered for the benefit of the estate; hence where, after the administrator had been removed from office, suit was brought against him as an individual and against his surety by his successor, the estate was not liable for the payment of such fees, even though the action was without foundation.

Id. Where an administrator made no showing why it was necessary to employ an attorney other than the one who had

acted for the estate and who had been paid for his services in that behalf, to prepare the administrator's final account, the latter was not entitled to reimbursement for the expense incurred for that purpose.

Premium on Bond

For premiums paid by an administrator to a surety company for his official bond during the time he served as administrator he was properly allowed credit, the contention of contestant that the item should not have been allowed for the period for which settlement of the estate was unduly delayed being untenable in view of the finding of the court that there was no delay attributable to the administrator. In re Springer's Estate, 79 M 256, 267, 255 P 1058.

References

First Nat. Bank v. Collins, 17 M 433, 436, 43 P 499; State ex rel. Kelly v. District Court, 25 M 33, 37, 63 P 717; State ex rel. Cohen v. District Court, 53 M 210, 212, 162 P 1053; State ex rel. Eisenhauer v. District Court, 54 M 172, 174, 168 P 522; State v. Daems, 97 M 486, 497, 37 P 2d 322.

10286. Not to purchase claims against the estate. No executor or administrator shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

History: En. Sec. 252, p. 305, L. 1877; re-en. Sec. 252, 2nd Div. Rev. Stat. 1879; re-en. Sec. 252, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2775, C. Civ. Proc. 1895; re-en. Sec. 7632, Rev. C. 1907; re-en. Sec. 10286, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1617.

10287. Compensation of executors and administrators. When no compensation is provided by the will, or the executor renounces all claims thereto, he must be allowed commissions upon the amount of the estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum, not exceeding ten thousand dollars, at the rate of five per cent.; for all above ten thousand dollars, not exceeding twenty thousand dollars, at the rate of four per cent.; and for all above twenty thousand dollars, at the rate of two per cent. If there be more than one executor, only one commission must be allowed. The same commissions must be allowed to administrators. In all such cases further allowances may be made as the court or judge may deem just and reasonable for any extraordinary services. The total amount of such extra allowance must not exceed the total amount of commission allowed by this section.

History: En. Sec. 253, p. 305, L. 1877; re-en. Sec. 253, 2nd Div. Rev. Stat. 1879; re-en. Sec. 253, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 59, Ex. L. 1887; amd. Sec. 2776, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 4, L. 1905; re-en. Sec. 7633, Rev. C. 1907; re-en. Sec. 10287, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1618.

Operation and Effect

The claim of an administrator for fees is an inchoate right until ascertained and allowed upon a final accounting, and must be regulated by the law in force at the time thereof, and not by the law at the time of his appointment, unless such claim had become a vested right by reason of

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the services being fully performed prior to the passage of the latter law, and the fact appear upon such final account. In *re Dewar's Estate*, 10 M 426, 439, 25 P 1026. See also In *re Ricker's Estate*, 14 M 153, 180, 35 P 960.

The law regulating the fees of administrators is not a contract that the same compensation will not continue during the term of any incumbent; nor does the holding of such office create a vested right to receive for future services the fees established at the time of his appointment. In *re Dewar's Estate*, 10 M 426, 440, 25 P 1026.

Whether an administrator is entitled to commissions as provided for by this section, is dependent upon whether he earned them, by attending to the duties of his trust with fidelity and in accordance with the provisions of the law; hence wilful neglect and mismanagement of the estate are sufficient to authorize the court in withholding them or such part of them as it may see fit to withhold in the exercise of the discretion lodged in the court in that respect. In *re Jennings' Estate*, 74 M 468, 474, 241 P 655.

Allowance of payment made by an administrator to his attorney for services in the amount of \$270, and of a like amount to himself as compensation for his own services, held not improper where the estate amounted to some \$6,100, in view of the finding that there was no unreasonable delay in closing it, that the administrator acted in good faith throughout and

was not subject to criticism for any action taken by him in the premises. In *re Springer's Estate*, 79 M 256, 266, 255 P 1058.

Where an executor, who was also named trustee in the will for certain purposes after his executorial duties were completed, never in his fourteen years of service acted as trustee, and the will, while providing for his compensation as trustee at five per cent. of the gross income of the estate, did not fix his remuneration as executor; who on settlement of his accounts asked that his fee be fixed as executor only, as provided by this section, i. e., based upon the inventory value of the estate together with the rents, income and profits, the court erred in not so fixing it, but instead allowing him only five per cent. of the total rents and income. In *re Kelley's Estate*, 91 M 98, 5 P 2d 559.

Where an estate was in condition to be closed at any time and there remained but few steps to be taken toward that end, and the value of the estate was \$53,093, warranting an attorney's fee of \$1,581 computed under the rules of court and this section, an order allowing a dismissed attorney \$1,315, leaving the sum of \$266 as compensation for services to be performed by his successor, held not improper. In *re Culver's Estate*, 91 M 475, 479, 8 P 2d 662.

References

Cited or applied as section 7633, Revised Codes, in *re Dolenty's Estate*, 53 M 33, 39, 161 P 524.

CHAPTER 136

ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS

- Section 10288. Exhibit of receipts and disbursements and claims allowed.
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 10290. Petition for citation to render exhibit.
 10291. Citation to account on application.
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10288. Exhibit of receipts and disbursements and claims allowed.
 Six months after his appointment, and at any time when required by the

court or judge, either upon his own motion or upon the application of ^{102 M.} any person interested in the estate, the executor or administrator must ^{54 P. 778} render, for the information of the court or judge, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs.

History: En. Sec. 254, p. 306, L. 1877; re-en. Sec. 254, 2nd Div. Rev. Stat. 1879; re-en. Sec. 254, 2nd Div. Comp. Stat. 1887; amd. Sec. 2780, C. Civ. Proc. 1895; re-en. Sec. 7634, Rev. C. 1907; re-en. Sec. 10288, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1622.

Operation and Effect

It is not the intention of the law that the administrator should in every account give a full inventory of the assets of the estate. This properly belongs to the inventory which is filed, except the actual cash on hand, which the law appears to contemplate he should carry forward in his several accounts rendered to the court. Where, therefore, the account of an ad-

ministrator gave a statement of the receipts and disbursements of money since his last report, it was a sufficient compliance with the requirement of the statute. In re Davis' Estate, 31 M 421, 425, 78 P 704.

References

Cited or applied as section 7634, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717; State ex rel. Eisenhower v. District Court, 54 M 172, 175, 168 P 522; In re Jennings' Estate, 74 M 449, 456, 241 P 648; In re Jennings' Estate, 74 M 468, 472, 241 P 655; In re Rinio's Estate, 96 M 344, 347, 30 P 2d 803.

10289. Citation to account. If the executor or administrator fails to render an exhibit for six months after his appointment, the court or judge must cause a citation to be issued requiring him to appear and render it.

History: En. Sec. 255, p. 306, L. 1877; amd. Sec. 2781, C. Civ. Proc. 1895; re-en. re-en. Sec. 255, 2nd Div. Rev. Stat. 1879; Sec. 7635, Rev. C. 1907; re-en. Sec. 10289, re-en. Sec. 255, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1623.

10290. Petition for citation to render exhibit. Any person interested in any estate may, at any time before the final settlement of accounts, present his petition to the court or judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

History: En. Sec. 256, p. 306, L. 1877; re-en. Sec. 256, 2nd Div. Rev. Stat. 1879; re-en. Sec. 256, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2782, C. Civ. Proc. 1895; re-en. Sec. 7636, Rev. C. 1907; re-en. Sec. 10290, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1624.

10291. Citation to account on application. If the court or judge is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear, at some day to be named in the citation, and render an exhibit as prayed for.

History: En. Sec. 257, p. 306, L. 1877; re-en. Sec. 257, 2nd Div. Rev. Stat. 1879; re-en. Sec. 257, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2783, C. Civ. Proc. 1895; re-en. Sec. 7637, Rev. C. 1907; re-en. Sec. 10291, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1625.

10292. Objections to account, who may file. When an exhibit is rendered by an executor or administrator, any person interested may appear, and, by objections in writing, contest any account or statement therein contained. The court or judge may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

History: En. Sec. 258, p. 306, L. 1877; re-en. Sec. 258, 2nd Div. Rev. Stat. 1879; re-en. Sec. 258, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2784, C. Civ. Proc. 1895; re-en. Sec. 7638, Rev. C. 1907; re-en. Sec. 10292, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1626.

References

Cited or applied as section 2784, Code of Civil Procedure, in *In re Tuohy's Estate*, 33 M 230, 246, 83 P 486.

10293. Attachment for not obeying the citation. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may issue against him and such exhibit enforced, or his letters may be revoked, in the discretion of the court or judge.

History: En. Sec. 259, p. 307, L. 1877; re-en. Sec. 259, 2nd Div. Rev. Stat. 1879; re-en. Sec. 259, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2785, C. Civ. Proc. 1895; re-en. Sec. 7639, Rev. C. 1907; re-en. Sec. 10293, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1627.

10294. To render accounts after notice to creditors. Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served, and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account.

History: En. Sec. 260, p. 307, L. 1877; re-en. Sec. 260, 2nd Div. Rev. Stat. 1879; re-en. Sec. 260, 2nd Div. Comp. Stat. 1887; amd. Sec. 2786, C. Civ. Proc. 1895; re-en. Sec. 7640, Rev. C. 1907; re-en. Sec. 10294, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1628.

References

In re Jennings' Estate, 74 M 449, 456, 241 P 648; *In re Rinio's Estate*, 93 M 428, 433, 19 P 2d 322.

10295. Accounting on removal or death of representative or guardian. When the authority of an executor, administrator or guardian ceases, or is revoked for any reason, he may be cited to account before the court or judge, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor, administrator or guardian. If an executor, administrator or guardian dies, his accounts may be presented by his personal representative to and settled by the court in which the estate of which he was executor, administrator or guardian is being administered, and upon the petition of the successor of such deceased executor, administrator or guardian, such court may compel the personal representative of such deceased executor, administrator or guardian to render an account of the administration of his testator, intestate or ward, and must settle such account as in other cases.

History: En. Sec. 261, p. 307, L. 1877; re-en. Sec. 261, 2nd Div. Rev. Stat. 1879; re-en. Sec. 261, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2787, C. Civ. Proc. 1895; re-en. Sec. 7641, Rev. C. 1907; amd. Sec. 1, Ch. 122, L. 1913; re-en. Sec. 10295, R. C. M. 1921; amd. Sec. 1, Ch. 11, L. 1927. Cal. C. Civ. Proc. Sec. 1629.

Operation and Effect

An action at law to recover from an administrator and his surety a money judgment for assets in the hands of the former does not lie until after accounting and settlement had in the probate proceedings. *O'Sullivan v. Alexander et al.*, 73 M 12, 16 et seq., 234 P 1099.

Id. The district court sitting in probate has the same jurisdiction in the matter of issuing process, under this section and 10361, as has the district court; hence superior authority of the district court in that regard cannot be urged as a reason for invoking its jurisdiction, rather than that of the probate court, in an action against an administrator who had removed

from the state, and his surety, to recover assets of the estate prior to settlement of the former's account.

References

Baker v. Hanson et al., 72 M 22, 32, 231 P 902; In re Connolly's Estate, 73 M 35, 64, 235 P 408; In re Kern's Estate, 96 M 443, 447, 31 P 2d 313.

10296. Revoking authority of executor, when. If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citation cannot be personally served, and neglects to render an account, within thirty days after the time prescribed in this chapter, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

History: En. Sec. 262, p. 307, L. 1877; re-en. Sec. 262, 2nd Div. Rev. Stat. 1879; re-en. Sec. 262, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2788, C. Civ. Proc. 1895; re-en. Sec. 7642, Rev. C. 1907; re-en. Sec. 10296, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1630.

10297. To produce and file vouchers, which may remain in court. In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reasons cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

History: En. Sec. 263, p. 308, L. 1877; re-en. Sec. 263, 2nd Div. Rev. Stat. 1879; re-en. Sec. 263, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2789, C. Civ. Proc. 1895; re-en. Sec. 7643, Rev. C. 1907; re-en. Sec. 10297, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1631.

Operation and Effect

Where an administrator made a showing

relative to the absence of vouchers for certain amounts satisfactory to the court as required by this section, and the contestant did not offer any testimony to refute it, approval of the amounts paid by the administrator will not be disturbed on appeal. In re Springer's Estate, 79 M 256, 265, 255 P 1058.

10298. Vouchers for items less than twenty dollars—when dispensed with. On the settlement of his account, he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate, and if, upon such settlement of accounts, it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or sections 10174, 10175, and 10176 of this code, and it shall be proven by competent evidence to the satisfaction of the court or judge that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court or judge to allow the said sums so paid in the settlement of said accounts.

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727, 728

History: En. Sec. 264, p. 308, L. 1877; re-en. Sec. 264, 2nd Div. Rev. Stat. 1879; re-en. Sec. 264, 2nd Div. Comp. Stat. 1887; amd. Sec. 2790, C. Civ. Proc. 1895; re-en. Sec. 7644, Rev. C. 1907; re-en. Sec. 10298, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1632.

References

Cited or applied as section 7644, Revised Codes, in *State ex rel. Eisenhower v. District Court*, 54 M 172, 175, 168 P 522.

10299. Day of settlement to be appointed and notice thereof. When any account is rendered for settlement, the court or judge may appoint a day for the settlement thereof; the clerk must thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court or judge may order such further notice to be given as may be proper.

History: En. Sec. 265, p. 308, L. 1877; re-en. Sec. 265, 2nd Div. Rev. Stat. 1879; re-en. Sec. 265, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2791, C. Civ. Proc. 1895; re-en. Sec. 7645, Rev. C. 1907; re-en. Sec. 10299, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1633.

Operation and Effect

The giving of the notice required by this section is an indispensable requirement, and must be observed, or the order of allowance will not be binding. In *re Davis' Estate*, 35 M 273, 280, 88 P 957.

Id. The notice required in probate proceedings serves the purpose of a summons in ordinary actions. The giving of the notice in probate proceedings may be rendered unnecessary by the appearance of the parties and their participation in the proceedings. In such case the purpose of the notice has been served, and one who has appeared and taken part in the hearing will not be heard to say that the court had no jurisdiction to determine his rights.

In an action to recover on a guardian's bond, in which defendant surety's conten-

tion was that the decree of settlement of the guardian's account was not binding upon it because it had not received notice of hearing thereon, held, that posted notice given under this section (relating to settlement of accounts of executors and administrators made applicable by section 10463 to proceedings in guardianship) was constructive notice to defendant, and that the court's recital in the decree of settlement that notice had been given, was sufficient proof of notice (section 10558). *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054.

References

Cited or applied as section 2791, Code of Civil Procedure, in *In re Tuohy's Estate*, 33 M 230, 246, 83 P 486; as section 7645, Revised Codes, in *State ex rel. Eisenhower v. District Court*, 54 M 172, 175, 168 P 522; *In re Estate of Murphy*, 57 M 273, 279, 188 P 146; *State ex rel. Brophy v. District Court*, 97 M 83, 84, 33 P 2d 266.

10300. When settlement is final, notice must so state—final settlement, partition, and distribution. If the account mentioned in the preceding section be for final settlement, and a petition for the final distribution of the estate be filed with said accounts, the notice of the settlement must state those facts, which notice must be given by posting or publication, as the court or judge may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice of proceedings.

History: En. Sec. 266, p. 309, L. 1877; re-en. Sec. 266, 2nd Div. Rev. Stat. 1879; re-en. Sec. 266, 2nd Div. Comp. Stat. 1887; amd. Sec. 2792, C. Civ. Proc. 1895; re-en. Sec. 7646, Rev. C. 1907; re-en. Sec. 10300, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1634.

Purpose

The purpose of this section, while relating to settlement of administrator's or executor's account and requiring that the notice must state that the settlement is to be final, made applicable to guardian-

ship proceedings by section 10463, is to bring all interested parties within the jurisdiction of the court and bind them by the court's orders. In *re Kostohris' Estate*, 96 M 226, 231, 29 P 2d 829.

References

Cited or applied as section 7646, Revised Codes, in *In re Estate of Murphy*, 57 M 273, 280, 188 P 146; *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054; *State ex rel. Brophy v. District Court*, 97 M 83, 84, 33 P 2d 266.

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10301. Interested party may file exceptions to account. On the day appointed, or any subsequent day to which the hearing may be postponed by the court or judge, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

History: En. Sec. 267, p. 309, L. 1877; re-en. Sec. 267, 2nd Div. Rev. Stat. 1879; re-en. Sec. 267, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2793, C. Civ. Proc. 1895; re-en. Sec. 7647, Rev. C. 1907; re-en. Sec. 10301, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1635.

Operation and Effect

A creditor whose claim against an estate may be reduced by the allowance of an alleged debt is a person interested in the estate, and may contest the administrator's final account under this section and section 10299. In re Mouillerat's Estate, 14 M 245, 251, 36 P 185.

The allowance of an individual claim of an administrator against the estate is not conclusive, but the parties interested may contest it when his account is presented. In re Barker's Estate, 26 M 279, 283, 67 P 941.

References

Cited or applied as section 7647, Revised Codes, in State ex rel. Eisenhower v. District Court, 54 M 172, 175, 168 P 522; In re Estate of Murphy, 57 M 273, 279, 188 P 146; Oliveri v. Maroncelli et al., 94 M 476, 479, 22 P 2d 1054.

10302. All matters may be contested by the heirs—hearing. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making an order of sale, may be contested by the heirs for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court or judge may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

History: En. Sec. 268, p. 309, L. 1877; re-en. Sec. 268, 2nd Div. Rev. Stat. 1879; re-en. Sec. 268, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2794, C. Civ. Proc. 1895; re-en. Sec. 7648, Rev. C. 1907; re-en. Sec. 10302, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1636.

References

Cited or applied as section 7648, Revised Codes, in In re Estate of Murphy, 57 M 273, 279, 188 P 146; In re Smith's Estate, 60 M 276, 295, 199 P 696; In re Harper's Estate, 98 M 356, 40 P 2d 51.

10303. Settlement of accounts to be conclusive, when and when not. The settlement of any account and the allowance thereof by the court or judge, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness; provided, the court may, upon motion of any party interested, or upon its own motion, within sixty days after the rendition of the decree in cases of inadvertence, or within sixty days after the discovery of the facts constituting the fraud, reopen or set aside any decree of any settlement on the grounds of inadvertence or fraud.

History: En. Sec. 269, p. 309, L. 1877; re-en. Sec. 269, 2nd Div. Rev. Stat. 1879; re-en. Sec. 269, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2795, C. Civ. Proc. 1895; re-en. Sec. 7649, Rev. C. 1907; amd. Sec. 1, Ch. 46, L. 1919; re-en. Sec. 10303, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1637.

Burden of Proof on Re-examination of Account

Where a minor asks to have the accounts of the executrix previously approved reopened, the previous settlement is, under this section, prima facie evidence of the correctness of the account, and the burden

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102 Mont. 78-85
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1300
102 Mont. 230,
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57 P (2d) 810, 812

10303
108 P. (2d) 627

10303
136 P. (2d) 768

10303
160 P. 2d 473,
474

rests upon him to prove that a certain item was erroneously allowed and approved. In re Eakins' Estate, 64 M 84, 90, 208 P 956.

Effect of Fraud

An order settling an executor's account is not binding upon the court in considering his second account filed about a year later, the provision of this section, making settlement conclusive, having no application where the executor has been guilty of fraud. In re Bradfield's Estate, 69 M 247, 258, 221 P 531.

The rule that an order approving an administrator's final account is conclusive of all matters involved which might have been disputed at the hearing but were not, has no application in an action by his successor against the sureties on his predecessor's bond to recover property of the estate fraudulently concealed by him, where no one interested in the estate prior to the time he presented his final report knew of the existence of the property or that it belonged to the estate. Baker v. Hanson et al., 72 M 22, 33, 231 P 902.

Motion to Reopen Matter—Dismissal of Motion Without Hearing—Mandamus Proper Remedy

Held, on application for writ of mandate, that where a party interested in an estate after rendition of final decree of settlement of an administrator's account, within the time allowed by this section, moved to reopen the matter for the purpose of having set aside a portion of the decree fixing fees for alleged inadvertence, the court, in dismissing the motion without hearing on the merits on the ground that the matter was res judicata deprived the moving party of his day in court granted him by this section, and thus refused to perform a duty imposed upon it by law. State ex rel. Brophy v. District Court, 95 M 479, 482, 27 P 2d 509.

Id. Contention of respondent district judge, whom relator sought to compel by writ of mandate to take jurisdiction of a motion to reopen an estate matter under authority of this section, on the ground that the court through inadvertence had included improper items of expense in the order settling an administrator's account, that before taking jurisdiction it had the right to dispose of the question whether in fact there was any inadvertence in doing what it had done, held without merit.

Motion to Set Aside Decree of Final Settlement on Ground of Inadvertence—Sufficiency of Evidence

After entry of decree of final settlement of the account of an administratrix and distribution of an estate, the beneficiary filed a motion to set aside that portion

of the decree awarding administratrix and counsel fees, on the ground that the items had been allowed inadvertently, and, the motion being denied, the movant sought review of the action of the court by writ of supervisory control. Held, after a review of the evidence heard on the motion, that the finding of the trial court that in entering the decree it did not act through inadvertence, i. e., through a want of care, inattention, carelessness, negligence or oversight, may not be disturbed. State ex rel. Brophy v. District Court, 97 M 83, 84, 33 P 2d 266.

Not Applicable to Guardians' Accounts

Section 10440 provides that all the proceedings as to accounting, and the settlement of accounts of guardians, must be had and made as required concerning estates of deceased persons; but this does not make this section, as to the conclusiveness of the settlement of administrators' accounts applicable to guardians' accounts. The code does not in terms provide that the settlement of a guardians' intermediate account shall be conclusive. It may, therefore, be said to be merely prima facie evidence of its correctness, subject to be inquired into. In re Kostohris' Estate, 96 M 226, 234, 29 P 2d 829.

When Order Settling Accounts is Conclusive

Where the account of an administratrix has been settled, and it has been adjudged that the estate is indebted to her for moneys advanced by her for the benefit of the estate, the order of court settling such account is, in the absence of an affirmative showing on the face of the claims for money so advanced, conclusive, both on the estate and on all persons interested therein, who, at the time of settlement, were not laboring under any legal disability. In re Williams' Estate, 47 M 325, 330, 132 P 421.

An heir who permitted the will of his father to be probated without contest, accounts of the executor settled and allowed, and partial distribution of the assets made without timely objection or appeal, was foreclosed from attacking such proceedings on appeal from an order settling the final account of the executor and making final distribution. In re Estate of Murphy, 57 M 273, 188 P 146.

Under this section, an order of the district court settling and allowing the accounts of an administrator or executor is conclusive upon the estate and all persons interested therein not laboring under any legal disability, in the absence of an affirmative showing on the face thereof that claims embraced therein are illegal. In re McLure's Estate, 90 M 502, 510, 3 P 2d 1056.

References

Cited or applied as section 2795, Code of Civil Procedure, before amendment, in *In re Dougherty's Estate*, 34 M 336, 344, 86 P 38; as section 7649, Revised Codes, before

amendment, in *State ex rel. Eisenhauer v. District Court*, 54 M 172, 175, 168 P 522; *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054; *In re Kostohris' Estate*, 96 M 226, 233, 29 P 2d 829.

10304. Proof of notice of settlement of accounts. The account must not be allowed by the court or judge until it is first proved that notice has been given as required by this chapter, and the order must show that such proof was made to the satisfaction of the court or judge, and is conclusive evidence of the fact.

History: En. Sec. 270, p. 310, L. 1877; re-en. Sec. 270, 2nd Div. Rev. Stat. 1879; re-en. Sec. 270, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2796, C. Civ. Proc. 1895; re-en. Sec. 7650, Rev. C. 1907; re-en. Sec. 10304, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1638.

account did not show any proof of notice of the hearing, the finding of the court that such notice had been given was sufficient to meet the requirements of this section. *In re Davis' Estate*, 35 M 273, 280, 88 P 957.

Operation and Effect

Where the record on appeal from an order allowing an administrator's annual

References

Oliveri v. Maroncelli et al., 94 M 476, 479, 22 P 2d 1054.

10305. Sale of personal property in lieu of realty—when ordered. Whenever it appears to the court or judge on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court or judge may order the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

History: En. Sec. 271, p. 310, L. 1877; re-en. Sec. 271, 2nd Div. Rev. Stat. 1879; re-en. Sec. 271, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2797, C. Civ. Proc. 1895; re-en. Sec. 7651, Rev. C. 1907; re-en. Sec. 10305, R. C. M. 1921.

References

Cited or applied as section 7651, Revised Codes, in *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847.

10306. Moneys invested by order of court. Pending the settlement of any estate, on the petition of the executor, administrator, or any one or more of the heirs, legatees, or devisees, the court or judge may order any moneys in the hands of any executor or administrator to be loaned, for such length of time as may be requested by the party petitioning, and the court or judge may think to the interests of the estate; and on such security as the court or judge thereof may approve of, which shall not be a period of time to exceed one year at any one time; but no money shall be loaned, except on United States, state, county, or approved municipal bonds or real estate mortgage (and then only to the extent of one-half of the market value of the real estate so loaned upon the value of said property, to be estimated by the judge). The term "real estate," as herein used, does not include mining property. Such order can only be made after notice in the manner prescribed by the court or judge.

History: En. Sec. 272, p. 310, L. 1877; re-en. Sec. 272, 2nd Div. Rev. Stat. 1879; re-en. Sec. 272, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 145, L. 1889; amd. Sec. 2798, C. Civ. Proc. 1895; re-en. Sec. 7652, Rev. C. 1907; re-en. Sec. 10306, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1640.

Effect of Loaning Estate Funds Without Approval of Court

An executor or administrator who makes loans of estate funds without authority of court (this section) does so at the peril of being held liable for losses sustained by the estate; whereas if the

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course prescribed by the statute is pursued he will be relieved of liability upon a showing that the loss was not occasioned by his own fault. In re Connolly's Estate, 73 M 35, 43 et seq., 235 P 408.

Making Loans Under Power of the Will

A provision of a will authorizing an executor to make real estate loans and to pay the interest therefrom to a named legatee during the remainder of her life did not deprive the probate court of jurisdiction to compel the executor to exercise good faith and good judgment in making loans nor authorize him to unduly prolong the settlement of the estate. In re Bradfield's Estate, 69 M 247, 258, 221 P 531.

Not Applicable to Guardianship Matters

Counsel for the government and the present guardian contend that, as this section specifies that money shall be loaned only on real estate security, or certain public securities, these loans could not have been authorized by the court. That section, however, has to do only with loans from the funds of decedents' estates and deals with substantive law, rather than a matter of procedure, so that, as above noted, the section is not made applicable to guardianship matters. In re Kostohris' Estate, 96 M 226, 240, 29 P 2d 829.

Not Applicable to Investments of Estate Funds by Testamentary Trustees

The provision of this section that pending settlement of an estate the district court may order any moneys in the hands of the executors or administrators to be loaned for not to exceed one year, in United States, state, county, approved municipal bonds or real estate mortgages only, held to have no application to investments made by testamentary trustees in charge of closed estates of which distribution has been made, such trustees not being named therein and the provision

being unworkable in such cases. In re Harper's Estate, 98 M 356, 363, 40 P 2d 51.

Operation in General

An administrator is not chargeable with interest on money of an estate, pending an appeal and the delay incident thereto, where it does not appear that he was culpable in any respect. In re Davis' Estate, 35 M 273, 286, 88 P 957.

Numerous sections of the code, relating to probate matters, show a clear purpose to place in the hands of the court authority sufficient to secure a just administration of the estate, to the end that the creditors may be protected and the heirs receive the largest amount of the property compatible with an economical but complete administration of the estate. State ex rel. King v. District Court, 42 M 182, 185, 111 P 717.

Special Administrator Has no Power to Loan Funds

A special administrator has no power to loan the funds of the estate in his charge, and therefore cannot be held to pay interest for failing to loan them. If he receives profits from the funds of the estate in his keeping, such profits belong to the heirs, and must be included in his final account. In re Williams' Estate, 55 M 63, 67, 70, 173 P 790.

Id. Since a special administrator cannot lawfully invest, loan, or use funds which come into his hands by virtue of his office, the only theory upon which he can be held to account for profits accruing upon them is that he made an unlawful use of them.

References

Cited or applied as section 7652, Revised Codes, in State ex rel. Eisenhower v. District Court, 54 M 172, 175, 168 P 522.

CHAPTER 137

THE PAYMENT OF DEBTS OF THE ESTATE

- Section 10307. Order of payment of debts.
 10308. Where property insufficient to pay mortgage.
 10309. Estate insufficient, a dividend to be paid.
 10310. Funeral expenses, expenses of last sickness and family allowance.
 10311. Order for payment of debts and discharge of the executor or administrator.
 10312. Provision for disputed and contingent claims.
 10313. After order for payment of debts, executor or administrator personally liable to creditors.
 10314. Claims not included in order for payment of debts—how disposed of.
 10315. Order for payment of legacies and distribution of estate.
 10316. Final account—when to be made.
 10317. Neglect to render final account—how treated.

10307. Order of payment of debts. The debts of the estate subject to the provisions of section 8353, must be paid in the following order:

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1. Funeral expenses not to exceed two hundred dollars (\$200.00);
2. The expenses of the last sickness not to exceed five hundred dollars (\$500.00);
3. Debts having preference by the laws of the United States or of the state;
4. Judgments rendered against the decedent in his life-time, constituting a lien on property of the estate, and mortgages in the order of their date, provided the amount of such preference shall not exceed the value of said property subject to such lien;
5. All other demands against the estate, including funeral expenses in excess of two hundred dollars (\$200.00) and expenses of the last sickness in excess of five hundred dollars (\$500.00).

History: En. Sec. 273, p. 310, L. 1877; re-en. Sec. 273, 2nd Div. Rev. Stat. 1879; re-en. Sec. 273, 2nd Div. Comp. Stat. 1887; amd. Sec. 2810, C. Civ. Proc. 1895; re-en. Sec. 7653, Rev. C. 1907; re-en. Sec. 10307, R. C. M. 1921; amd. Sec. 1, Ch. 141, L. 1933. Cal. C. Civ. Proc. Sec. 1643.

Operation and Effect

An administrator, upon a sale by him of a chattel belonging to the estate and mortgaged by the decedent, must apply the proceeds to the payment of the mortgaged debt, before he can use any thereof in payment of expenses of administration. *Horsfall Estate v. Royles*, 20 M 495, 496, 52 P 198.

A guardian appointed for an incompetent, who was indebted to his attorney for fees at the time of such appointment, could not pay such attorney the fees claimed to be due out of the funds of the

incompetent's estate until such claim had been allowed by the court. *State ex rel. Davis v. District Court*, 30 M 8, 11, 75 P 516.

Quaere: Does this section, providing for the payment of all debts of an estate and specifying the order of payment (heretofore held not controlling as to payment of debts secured by mortgage) control as to a debt secured by pledge? In *re Stevenson*, 87 M 486, 494 et seq., 289 P 566.

References

Nathan v. Freeman et al., 70 M 259, 267, 225 P 1015; In *re Jennings' Estate*, 74 M 449, 458, 241 P 648; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Leffek v. Luedeman*, 95 M 457, 469, 27 P 2d 511; In *re Bielenberg's Estate*, 98 M 546, 40 P 2d 49.

10308. Where property insufficient to pay mortgage. The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with the other demands against the estate.

History: En. Sec. 274, p. 311, L. 1877; re-en. Sec. 274, 2nd Div. Rev. Stat. 1879; re-en. Sec. 274, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2811, C. Civ. Proc. 1895; re-en. Sec. 7654, Rev. C. 1907; re-en. Sec. 10308, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1644.

References

Cited or applied as section 2810, Code of Civil Procedure, in *Horsfall Estate v. Royles*, 20 M 495, 497, 52 P 198.

10309. Estate insufficient, a dividend to be paid. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

History: En. Sec. 275, p. 311, L. 1877; re-en. Sec. 275, 2nd Div. Rev. Stat. 1879; re-en. Sec. 275, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2812, C. Civ. Proc. 1895; re-en. Sec. 7655, Rev. C. 1907; re-en. Sec. 10309, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1645.

References

State v. Yellowstone Bank etc. Co., 75 M 43, 50, 243 P 813; *Leffek v. Luedeman*, 95 M 457, 469, 27 P 2d 511.

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10310. Funeral expenses, expenses of last sickness and family allowance. The executor or administrator, as soon as he has sufficient funds in his hands, may pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court or judge.

History: En. Sec. 276, p. 311, L. 1877;
re-en. Sec. 276, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 276, 2nd Div. Comp. Stat. 1887;
amd. Sec. 2813, C. Civ. Proc. 1895; re-en.
Sec. 7656, Rev. C. 1907; re-en. Sec. 10310,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1646.

References

In re Bielenberg's Estate, 98 M 546, 40
P 2d 49.

10311. Order for payment of debts and discharge of the executor or administrator. Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court or judge must make an order for the payment of the debts, as circumstances of the estate require. If there are not sufficient funds in the hands of the executor or administrator, the court or judge must specify in the order the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proofs, showing that such payments have been made, and that he has fully complied with the order of the court or judge.

History: En. Sec. 277, p. 311, L. 1877;
re-en. Sec. 277, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 277, 2nd Div. Comp. Stat. 1887;
amd. Sec. 2814, C. Civ. Proc. 1895; re-en.
Sec. 7657, Rev. C. 1907; re-en. Sec. 10311,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1647.

References

Leffek v. Luedeman, 95 M 457, 469, 27
P 2d 511.

10312. Provision for disputed and contingent claims. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.

History: En. Sec. 278, p. 312, L. 1877;
re-en. Sec. 278, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 278, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2815, C. Civ. Proc. 1895; re-en.
Sec. 7658, Rev. C. 1907; re-en. Sec. 10312,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1648.

10313. After order for payment of debts, executor or administrator personally liable to creditors. When an order is made by the court or judge for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such order as upon a judgment in the court,

in favor of each creditor, and the same proceedings may be had under such execution as under execution in other cases. The executor or administrator is liable therefor on his bond to each creditor.

History: En. Sec. 279, p. 312, L. 1877; re-en. Sec. 2816, C. Civ. Proc. 1895; re-en. re-en. Sec. 279, 2nd Div. Rev. Stat. 1879; Sec. 7659, Rev. C. 1907; re-en. Sec. 10313, re-en. Sec. 279, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1649.

10314. Claims not included in order for payment of debts—how disposed of. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section 10171, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day.

History: En. Sec. 280, p. 312, L. 1877; re-en. Sec. 2817, C. Civ. Proc. 1895; re-en. re-en. Sec. 280, 2nd Div. Rev. Stat. 1879; Sec. 7660, Rev. C. 1907; re-en. Sec. 10314, re-en. Sec. 280, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1650.

10315. Order for payment of legacies and distribution of estate. If the whole of the debts have been paid by the first distribution, the court or judge must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court or judge must give such extension of time as may be reasonable for the final settlement of the estate.

History: En. Sec. 281, p. 312, L. 1877; re-en. Sec. 281, 2nd Div. Rev. Stat. 1879; re-en. Sec. 281, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2818, C. Civ. Proc. 1895; re-en. Sec. 7661, Rev. C. 1907; re-en. Sec. 10315, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1651.

Operation and Effect

The final account of an administrator or executor cannot be settled or approved so long as there are outstanding claims against the estate which have not been paid, if there is any property in the hands

of the representative that is available for the payment of such claims, in whole or in part. In *re Williams' Estate*, 47 M 325, 329, 331, 132 P 421.

Id. It is error for the district court to settle and approve the final account of an administrator, where it appears that claims against the estate for advancements made for its benefit, though properly allowed, are unpaid, and where there is no showing that all property available for their payment has been exhausted.

10316. Final account—when to be made. At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administration.

History: En. Sec. 282, p. 313, L. 1877; re-en. Sec. 282, 2nd Div. Rev. Stat. 1879; re-en. Sec. 282, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2819, C. Civ. Proc. 1895; re-en. Sec. 7662, Rev. C. 1907; re-en. Sec. 10316, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1652.

References

Cited or applied as section 7662, Revised Codes, in *In re Williams' Estate*, 47 M 325, 329, 132 P 421.

10317. Neglect to render final account—how treated. If he neglects to render his account, the same proceedings may be had as prescribed in regard to the first account to be rendered by him, and all the provisions relative to the last-mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

History: En. Sec. 283, p. 313, L. 1877; re-en. Sec. 283, 2nd Div. Rev. Stat. 1879; re-en. Sec. 283, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2820, C. Civ. Proc. 1895; re-en. Sec. 7663, Rev. C. 1907; re-en. Sec. 10317, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1653.

CHAPTER 138

PARTITION AND DISTRIBUTION PRIOR TO FINAL SETTLEMENT OF ESTATE

- Section 10318. Payment to distributees upon giving bonds.
 10319. Notice of application.
 10320. Executor or other person may resist application.
 10321. Order prayed for to require bond, which must be given—may order whole or part of share to be delivered—where partition is necessary, how made—costs.
 10322. Order for payment of part of money secured by bond, and suit thereon.
 10323. Application for distribution.

10318. Payment to distributees upon giving bonds. At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court or judge for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

History: En. Sec. 284, p. 313, L. 1877; re-en. Sec. 284, 2nd Div. Rev. Stat. 1879; re-en. Sec. 284, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2830, C. Civ. Proc. 1895; re-en. Sec. 7664, Rev. C. 1907; re-en. Sec. 10318, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1658.

Operation and Effect

While an executor (or administrator) may resist an application for partial distribution, in the absence of statute permitting him to petition for such distribution, he has no right to do so, the right to so petition being only conferred upon heirs, devisees and legatees by this section and section 10323, and the court was therefore without jurisdiction to entertain his petition. In re Fratt's Estate, 60 M 526, 534, 199 P 711.

Title to property of a testator vests in the devisees from the moment of his death, subject to right of the executor to possession for purposes of administration; therefore, where no portion of the property was necessary for payment of expenses of administration or debts of the estate, the devisees were entitled to possession at the time they executed a mortgage on the property, and the executor was in no position to complain of the decree of foreclosure. First State Bank v. Mussigbrod et al., 83 M 68, 85, 271 P 695.

References

Cited or applied as section 284, Second Division Compiled Statutes 1887, in In re Phillips' Estate, 18 M 311, 45 P 222; as section 2830, Code of Civil Procedure, in In re Davis' Estate, 27 M 235, 240, 70 P 721.

10319. Notice of application. Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

History: En. Sec. 285, p. 313, L. 1877; re-en. Sec. 285, 2nd Div. Rev. Stat. 1879; re-en. Sec. 285, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2831, C. Civ. Proc. 1895; re-en. Sec. 7665, Rev. C. 1907; re-en. Sec. 10319, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1659.

References

Cited or applied as section 285, Second Division Compiled Statutes 1887, in In re Phillips' Estate, 18 M 311, 45 P 222.

10320. Executor or other person may resist application. The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself.

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History: En. Sec. 286, p. 313, L. 1877; re-en. Sec. 286, 2nd Div. Rev. Stat. 1879; re-en. Sec. 286, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2832, C. Civ. Proc. 1895; re-en. Sec. 7666, Rev. C. 1907; re-en. Sec. 10320, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1660.

References

Cited or applied as section 2832, Code of Civil Procedure, in *State ex rel. Leyson v. District Court*, 26 M 378, 379, 68 P 411; In *re Davis' Estate*, 27 M 235, 240, 70 P 721.

10321. Order prayed for to require bond, which must be given—may order whole or part of share to be delivered—where partition is necessary, how made—costs. If, at the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court or judge must make an order in conformity with the prayer of the applicant, requiring:

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1. Each heir, legatee, or devisee obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court or judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled;

2. The executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally among them.

History: En. Sec. 287, p. 314, L. 1877; re-en. Sec. 287, 2nd Div. Rev. Stat. 1879; re-en. Sec. 287, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2833, C. Civ. Proc. 1895; re-en. Sec. 7667, Rev. C. 1907; re-en. Sec. 10321, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1661.

References

Cited or applied as section 2833, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 235, 240, 70 P 721.

10322. Order for payment of part of money secured by bond, and suit thereon. When any bond has been executed and delivered, under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court or judge for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court or judge, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

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History: En. Sec. 288, p. 314, L. 1877; re-en. Sec. 288, 2nd Div. Rev. Stat. 1879; re-en. Sec. 288, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2834, C. Civ. Proc. 1895; re-en. Sec. 7668, Rev. C. 1907; re-en. Sec. 10322, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1662.

10323. Application for distribution. At any time after the lapse of one year from the issuance of letters testamentary or of administration, any heir, devisee, or legatee may present his or her petition to the court or judge for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled. Notice of the application must be given, as required by section 10319. The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself. If, at the hearing, it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court or judge must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, devisee, or legatee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court or judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the amount or portion of the proceeds of the estate which he has received; provided, that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court or judge is satisfied that no injury can result to the estate, the court or judge may dispense with the bond.

2. The executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which he may be entitled, or only a part thereof, designating it. If, in the opinion of the court or judge, it be necessary, in order to ascertain the proceeds that any or all of the heirs, legatees, or devisees may be entitled to, that the interest of any heir, legatee, or devisee in one or more pieces or parcels of property of the estate shall be determined or ascertained, the court or judge may suspend proceedings and direct the petitioner or petitioners to take proceedings under section 10324 to ascertain the interest the petitioner or petitioners will have under the will in any piece or parcel of property. The order must describe the property in relation to which proceedings are to be taken. Whenever any bond has been executed and delivered, proceedings upon any such bond may be taken under section 10322. The cost of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally between them.

History: En. Sec. 2835, C. Civ. Proc. 1895; re-en. Sec. 7669, Rev. C. 1907; re-en. Sec. 10323, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1663.

Effect of Assignment on Right to Object

Where a distributee has assigned his share, and the assignment has been recognized by the court, and is not disputed by the assignor, neither the administrator nor another distributee is interested or has a

right to object to such share being paid to such assignee. In *re Davis' Estate*, 27 M 490, 497, 71 P 757.

Effect of Settlement by Agreement

Where a contest of a will was settled by agreement of the parties, and a decree entered affirming such agreement, and fixing the shares of the estate to which the parties were entitled as agreed, such decree became the basis of administration as to the devolution of the property, and such

parties and their assigns, though not heirs or legatees named in the will, had a right to petition for a partial distribution of the estate. In re Davis' Estate, 27 M 490, 497, 71 P 757.

Executor or Administrator May Not Petition for Partial Distribution

While an executor (or administrator) may resist an application for partial distribution, in the absence of statute permitting him to petition for such distribution, he has no right to do so, the right to so petition being only conferred upon heirs, devisees and legatees by section 10318 and this section, and the court was therefore without jurisdiction to entertain his petition. In re Fratt's Estate, 60 M 526, 534, 539, 199 P 711.

Failure to Serve Nonappearing Devisees

Under this section and section 10327, relative to distribution of estates, failure of petitioners to serve nonappearing devisees with process does not deprive the court of jurisdiction to make the order of distribution, it being presumed, in the absence of any showing to the contrary, that the notice required by section 10330 to be given by posting or publication was caused to be given by the court or judge. In re McGovern's Estate, 77 M 182, 203, 250 P 812.

Heirship Not Determinable Under This Section

In a proceeding under this section for partial distribution of an estate, the questions of heirship, amount of distributive estate claimed, etc., cannot be considered. Those questions are to be determined under the express authority of section 10326. In re Fleming's Estate, 38 M 57, 59, 98 P 648.

Right to Appeal From Order

The right of the administrator, and of an heir of a beneficiary under the decedent's will, to appeal from a decree granting a distribution of the estate, in proceedings under this section, in which proceedings the administrator and heir both appeared in opposition thereto, will not be determined on a motion to dismiss the appeals, based on the theory that they are not aggrieved by the decree. In re Davis' Estate, 27 M 235, 240, 70 P 721.

Id. Where the facts alleged in the petition for an order of distribution of an estate were admitted by defendants, this fact was a sufficient reason for an affirmance of the order, but not for a dismissal of the appeal.

Right to Move for a New Trial

The parties opposing the granting of a decree for a distribution of the estate of a decedent under this section may make a motion for a new trial where the decree directs the distribution. In re Davis' Estate, 27 M 235, 241, 70 P 721.

Scope of Section in General

This section is susceptible of but one meaning, namely, that any heir, devisee, or legatee shown by the record to be such, and concerning whose right to inherit there is no question raised, may ask for distribution to him of the share of the estate which the record shows he is entitled to receive, and about which there is no controversy. In re Fleming's Estate, 38 M 57, 61, 98 P 648.

References

Cited or applied as section 2835, Code of Civil Procedure, in State ex rel. Pauwelyn v. District Court, 34 M 345, 346, 86 P 268.

CHAPTER 139

DETERMINATION OF HEIRSHIP AND INTEREST IN THE ESTATE

- Section 10324. Proceedings to determine heirship.
 10325. Appearance of parties.
 10326. Trial and judgment.

10324. Proceedings to determine heirship. Any person claiming to be heir to the deceased, or entitled to the distribution in whole or in part of an estate may, at any time after the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court or judge to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the court or judge must make an order directing service of notice to all persons interested in said estate, to appear and show cause, on a day to be therein named, not less than sixty days nor more than four months from the date

10324
 101 Mont. 507,
 515, 520
 54 P (2d) 870,
 873, 875

10324
 136 P. (2d) 231

10324
 155 P. 2d 760

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 162 P. 2d
 369, 370

of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate, in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court or judge may direct, and also a description of the real estate whereof said deceased died seized or possessed so far as known, described with certainty to a common intent; and requiring said persons, and all persons named or not named having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said court or judge, which notice shall be served in the same manner as a summons in a civil action; upon proof of which service, by affidavit or otherwise, to the satisfaction of the court or judge, the court or judge shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and of the title and ownership of said property, the court or judge must enter an order establishing proof of the service of such notice; provided, that whenever it appears to the satisfaction of the court or judge that such estate consists of personal property only, and upon application being made showing good reason therefor, the court or judge may, in its discretion, make an order directing service of said notice to all persons interested in said estate to be made by posting or publication, or both, for such shorter period as to the court or judge may appear proper and requisite.

History: En. Sec. 2840, C. Civ. Proc. 1895; re-en. Sec. 7670, Rev. C. 1907; amd. Sec. 1, Ch. 234, L. 1921; re-en. Sec. 10324, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1664.

Appeal From Proceedings

Where a motion to dismiss the appeal of an executor and some of the legatees from that portion of a "judgment," rendered in a proceeding had under this and the two following sections, based on the ground that an appeal does not lie from a part thereof, is denied upon consideration of exhaustive briefs of counsel, the determination will be deemed the law of the case on the submission of the question on its merits. In *re Klein's Estate*, 35 M 185, 202, 88 P 798.

Id. The denial of a motion to affirm an order of this district court, in the proceeding under this and the two following sections, refusing a new trial to an executor and some of the legatees, of issues found in favor of other legatees, is held not the law of the case upon final determination on the merits.

Burden of Proof

In a proceeding to establish heirship, the petitioner is plaintiff, and has the burden of proof. In *re Colbert's Estate*, 51 M 455, 469, 153 P 1022.

Claims Not Recognizable Until Established as Provided Herein

An administrator is not required to take notice of the claims of heirs until their heirship has been established as prescribed in this chapter. *Kirk v. Baker*, 26 M 190, 192, 66 P 942.

Declaration of Relationship Admissible

In a proceeding under this section, a declaration of relationship is admissible under section 10531. In *re Colbert's Estate*, 51 M 455, 467, 153 P 1022.

Enforcement of an Agreement to Devise

The district court, as a court of general original common law and equity jurisdiction, has concurrent jurisdiction with the district court, sitting as a probate court, of an action brought against an estate of a decedent to enforce an agreement made by deceased to devise a certain share in his property. *Burns v. Smith*, 21 M 251, 266, 53 P 742.

Heirship How Determined

The question of heirship and the interest of any heir may be determined, not only under this and the next two succeeding sections, but also upon a proceeding for the final distribution of an estate. In *re Fleming's Estate*, 38 M 57, 59, 98 P 648.

The complete procedure for determining the rights of all persons to an estate, and all interests therein, and to whom distribution thereof should be made, must be held, upon well-known rules of statutory construction, to exclude every other procedure for determining such questions. In *re Fleming's Estate*, 38 M 57, 59, 98 P 648; In *re Colbert's Estate*, 51 M 455, 464, 153 P 1022.

Inasmuch as the procedure provided by this section and the two succeeding sections, for determining the rights of persons to an estate or an interest therein, excludes every other method, an independent civil action for that purpose was unauthorized, and depositions taken in it were not taken in a former action, and hence inadmissible in a proceeding instituted thereunder. In *re Colbert's Estate*, 51 M 455, 464, 153 P 1022.

Heirship Proceedings Not Civil Action

Proceedings to determine heirship, while partaking in form of the nature of a civil action, are not such, and therefore the provisions of section 9872, permitting parties to submit a civil action for determination by the district court upon an agreed statement of facts, have no application to such proceedings. In *re Spriggs' Estate*, 68 M 92, 93 et seq., 216 P 1108.

Nature of Decree

Where the statutory procedure with relation to determination of heirship (this section), authorizing proceedings against persons who may have an interest in property without naming them in the order for service of notice, is followed, they, as well as their issue, are bound by the decree, which is in the nature of one in rem as to which all the world is charged with notice to the same extent as if they had been named. In *re Baxter's Estate*, 98 M 291, 39 P 2d 186.

Not Exclusive Jurisdiction in Probate Court

This section does not expressly confer exclusive jurisdiction upon the district court, sitting as a court of probate, to try the questions therein enumerated; nor can exclusive jurisdiction to do so be implied from the language of the section. *Burns v. Smith*, 21 M 251, 264, 53 P 742.

Notice Required

Where notice of the hearing of a petition for the distribution of an estate was not served upon an heir as required by this section, the decree rendered in the proceeding did not foreclose her rights as an heir. *State v. District Court et al.*, 62 M 60, 64 et seq., 203 P 860.

Order for Service of Notice—Naming "Other Persons"

A petition for the determination of heirship need not name the persons interested in the estate, and while the court in ordering service of notice must set forth the names of those who have appeared claiming an interest in the estate (this section), the matter of naming "such other persons" as the court may direct is left to its discretion. In *re Baxter's Estate*, 98 M 291, 39 P 2d 186.

Order for Service of Notice—Time for Appearance

Under this section, the court in directing service of notice in a proceeding to determine heirship must in the order specify a day to be fixed at not less than sixty days from the date of making the order for appearance of the persons interested in the estate; hence contention that the statute requires notice for a minimum of sixty days from and after the date of the last publication of the notice is without merit. In *re Baxter's Estate*, 98 M 291, 39 P 2d 186.

Proceedings Must Be Commenced by Petition

Held, in view of the provision of this section, that a proceeding to determine heirship must be presented by petition, that where the parties without filing a petition submitted the cause on an agreed statement of facts, the court did not acquire jurisdiction and its judgment therein was a nullity. In *re Spriggs' Estate*, 68 M 92, 93 et seq., 216 P 1108.

Suit Not Necessary Where Parties Are Agreed on Distributive Shares

This section does not require a suit to be brought to determine the distributive shares in an estate, where all the parties interested have agreed as to the share each is to receive, and a decree has been entered pursuant to such agreement. In *re Davis' Estate*, 27 M 490, 499, 71 P 757.

Vacating a Default

Held, under section 10365, that the provisions of section 9187, authorizing the district court to relieve a party from a default under conditions prescribed, are applicable to probate proceedings, and that under the second clause of that section the court may, in a proceeding to determine heirship, permit an heir who from any cause was not personally served with the notice required by this section, to answer to the merits of the proceeding at any time within one year from the rendition of the judgment, and that the technical objection that such notice is not a "summons" and the proceeding not "an action" and that, therefore,

section 9187 is inapplicable, cannot be sustained, in view of the rules of statutory construction in this case held. *State v. District Court et al.*, 83 M 400, 410; 272 P 525.

When Determination of Heirship Necessary—Foreign Heirs

While ordinarily proceedings to determine heirship under this section are not necessary as a condition precedent to the distribution of an estate, yet where a person claiming to be an heir is a resident of a foreign country the court must, under section 10327, determine the question of heirship as provided in this section and the two following, before decreeing distribution. *State v. District Court et al.*, 62 M 60, 64 et seq., 203 P 860.

When Determination of Heirship Unnecessary

Where there are no foreign heirs and where the persons entitled to share in an estate have been fully determined and there is no question raised as to their rights, the authority of the court to order distribution does not depend upon a prior determination of heirship under this section and the following section; but if the

court should deem a proceeding for such determination necessary, it would not be warranted in dismissing the petition for distribution, but should suspend it until such determination can be had. In *re McGovern's Estate*, 77 M 182, 203, 204, 250 P 812.

The district court has jurisdiction of an action against the administrator of an estate to compel specific performance of a contract of adoption entered into by his intestate; plaintiff in such an action claiming under the contract and adversely to the estate and not as an heir in privity with it, he is not required to proceed under this section and the three following sections, for the establishment of heirship. *Gravelin v. Porier et al.*, 77 M 260, 275 et seq., 250 P 823.

References

Cited or applied as section 2840, Code of Civil Procedure, in *In re Davis' Estate*, 35 M 273, 281, 88 P 957; as section 7670, Revised Codes, in *State ex rel. Kolbow v. District Court*, 38 M 415, 416, 100 P 207; *In re Colbert's Estate*, 44 M 259, 264, 119 P 791; *In re Beck's Estate*, 44 M 561, 569, 121 P 784, 1057; *In re Bernheim's Estate*, 82 M 198, 205, 266 P 378.

10325. Appearance of parties. All persons appearing within the time limited must file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, which written evidence must be in the English language, or if in a foreign language, the same must be accompanied by an English translation thereof, duly certified as correct by a United States consul, entry of which appearance shall be made in the minutes of the court and in the register of proceedings of said estate. And the court or judge shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order of the court or judge establishing proof of service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the court or judge may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his postoffice address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided in case of an ordinary

10325
100 Mont. 233
46 P (2d) 715
101 Mont. 507,
515, 520
54 P (2d) 870, 873

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136 P. (2d) 231

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155 P. 2d 760

10325
162 P. 2d
369, 370

10325
191 P. (2d) 328

civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the supreme court; and the provisions in this code contained, regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exceptions, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; provided, however, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of.

History: En. Sec. 2841, C. Civ. Proc. 1895; re-en. Sec. 7671, Rev. C. 1907; amd. Sec. 1, Ch. 54, L. 1913; re-en. Sec. 10325, R. C. M. 1921.

Operation and Effect

In a proceeding to determine the rights of a large number of persons claiming to be legatees under a will, and where the executor and certain claimants, adjudged to be entitled to share in the distribution of the estate, moved for a new trial of the issues found in favor of certain other claimants, the aggrieved parties may move for a new trial and appeal from an adverse ruling. In re Klein's Estate, 35 M 185, 201, 88 P 798.

Under this section, an attorney claiming a right to appear in behalf of an heir at a proceeding to determine heirship must

file written evidence of his authority to so appear, otherwise the heir is not barred from questioning the jurisdiction of the court to render the decree. State v. District Court et al., 62 M 60, 64, 203 P 860.

References

Cited or applied as section 7671, Revised Codes, before amendment, in In re Fleming's Estate, 38 M 57, 59, 98 P 648; State ex rel. Kolbow v. District Court, 38 M 415, 419, 100 P 207; In re Colbert's Estate, 44 M 259, 264, 119 P 791; In re Colbert's Estate, 51 M 455, 464, 153 P 1022; In re McGovern's Estate, 77 M 182, 203, 250 P 812; Gravelin v. Porier et al., 77 M 260, 275, 250 P 823; State v. District Court et al., 83 M 400, 410, 272 P 525; In re Baxter's Estate, 98 M 291, 39 P 2d 186.

10326. Trial and judgment. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, must in all subsequent proceedings be treated as the plaintiff therein, and all other parties so appearing must be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claims of heirship, ownership, or interest in said estate, with such particularity as a court or judge may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties or the attorneys of the parties so appearing in said proceeding. The court or judge shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceedings, the court or judge shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the court or judge thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under this chapter

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54 P (2d) 870-875

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136 P. (2d) 231

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155 P. 2d 760

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162 P. 2d
369, 370

shall be apportioned in the discretion of the court or judge. In such proceeding, the court or judge may appoint an attorney for any minor not having a guardian. Nothing in this chapter shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of sections 10324 to 10326 inclusive, but where the questions shall have been litigated under the provisions of these sections, the determination thereof, as therein provided, shall be conclusive in the distribution of said estate.

History: En. Sec. 2842, C. Civ. Proc. 1895; re-en. Sec. 7672, Rev. C. 1907; re-en. Sec. 10326, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1664.

References

Cited or applied as section 2842, Code of Civil Procedure, in *In re Klein's Estate*, 35 M 185, 202, 88 P 798; as section

7672, Revised Codes, in *In re Fleming's Estate*, 38 M 57, 59, 98 P 648; *In re Beck's Estate*, 44 M 561, 569, 121 P 784, 1057; *In re Colbert's Estate*, 51 M 455, 464, 153 P 1022; *State v. District Court et al.*, 62 M 60, 65, 203 P 860; *Gravelin v. Porier et al.*, 77 M 260, 275, 250 P 823; *Link v. Haire*, 82 M 406, 410, 267 P 952; *In re Baxter's Estate*, 98 M 291, 39 P 2d 186.

CHAPTER 140

FINAL DISTRIBUTION OF THE ESTATE—DISCHARGE OF EXECUTOR OR ADMINISTRATOR

- Section 10327. Distribution of estate—how made and to whom.
 10328. Order of distribution, contents and finality of.
 10329. Distribution when decedent was not a resident of this state.
 10330. Decree to be made only after notice.
 10331. No distribution till taxes on personal property are paid.
 10332. Final settlement, order, and discharge.
 10333. Discovery of property.

10327. Distribution of estate—how made and to whom. Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, legatee, or devisee, the court or judge must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of the administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law; provided, that whenever it appears any of the persons claiming to be heirs, or claiming a right to share in said estate, are nonresidents of the United States, then a proceeding to determine their rights shall be held under the provisions and as provided for in the three preceding sections with reference to the determination of heirship. Whenever all the heirs or devisees of any estate who are residents of the United States shall agree that any nonresident of the United States is a lawful heir or devisee of said estate and is lawfully entitled to share therein, said agreement may be reduced to writing and filed with the clerk of the court in the matter of said estate, and thereafter it shall not be necessary for any such nonresident heir or devisee to institute any proceedings to determine his rights of heirship. A statement of any receipts and disbursements of

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55 P (2d) 1299

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the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution; and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court or judge, and included in the order; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

History: En. Sec. 289, p. 315, L. 1877; re-en. Sec. 289, 2nd Div. Rev. Stat. 1879; re-en. Sec. 289, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2843, C. Civ. Proc. 1895; re-en. Sec. 7673, Rev. C. 1907; amd. Sec. 2, Ch. 54, L. 1913; amd. Sec. 2, Ch. 234, L. 1921; re-en. Sec. 10327, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1665.

Operation and Effect

The giving of notice of final distribution of an estate is jurisdictional; hence where a final decree of distribution had been set aside in an equity action for want of notice to one of the interested parties, entry of a corrected decree to conform to that rendered in the suit to set aside without notice was a nullity. *Hoppin v. Long*, 74 M 558, 566 et seq., 241 P 636.

10328. Order of distribution, contents and finality of. In the order, the court or judge must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

History: En. Sec. 290, p. 315, L. 1877; re-en. Sec. 290, 2nd Div. Rev. Stat. 1879; re-en. Sec. 290, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2844, C. Civ. Proc. 1895; re-en. Sec. 7674, Rev. C. 1907; re-en. Sec. 10328, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1666.

Operation and Effect

A decree of distribution, though not strictly speaking a judgment, is treated and reviewable as such and may be set aside if obtained by fraud. *Hoppin v. Long*, 74 M 558, 578, 241 P 636.

Notwithstanding the provision of this section that a decree directing the distribution of the property of an estate is conclusive unless reversed, set aside or modified on appeal, the district court may set it aside under section 9187 on a showing by an aggrieved party that it had been

Under section 10323 and this section, relative to distribution of estates, failure of petitioners to serve nonappearing devisees with process does not deprive the court of jurisdiction to make the order of distribution, it being presumed, in the absence of any showing to the contrary, that the notice required by section 10330 to be given by posting or publication was caused to be given by the court or judge. In *re McGovern's Estate*, 77 M 182, 203, 250 P 812.

References

State v. District Court et al., 62 M 60, 65, 203 P 860; In *re Bernheim's Estate*, 82 M 198, 215, 266 P 378.

taken against him through his mistake, surprise, inadvertence or excusable neglect. *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 396 et seq., 30 P 2d 815.

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. *Montgomery v. Gilbert*, 77 F. 2d 39.

References

Cited or applied as section 2844, Code of Civil Procedure, in *Spencer v. Spencer*, 31 M 631, 637, 79 P 320; *Town of Cascade v. County of Cascade*, 75 M 304, 312, 243 P 806; In *re Baxter's Estate*, 98 M 291, 39 P 2d 186; In *re Murphy's Estate*, 99 M 114, 43 P 2d 233.

10329. Distribution when decedent was not a resident of this state. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this

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77 F(2d) 39

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145 F. 2d 255

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203 P.(2d) 978

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state, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court or judge may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court or judge, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court or judge.

History: En. Sec. 291, p. 315, L. 1877; re-en. Sec. 291, 2nd Div. Rev. Stat. 1879; re-en. Sec. 291, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2845, C. Civ. Proc. 1895; re-en. Sec. 7675, Rev. C. 1907; re-en. Sec. 10329, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1667.

Operation and Effect

The duties imposed upon the court by this section do not deprive it of jurisdiction to collect an inheritance tax. *State ex rel. Floyd v. District Court*, 41 M 357, 364, 109 P 438.

Id. The delivery provided for by this section, when the property is ready for distribution, serves all the purposes of distribution, and the power to direct the delivery is tantamount to the power to order distribution directly to the persons entitled to take.

References

In *re Mauldin's Estate*, 69 M 132, 138, 220 P 1102; In *re Livingston's Estate*, 91 M 584, 589, 9 P 2d 159.

10330. Decree to be made only after notice. The order may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court or judge may direct, and for such time as may be ordered. If partition be applied for, as provided in this chapter, the order of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.

History: En. Sec. 292, p. 316, L. 1877; re-en. Sec. 292, 2nd Div. Rev. Stat. 1879; re-en. Sec. 292, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2846, C. Civ. Proc. 1895; re-en. Sec. 7676, Rev. C. 1907; re-en. Sec. 10330, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1668.

Operation and Effect

The giving of notice of final distribution of an estate is jurisdictional; hence where a final decree of distribution had been set aside in an equity action for want of notice to one of the interested parties, entry of a corrected decree to conform to that rendered in the suit to set aside without notice was a nullity. *Hoppin v. Long*, 74 M 558, 566, 241 P 636.

Under sections 10323 and 10327, relative to distribution of estates, failure of petitioners to serve nonappearing devisees with process does not deprive the court of jurisdiction to make the order of distribution,

it being presumed in the absence of any showing to the contrary, that the notice required by this section to be given by posting or publication was caused to be given by the judge. In *re McGovern's Estate*, 77 M 182, 185, 250 P 812.

One acquiring the interest of an heir in an estate at execution sale is entitled to no other notice of a proceeding instituted for the modification of the decree of distribution of the property of the estate than is required to be given to the heir to whose rights he succeeded, i. e., by posting or publication, such notice serving the purpose of a summons in ordinary actions. *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 399 et seq., 30 P 2d 815.

References

State ex rel. Brophy v. District Court, 97 M 83, 84, 33 P 2d 266.

10331. No distribution till taxes on personal property are paid. Before any order of distribution of an estate is made, the court or judge must be satisfied, by the oath of the executor or administrator, or otherwise, that

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all the state, county, and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

History: En. Sec. 293, p. 316, L. 1877; re-en. Sec. 293, 2nd Div. Rev. Stat. 1879; re-en. Sec. 293, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2847, C. Civ. Proc. 1895; re-en. Sec. 7677, Rev. C. 1907; re-en. Sec. 10331, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1669.

References

Cited or applied as section 2847, Code of Civil Procedure, in *Kirk v. Baker*, 26 M 190, 192, 66 P 942.

10332. Final settlement, order, and discharge. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court or judge, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court or judge must make an order discharging him from all liability to be incurred thereafter.

History: En. Sec. 2886, C. Civ. Proc. 1895; re-en. Sec. 7696, Rev. C. 1907; re-en. Sec. 10332, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1697.

References

State v. District Court et al., 76 M 143, 148, 245 P 148.

10333. Discovery of property. The final settlement of an estate, as in sections 10318 to 10354 provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued.

History: En. Sec. 2887, C. Civ. Proc. 1895; re-en. Sec. 7697, Rev. C. 1907; re-en. Sec. 10333, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1698.

References

Montgomery v. Gilbert, 77 F. 2d 39.

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106 P.(2d) 346

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CHAPTER 141

PARTITION OF UNDIVIDED ESTATE AFTER DISTRIBUTION

- Section 10334.** Estate in common—commissioners.
10335. Partition and notice thereof, and the time of filing petition.
10336. Estate in different counties—how divided.
10337. Partition may be made, although some of the heirs, etc., have parted with their interest.
10338. Shares to be set out by metes and bounds.
10339. Whole estate may be assigned to one, in certain cases.
10340. Payments for equality of partition, by whom and how.
10341. Estate may be sold.
10342. To give notice to all persons and guardians before partition—duties of commissioners.
10343. To make report, and partition to be recorded.
10344. When commissioners to make partition are not necessary.
10345. Advancements made to heirs.

10334. Estate in common—commissioners. When the estate, real or personal, assigned by the order of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon.

Upon consent of the parties, or when the court or judge deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed.

History: En. Sec. 294, p. 317, L. 1877; re-en. Sec. 294, 2nd Div. Rev. Stat. 1879; re-en. Sec. 294, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2860, C. Civ. Proc. 1895; re-en. Sec. 7678, Rev. C. 1907; re-en. Sec. 10334, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1675.

Operation and Effect

The purpose of this chapter was to vest in the court, when sitting in probate, the power to partition, among the distributees of an estate entitled to interests therein, real or personal property owned in severalty by the decedent in his lifetime, thus obviating the necessity for an independent proceeding brought after the close of the administration to accomplish the same re-

sult. *State ex rel. Goodman v. District Court*, 46 M 492, 495, 128 P 913.

That distribution of real property of an estate will result in loss and inconvenience to the devisees is of no concern to the executor, and the latter cannot defeat a petition for such distribution on the ground that for that reason a prior order of sale should stand, under this section and the following, these sections being applicable only to action by the court after distribution and at the instance of interested parties. In *re McGovern's Estate*, 77 M 182, 203, 250 P 812.

References

Hoppin v. Long, 74 M 558, 569, 241 P 636.

10335. Partition and notice thereof, and the time of filing petition. Such partition may be ordered and had in the district court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the court or judge, as directed in this chapter, notice thereof must be given to all persons interested who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of this state, either personally or by public notice, as the court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order of distribution, but the commissioners must not be appointed until the order is made distributing the estate.

History: En. Sec. 295, p. 317, L. 1877; re-en. Sec. 295, 2nd Div. Rev. Stat. 1879; re-en. Sec. 295, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2861, C. Civ. Proc. 1895; re-en. Sec. 7679, Rev. C. 1907; re-en. Sec. 10335, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1676.

Operation and Effect

When a proceeding for partition has been instituted, the decree of distribution, though final in form, performs only the office of ascertaining definitely who are entitled to the succession and the interest of each distributee, the vesting of title in the allottees, the assignee, or purchaser, as the case may be, being left in abeyance until the confirmation of the report

of the commissioners. *State ex rel. Goodman v. District Court*, 46 M 492, 496, 128 P 913.

Id. The power to make partition among the distributees of an estate is vested in the court as an incident of administration.

That distribution of real property of an estate will result in loss and inconvenience to the devisees is of no concern to the executor, and that latter cannot defeat a petition for such distribution on the ground that for that reason a prior order of sale should stand, under this section and the preceding one, these sections being applicable only to action by the court after distribution and at the instance of interested parties. In *re McGovern's Estate*, 77 M 182, 203, 250 P 812.

10336. Estate in different counties—how divided. If the real estate is in different counties, the court or judge may, if deemed proper, appoint commissioners for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs, legatees, or devisees, as if there were no other estate to be divided; but the commis-

sioners first appointed must, unless otherwise directed by the court or judge, make division of such real estate wherever situated within this state.

History: En. Sec. 296, p. 317, L. 1877; re-en. Sec. 2862, C. Civ. Proc. 1895; re-en. Sec. 296, 2nd Div. Rev. Stat. 1879; Sec. 7680, Rev. C. 1907; re-en. Sec. 10336, re-en. Sec. 296, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1677.

10337. Partition may be made, although some of the heirs, etc., have parted with their interest. Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

History: En. Sec. 297, p. 318, L. 1877; re-en. Sec. 2863, C. Civ. Proc. 1895; re-en. Sec. 297, 2nd Div. Rev. Stat. 1879; Sec. 7681, Rev. C. 1907; re-en. Sec. 10337, re-en. Sec. 297, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1678.

10338. Shares to be set out by metes and bounds. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

History: En. Sec. 298, p. 318, L. 1877; re-en. Sec. 298, 2nd Div. Rev. Stat. 1879; re-en. Sec. 298, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2864, C. Civ. Proc. 1895; re-en. Sec. 7682, Rev. C. 1907; re-en. Sec. 10338, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1679.

References

Cited or applied as section 7682, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

10339. Whole estate may be assigned to one, in certain cases. When the real estate cannot be divided without prejudice or inconvenience to the owners, the court or judge may assign the whole to one or more of the parties entitled to the share therein, who will accept it, always preferring the males to the females, and, among children, preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court or judge, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court or judge, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is assigned.

History: En. Sec. 299, p. 318, L. 1877; re-en. Sec. 299, 2nd Div. Rev. Stat. 1879; re-en. Sec. 299, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2865, C. Civ. Proc. 1895; re-en. Sec. 7683, Rev. C. 1907; re-en. Sec. 10339, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1680.

References

Cited or applied as section 7683, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

10340. Payments for equality of partition, by whom and how. When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court or judge until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

History: En. Sec. 300, p. 319, L. 1877; re-en. Sec. 300, 2nd Div. Rev. Stat. 1879; re-en. Sec. 300, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2866, C. Civ. Proc. 1895; re-en. Sec. 7684, Rev. C. 1907; re-en. Sec. 10340, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1681.

References

Cited or applied as section 7684, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

10341. Estate may be sold. When it appears to the court or judge, from the commissioners' report, that it cannot otherwise be fairly divided, and should be sold, the court or judge may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements provided in sections 10210 to 10248 of this code.

History: En. Sec. 301, p. 319, L. 1877; re-en. Sec. 301, 2nd Div. Rev. Stat. 1879; re-en. Sec. 301, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2867, C. Civ. Proc. 1895; re-en. Sec. 7685, Rev. C. 1907; re-en. Sec. 10341, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1682.

References

Cited or applied as section 7685, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

10342. To give notice to all persons and guardians before partition—duties of commissioners. Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

History: En. Sec. 302, p. 319, L. 1877; re-en. Sec. 302, 2nd Div. Rev. Stat. 1879; re-en. Sec. 302, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2868, C. Civ. Proc. 1895; re-en. Sec. 7686, Rev. C. 1907; re-en. Sec. 10342, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1683.

10343. To make report, and partition to be recorded. The commissioners must report their proceedings, and the partition agreed upon by them, to the court or judge, in writing, and the court or judge may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the order of partition made thereon, attested by the clerk under the seal of the court, must be recorded in the office of the county clerk of the county where the lands lie.

History: En. Sec. 303, p. 320, L. 1877; re-en. Sec. 303, 2nd Div. Rev. Stat. 1879; re-en. Sec. 303, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2869, C. Civ. Proc. 1895; re-en. Sec. 7687, Rev. C. 1907; re-en. Sec. 10343, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1684.

10344. When commissioners to make partition are not necessary. When the court or judge makes an order assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is made, or some of them, request that such partition be made.

History: En. Sec. 304, p. 320, L. 1877; re-en. Sec. 304, 2nd Div. Rev. Stat. 1879; re-en. Sec. 304, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2870, C. Civ. Proc. 1895; re-en. Sec. 7688, Rev. C. 1907; re-en. Sec. 10344, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1685.

10345. Advancements made to heirs. All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the court or judge, and must be specified in the order assigning and distributing the estate; and the final order of the court or judge, or in case of appeal, of the supreme court, is binding on all parties interested in the estate.

History: En. Sec. 305, p. 320, L. 1877; re-en. Sec. 305, 2nd Div. Rev. Stat. 1879; re-en. Sec. 305, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2871, C. Civ. Proc. 1895; re-en. Sec. 7689, Rev. C. 1907; re-en. Sec. 10345, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1686.

References

Cited or applied as section 7689, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 495, 128 P 913.

CHAPTER 142

APPOINTMENT OF AGENTS FOR PERSONS RESIDING OUT OF THE STATE

Section 10346. Court may appoint agent to take possession for absentees.
 10347. Bond and compensation of agent.
 10348. Unclaimed estate—how disposed of.
 10349. Account of agent annually required.
 10350. Liability of agent on his bond.
 10351. Certificate to claimant.

10346. Court may appoint agent to take possession for absentees. When any estate is assigned or distributed by an order of the court or judge, as provided in sections 10318 to 10354, to any person residing out of, and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court or judge may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the distribution.

History: En. Sec. 306, p. 320, L. 1877; re-en. Sec. 2880, C. Civ. Proc. 1895; re-en. Sec. 306, 2nd Div. Rev. Stat. 1879; re-en. Sec. 7690, Rev. C. 1907; re-en. Sec. 10346, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1691.

10347. Bond and compensation of agent. The agent must execute a bond to the state of Montana, to be approved by the court or judge, conditioned that he shall faithfully manage and account for the estate. The court or judge appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

History: En. Sec. 307, p. 320, L. 1877; re-en. Sec. 2881, C. Civ. Proc. 1895; re-en. Sec. 307, 2nd Div. Rev. Stat. 1879; re-en. Sec. 7691, Rev. C. 1907; re-en. Sec. 10347, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1692.

10348. Unclaimed estate—how disposed of. When the personal property remains in the hands of the agent unclaimed for a year, and it appears to the court or judge that it is for the benefit of those interested, it shall

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be sold under the order of the court or judge, and the proceeds, after deducting the expenses of the sale allowed by the court or judge, must be paid into the state treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the state auditor, and the other in the court.

History: En. Sec. 308, p. 321, L. 1877; re-en. Sec. 2882, C. Civ. Proc. 1895; re-en. re-en. Sec. 308, 2nd Div. Rev. Stat. 1879; Sec. 7692, Rev. C. 1907; re-en. Sec. 10348, re-en. Sec. 308, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1693.

10349. Account of agent annually required. The agent must render the court or judge appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what;
2. The income derived therefrom;
3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid;
4. The expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When filed, the court or judge may examine witnesses and take proofs in regard to the account, and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court or judge may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase-money to be deposited in the state treasury.

History: En. Sec. 309, p. 321, L. 1877; re-en. Sec. 2883, C. Civ. Proc. 1895; re-en. re-en. Sec. 309, 2nd Div. Rev. Stat. 1879; Sec. 7693, Rev. C. 1907; re-en. Sec. 10349, re-en. Sec. 309, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1694.

10350. Liability of agent on his bond. The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

History: En. Sec. 310, p. 321, L. 1877; re-en. Sec. 2884, C. Civ. Proc. 1895; re-en. re-en. Sec. 310, 2nd Div. Rev. Stat. 1879; Sec. 7694, Rev. C. 1907; re-en. Sec. 10350, re-en. Sec. 310, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1695.

10351. Certificate to claimant. When any person appears and claims the money paid into the treasury, the court or judge making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under seal; and upon the presentation of the certificate to him, the state auditor must draw his warrant on the treasurer for the amount.

NOTE.—Secs. 7696, 7697, Rev. C. 1907, re-en. Sec. 311, 2nd Div. Comp. Stat. 1887; re-en. with this section, re-en. as Secs. 10332, re-en. Sec. 2885, C. Civ. Proc. 1895; re-en. 10333, R. C. M. 1921. Sec. 7695, Rev. C. 1907; re-en. Sec. 10351, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1696.

History: En. Sec. 311, p. 322, L. 1877; re-en. Sec. 311, 2nd Div. Rev. Stat. 1879;

CHAPTER 143

SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATE

Section 10352. Court not to lose jurisdiction of trusts by distribution—accounts of trustees.

10353. Compensation of trustees.

10354. Appeal from order settling account of trustee.

10352. Court not to lose jurisdiction of trusts by distribution—accounts of trustees. Where any trust has been created by or under any will to continue after distribution, the district court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may, at the termination thereof, render and pray for the settlement of his accounts as such trustee, before the district court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or, in the case of his death, his legal representatives, shall, for that purpose, present to the court or judge his petition, setting forth his accounts in detail; and upon filing thereof, the court or judge shall fix a day for the hearing, and a citation shall be issued citing all the beneficiaries of the said trust to appear and show cause why the account should not be allowed; such citation shall be personally served upon all the beneficiaries in the state, in the manner provided for the service of summons in civil actions, and shall be served upon all the beneficiaries, who shall appear by affidavit to be absent from the state, by publication in such manner as the court or judge may order, for not less than two months. And any such trustee may, in the discretion of the court or judge, upon application of any beneficiary of the trust, be ordered to appear and render his account, after being cited by service of citation as provided for the service of summons in civil cases. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as are hereinbefore provided.

History: En. Sec. 2900, C. Civ. Proc. 1895; re-en. Sec. 7698, Rev. C. 1907; re-en. Sec. 10352, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1699.

Objecting Cestuis Que Trustent Not Entitled to Jury Trial

In a proceeding instituted under this section by testamentary trustees praying for settlement of their accounts, objecting cestuis que trustent were not entitled to trial by jury. In re Harper's Estate, 98 M 357, 361, 40 P 2d 51.

Operation and Effect

Since this section affords a plain, speedy and adequate remedy for the termination of testamentary trusts, a demurrer to a complaint in equity seeking the same relief will be sustained. Philbrick v. American Bank & Trust Co., 58 M 376, 385, 193 P 59.

Id. This section confers exclusive jurisdiction upon the district court when sitting

as a probate court, to determine whether the purpose of the testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution.

The district court, sitting in probate in a proceeding by testamentary trustees seeking settlement of their accounts, has the same general jurisdiction and powers as are exercised by a court of equity over trusts. In re Harper's Estate, 98 M 356, 40 P 2d 51.

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. Montgomery v. Gilbert, 77 F. 2d 39.

References

Cited or applied as section 2900, Code of Civil Procedure, in In re Higgins' Estate, 15 M 474, 502, 39 P 506.

10353. Compensation of trustees. On all such accountings, the court or judge shall allow the trustee or trustees the proper expenses and such compensation for services as the court or judge may deem to be just and reasonable, and shall apportion such compensation among the trustees

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according to the services rendered by them respectively, and may, in its discretion, fix a yearly compensation for the trustee or trustees, to continue as long as the court or judge may deem proper.

History: En. Sec. 2901, C. Civ. Proc. 1895; re-en. Sec. 7699, Rev. C. 1907; re-en. Sec. 10353, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1700.

10354. Appeal from order settling account of trustee. From an order settling such account appeal may be taken in the manner provided for an appeal from an order settling the account of an executor or administrator. The order of the district court, if affirmed on appeal or becoming final without appeal, shall be conclusive.

History: En. Sec. 2902, C. Civ. Proc. 1895; re-en. Sec. 7700, Rev. C. 1907; re-en. Sec. 10354, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1701.

CHAPTER 144

MISCELLANEOUS—ORDERS—PROCESS—MINUTES—RECORDS—TRIALS AND APPEALS

- Section 10355. Orders and judgments need not recite jurisdictional facts—orders to be entered in minutes.
10356. How often publication to be made.
10357. Recorded order to impart notice from date of filing.
10358. Proceeding in chambers—jury trial.
10359. Style of citation.
10360. Citation—how issued.
10361. Citation—how served.
10362. Personal notice given by citation.
10363. Citation to be served five days before return.
10364. One description of real estate sought to be sold, being published, is sufficient for all purposes.
10365. Rules of practice generally.
10366. New trials and appeals.
10367. Within what time appeal must be taken.
10368. Issues joined—how tried and disposed of.
10369. Court to try case when no jury demanded—how and what issues to be tried.
10370. Court to appoint attorney for minor or absent heirs, devisees, or legatees or creditors—when and what compensation he is to receive.
10371. Orders setting apart homestead, confirming sale, etc., to be recorded.
10372. Costs—by whom paid in certain cases.
10373. Executor, etc., to be removed when committed for contempt.
10374. Service of process on guardian.
10375. Termination of life estate.
10376. Power of clerk to issue orders and notices.

10355. Orders and judgments need not recite jurisdictional facts—orders to be entered in minutes. Orders and judgments made by the court or judge, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered, except as otherwise provided in sections 10018 to 10464 of this code. All orders of the court or judge must be entered at length in the minute-book of the court kept for probate proceedings.

History: En. Sec. 314, p. 322, L. 1877; re-en. Sec. 314, 2nd Div. Rev. Stat. 1879; re-en. Sec. 314, 2nd Div. Comp. Stat. 1887; amd. Sec. 2910, C. Civ. Proc. 1895; re-en. Sec. 7701, Rev. C. 1907; re-en. Sec. 10355, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1704.

Operation and Effect

Where the clerk enters in the minute-book, at length, an order to show cause why real estate should not be sold, though the order purports to have been signed by

the judge, such entry was sufficient evidence of the fact that the order was duly made, as the signature may be treated as surplusage; and there is no requirement

that the clerk shall recite that the order was made. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 285, 99 P 847, 129 Am. St. Rep. 645.

10356. How often publication to be made. When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in sections 10018 to 10464. The court or judge may, however, order a less number of publications during the period.

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Amended
S.L. '47, C. 7
Sec. 1, p. 6

History: En. Sec. 315, p. 322, L. 1877; re-en. Sec. 315, 2nd Div. Rev. Stat. 1879; re-en. Sec. 315, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2911, C. Civ. Proc. 1895; re-en. Sec. 7702, Rev. C. 1907; re-en. Sec. 10356, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1705.

10357. Recorded order to impart notice from date of filing. When it is provided in sections 10018 to 10464 that any order of the court or judge, or a copy thereof, must be recorded in the office of the county clerk, from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

History: En. Sec. 316, p. 322, L. 1877; re-en. Sec. 316, 2nd Div. Rev. Stat. 1879; re-en. Sec. 316, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2912, C. Civ. Proc. 1895; re-en. Sec. 7703, Rev. C. 1907; re-en. Sec. 10357, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1706.

10358. Proceeding in chambers—jury trial. All orders mentioned in sections 10018 to 10464, and all proceedings in matters of probate, may be made or heard either before the court or the judge thereof in chambers, and when a jury is needed, the court or judge may order the trial to take place in court as provided in sections 9008 to 9832 of this code.

History: En. Sec. 317, p. 322, L. 1877; re-en. Sec. 317, 2nd Div. Rev. Stat. 1879; re-en. Sec. 317, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2913, C. Civ. Proc. 1895; re-en. Sec. 7704, Rev. C. 1907; re-en. Sec. 10358, R. C. M. 1921. **References**
Cited or applied as section 2913, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 235, 242, 70 P 721.

10359. Style of citation. Citations must be directed to the person to be cited, signed by the clerk and issued under the seal of the court, and must contain:

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1. The title of the proceeding;
2. The style of the citation, which shall be "The State of Montana";
3. A brief statement of the nature of the proceeding;
4. A direction that the person cited do appear at a time and place specified.

History: En. Sec. 318, p. 322, L. 1877; re-en. Sec. 318, 2nd Div. Rev. Stat. 1879; re-en. Sec. 318, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2914, C. Civ. Proc. 1895; re-en. Sec. 7705, Rev. C. 1907; amd. Sec. 1, Ch. 40, L. 1921; re-en. Sec. 10359, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1707. **References**
State v. District Court, 73 M 84, 90, 235 P 751.

10360. Citation—how issued. The citation may be issued by the clerk upon the application of any party, without an order of the judge, except in cases in which such order is by the provisions of sections 10018 to 10464 expressly required.

History: En. Sec. 319, p. 323, L. 1877; re-en. Sec. 319, 2nd Div. Rev. Stat. 1879; re-en. Sec. 319, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2915, C. Civ. Proc. 1895; re-en. Sec. 7706, Rev. C. 1907; re-en. Sec. 10360, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1708.

10361. Citation—how served. The citation must be served in the same manner as a summons in a civil action.

History: En. Sec. 320, p. 323, L. 1877; re-en. Sec. 320, 2nd Div. Rev. Stat. 1879; re-en. Sec. 320, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2916, C. Civ. Proc. 1895; re-en. Sec. 7707, Rev. C. 1907; re-en. Sec. 10361, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1709.

Operation and Effect

The notice required by section 10412 to be served upon a person sought to be placed under guardianship as an incompetent must

be served as a citation, which in turn must be served as a summons; therefore, since a summons cannot be served by a party to the proceeding, service made by petitioner for letters of guardianship was void. State v. District Court et al., 73 M 84, 90, 235 P 751.

References

O'Sullivan v. Alexander et al., 73 M 12, 18, 234 P 1099.

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10362. Personal notice given by citation. When personal notice is required, and no mode of giving it is prescribed, it must be given by citation.

History: En. Sec. 321, p. 323, L. 1877; re-en. Sec. 321, 2nd Div. Rev. Stat. 1879; re-en. Sec. 321, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2917, C. Civ. Proc. 1895; re-en. Sec. 7708, Rev. C. 1907; re-en. Sec. 10362,

R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1710.

References

State v. District Court et al., 73 M 84, 90, 235 P 751.

10363. Citation to be served five days before return. When no other time is specifically prescribed in sections 10018 to 10464 of this code, citations must be served at least five days before the return day thereof.

History: En. Sec. 322, p. 323, L. 1877; re-en. Sec. 322, 2nd Div. Rev. Stat. 1879; re-en. Sec. 322, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2918, C. Civ. Proc. 1895; re-en. Sec. 7709, Rev. C. 1907; re-en. Sec. 10363, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1711.

References

State v. District Court et al., 73 M 84, 90, 235 P 751.

10364. One description of real estate sought to be sold, being published, is sufficient for all purposes. When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of petition for the confirmation thereof; it is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

History: En. Sec. 323, p. 324, L. 1877; re-en. Sec. 323, 2nd Div. Rev. Stat. 1879; re-en. Sec. 323, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2919, C. Civ. Proc. 1895; re-en. Sec. 7710, Rev. C. 1907; re-en. Sec. 10364, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1712.

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10365. Rules of practice generally. Except as otherwise provided in sections 10018 to 10464 of this code, the provisions of sections 9008 to 9832 of this code are applicable to and constitute the rules of practice in the proceedings mentioned in said sections 10018 to 10464.

History: En. Sec. 324, p. 324, L. 1877; re-en. Sec. 324, 2nd Div. Rev. Stat. 1879; re-en. Sec. 324, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2920, C. Civ. Proc. 1895; re-en. Sec. 7711, Rev. C. 1907; re-en. Sec. 10365, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1713.

Operation and Effect

An issue in a probate matter is to be tried and determined as an ordinary ac-

tion, except that a jury trial is a privilege, and not a matter of right. In re Estate of Peterson, 49 M 96, 97, 140 P 237.

References

Cited or applied as section 2920, Probate Practice Act, in State ex rel. Nissler v. Donlan, 32 M 256, 263, 80 P 244; as section 7711, Revised Codes, in In re Estate of Murphy, 57 M 273, 280, 188 P

146; State ex rel. Juckem v. District Court, 57 M 315, 188 P 137; In re Sprigg's Estate, 68 M 92, 95, 216 P 1108; State v. District

Court, 83 M 400, 410, 272 P 525; State ex rel. O'Neil v. District Court et al., 96 M 393, 396 et seq., 30 P 2d 815.

10366. New trials and appeals. The provisions of sections 9008 to 9832 of this code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of sections 10018 to 10464—apply to the proceedings mentioned in the sections last enumerated.

History: En. Sec. 325, p. 324, L. 1877; re-en. Sec. 325, 2nd Div. Rev. Stat. 1879; re-en. Sec. 325, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2921, C. Civ. Proc. 1895; re-en. Sec. 7712, Rev. C. 1907; re-en. Sec. 10366, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1714.

Operation and Effect

In the absence of specific provisions, in the Code of Civil Procedure, relating to new trials and appeals in probate proceedings as to the contents of the record in such cases, or the mode of authenticating it, the provisions regulating bills of exceptions, statements, and appeals in ordinary actions are applicable, and, so far as may be, the analogies between them must govern. In re Dougherty's Estate, 34 M 336, 341, 86 P 38.

New trials in probate proceedings are proper only in cases involving issues of fact which are based upon formal plead-

ings authorized by the codes. In re Antonioli's Estate, 42 M 219, 221, 111 P 1033; State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 598, 144 P 159.

Where formal pleadings authorized or required by the statute in a probate proceeding, no matter how denominated, present issues of fact, a new trial lies even though the proceeding was disposed of solely upon a question of law. In re Stinger Estate, 61 M 173, 183, 184, 201 P 693.

References

Cited or applied as section 2921, Code of Civil Procedure, in Tuohy's Estate, 23 M 305, 307, 58 P 722; In re Davis' Estate, 27 M 235, 241, 70 P 721; In re Kelly's Estate, 31 M 356, 359, 78 P 579, 79 P 244; as section 7712, Revised Codes, in In re Estate of Murphy, 57 M 273, 280, 188 P 146.

10367. Within what time appeal must be taken. The appeal must be taken within sixty days after the order or judgment is entered.

History: En. Sec. 326, p. 324, L. 1877; re-en. Sec. 326, 2nd Div. Rev. Stat. 1879; re-en. Sec. 326, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2922, C. Civ. Proc. 1895; re-en. Sec. 7713, Rev. C. 1907; re-en. Sec. 10367, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1715.

References

Cited or applied as section 7713, Revised Codes, in In re Estate of Murphy, 57 M 273, 277, 188 P 146.

10368. Issues joined—how tried and disposed of. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of sections 10032 to 10038 of this code, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise, by the court or judge, as in civil actions.

History: En. Sec. 327, p. 325, L. 1877; re-en. Sec. 327, 2nd Div. Rev. Stat. 1879; re-en. Sec. 327, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2923, C. Civ. Proc. 1895; re-en. Sec. 7714, Rev. C. 1907; re-en. Sec. 10368, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1716.

References

Cited or applied as section 2923, Code of Civil Procedure, in In re Liter's Estate,

19 M 474, 477, 48 P 753; In re Davis' Estate, 27 M 235, 241, 70 P 721; In re Tuohy's Estate, 33 M 230, 241, 83 P 486; as section 7714, Revised Codes, in In re Estate of Peterson, 49 M 96, 97, 140 P 237; In re Estate of Murphy, 57 M 273, 280, 188 P 146; In re Stinger Estate, 61 M 173, 184, 201 P 693; In re Harper's Estate, 98 M 356, 40 P 2d 51.

10369. Court to try case when no jury demanded—how and what issues to be tried. If no jury is demanded, the court or judge must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on

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(dissent)

file, the court or judge, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either party may move for a new trial upon the same grounds and errors, and in like manner, as provided in this code for civil actions. If the trial of the issues joined requires the examination of an account, the court or judge must try the matter or refer it, and no jury can be called.

History: En. Sec. 328, p. 325, L. 1877; re-en. Sec. 328, 2nd Div. Rev. Stat. 1879; re-en. Sec. 328, 2nd Div. Comp. Stat. 1887; amd. Sec. 2924, C. Civ. Proc. 1895; re-en. Sec. 7715, Rev. C. 1907; re-en. Sec. 10369, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1717.

Operation and Effect

Where objectors to the allowance of an attorney's fee for services rendered and administrator did not demand a jury trial, they were in no position to complain on appeal that the court tried the cause without a jury. In re McLure's Estate, 68 M 556.

In a proceeding instituted under section 10352 by testamentary trustees praying for settlement of their accounts, objecting cestuis que trustent were not entitled to trial by jury. In re Harper's Estate, 98 M 356, 361, 40 P 2d 51.

References

Cited or applied as section 2924, Code of Civil Procedure, in In re Davis' Estate, 27 M 235, 241, 70 P 721; In re Tuohy's Estate, 33 M 230, 242, 83 P 486; as section 7715, Revised Codes, in In re Estate of Peterson, 49 M 96, 97, 140 P 237; In re Stinger Estate, 61 M 173, 184, 201 P 693.

10370. Court to appoint attorney for minor or absent heirs, devisees, or legatees or creditors—when, and what compensation he is to receive. At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmation thereof; settlements, partitions, and distributions of estate, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof; the court or judge may, in its or his discretion, appoint some competent attorney-at-law to represent in all such proceedings the devisees, legatees, or heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are nonresidents of the state; and those interested who, though they are neither such minors nor nonresidents, are unrepresented. The order must specify the names of the parties, so far as known, for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court or judge, for his services, which must be paid out of the fund of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the court or judge may substitute another attorney for the one first appointed, in which case the fee must be apportionately divided. The nonappointment of an attorney will not affect the validity of any of the proceedings.

History: En. Sec. 329, p. 325, L. 1877; re-en. Sec. 329, 2nd Div. Rev. Stat. 1879; re-en. Sec. 329, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2925, C. Civ. Proc. 1895; re-en. Sec. 7716, Rev. C. 1907; re-en. Sec. 10370, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1718.

Operation and Effect

The provisions of this section being exclusive and applicable only to probate proceedings, minors cannot appear by

guardian ad litem in opposition to the probate of a will. State ex rel. Eakins v. District Court, 34 M 226, 229, 85 P 1022.

The district court, in its discretion, may, in probate proceedings, appoint an attorney for minor heirs. State ex rel. Cotter v. District Court, 34 M 306, 307, 87 P 615.

References

Hoppin v. Long, 74 M 558, 574, 241 P 636.

10371. Orders setting apart homestead, confirming sale, etc., to be recorded. When an order is made, setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the county clerk of the county in which the property is situated.

History: En. Sec. 330, p. 325, L. 1877; re-en. Sec. 330, 2nd Div. Rev. Stat. 1879; re-en. Sec. 330, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2926, C. Civ. Proc. 1895; re-en. Sec. 7717, Rev. C. 1907; re-en. Sec. 10371, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1719.

10372. Costs—by whom paid in certain cases. When it is not otherwise prescribed in sections 10018 to 10464, the district court, or supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for costs may issue out of the district court.

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History: En. Sec. 331, p. 326, L. 1877; re-en. Sec. 331, 2nd Div. Rev. Stat. 1879; re-en. Sec. 331, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2927, C. Civ. Proc. 1895; re-en. Sec. 7718, Rev. C. 1907; re-en. Sec. 10372, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1720.

Operation and Effect

Speaking generally, costs in probate proceedings are governed by this section. Where it is sought to have costs taxed against an administrator personally, the controlling inquiry is whether he acted in good faith; if so, justice requires that they be paid out of the funds of the estate. In *re Williams' Estate*, 55 M 63, 74, 173 P 790.

Where the supreme court in the disposition of an appeal from an order settling an administrator's account remands the cause with directions to require that officer to file a further account and orders, as it may do under this section, that the costs incident to the appeal shall be paid by the administrator personally, the jurisdiction of the district court is limited to the enforcement of the order, except that it may determine disputed questions of costs, or on final settlement of the account allow such portions of the costs incurred as a charge against the estate as justice may require. In *re Jennings' Estate*, 79 M 73, 76, 78, 254 P 1067.

Under the rule that reasonable attorneys' fees are proper charges against an estate

as costs where a will contest is initiated and defended in good faith, and under authority lodged in it in that behalf by this section, the supreme court may, in a proper case, fix the amounts the attorneys for such sides are entitled to for their services on appeal, to be paid out of the assets of the estate. In *re Bielenberg's Estate*, 86 M 521, 529, 284 P 546.

Where it appears that in a proceeding to determine heirship the appeal of unsuccessful claimants was prosecuted in good faith, the district court (as well as the supreme court on appeal) may, in its discretion, under this section, order all costs, including reasonable attorneys' fees, to be paid from the corpus of the estate; counsel for the executor of the estate being entitled to additional compensation for increased labor because of the appeal. In *re Hauge's Estate*, 92 M 36, 45, 9 P 2d 1065.

Attorneys' fees incurred by a devisee under a will to defend a contest thereof are not allowable as costs and disbursements within the purview of section 9786, nor under section 10047 and this section, out of the assets of the estate. In *re Baxter's Estate*, 94 M 257, 268, 22 P 2d 182.

References

Cited or applied as section 7718, Revised Codes, in *re Williams' Estate*, 52 M 366, 368, 157 P 963.

10373. Executor, etc., to be removed when committed for contempt. Whenever an executor or administrator or guardian is committed for contempt in disobeying any lawful order of the court or judge, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court or judge may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor or administrator or guardian in his stead.

History: En. Sec. 332, p. 326, L. 1877;
re-en. Sec. 332, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 332, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2928, C. Civ. Proc. 1895; re-en.
Sec. 7719, Rev. C. 1907; re-en. Sec. 10373,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1721.

References

Cited or applied as section 7719, Revised
Codes, in State ex rel. King v. District
Court, 42 M 182, 185, 111 P 717.

10374. Service of process on guardian. Whenever an infant, insane, or incompetent person has a guardian of his' estate residing in this state, personal service upon the guardian of any process, notice, or order of the court or judge, concerning the estate of a deceased person in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

History: En. Sec. 332, p. 326, L. 1877; re-en. Sec. 2929, C. Civ. Proc. 1895; re-en.
re-en. Sec. 332, 2nd Div. Rev. Stat. 1879; Sec. 7720, Rev. C. 1907; re-en. Sec. 10374,
re-en. Sec. 332, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1722.

10375. Termination of life estate. If any person has died, or shall hereafter die, who, at the time of his death, was the owner of a life estate, which terminates by reason of the death of such person, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the district court of the county in which the property is situated his verified petition, setting forth such facts, and thereupon, and after such notice, by publication or otherwise, as the court or judge may order, the court or judge shall hear such petition, and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court or judge shall make an order to that effect, and thereupon a certified copy of such order may be recorded in the office of the county clerk, and thereafter shall have the same effect as a final order of distribution so recorded.

History: En. Sec. 2930, C. Civ. Proc. 1895; re-en. Sec. 7721, Rev. C. 1907; re-en. Sec. 10375, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1723.

10376. Power of clerk to issue orders and notices. The clerk may make all necessary orders and issue notices of hearing for the probate of wills, both domestic and foreign, and letters of administration or guardianship, and in the absence of the judge may hear, and upon the hearing, grant such letters, including letters testamentary, when no objections are made or filed; may order notices to creditors, may appoint appraisers, file and approve all bonds, file and approve claims against the estate, file and approve all accounts of executors, administrators, and guardians, except final accounts, when no objections are made or filed thereto; make all orders for hearings and orders to give notice, as may be necessary in the exercise of the above powers. He may likewise make orders fixing the time and place of hearing accounts and petitions for distribution and may also make orders to show cause on applications for the sale of real estate and on any other application in a probate or guardianship matter for the hearing of which an order to show cause is necessary. The court or judge may at any time within thirty days thereafter set aside or modify any of the orders so made, but unless so set aside or modified they shall have the same effect as if made by the judge or court.

10375
Amended
S.L. '43 c. 130
Sec. 1 p. 221

10376
amended
L. 37 c. 173
sec. 1 p. 550

History: En. Sec. 1, p. 219, L. 1891; 58, L. 1921; re-en. Sec. 10376, R. C. M.
amd. Sec. 2931, C. Civ. Proc. 1895; re-en. 1921; amd. Sec. 1, Ch. 14, L. 1935.
Sec. 7722, Rev. C. 1907; amd. Sec. 1, Ch.

10377-10400. Repealed—Chapter 65, laws of 1923.

10377-10400
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56 P (2d) 739

CHAPTER 145

INHERITANCE TAX

- Section 10400.1. Taxes on transfer—when and how imposed.
- 10400.2. Primary rates, where not in excess of \$25,000.00.
- 10400.3. Other rates, where in excess of \$25,000.00—estate tax.
- 10400.4. Exemptions from first \$25,000.
- 10400.5. When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed.
- 10400.6. Discount—interest.
- 10400.7. Powers of representative in collection and payment of tax—collection from legatees or distributees.
- 10400.8. Refunding of tax—when authorized—manner of refunding—advance payment of tax for relief from penalty and interest.
- 10400.9. Bond for deferred payment of tax.
- 10400.10. Bequests to executors or trustees—when taxable.
- 10400.11. Payment of tax on transfer of securities by foreign representative—duty of holder of securities or assets of nonresident decedent—apportionment of deductions—information to be given board of equalization—amount of tax to be retained on delivery of assets—penalties.
- 10400.12. Retroactive nature of act.
- 10400.13. Jurisdiction of district court—certificate of board required before distributing estate.
- 10400.14. Ancillary letters—notice—hearing and determination of tax.
- 10400.15. Determination of tax due from estate of nonresident decedent—application—appeals.
- 10400.16. Determination when application not made.
- 10400.17. Special appraiser.
- 10400.18. Duties, powers and compensation of appraisers.
- 10400.19. Hearing by the court.
- 10400.20. Notice of hearing.
- 10400.21. Commissioner of insurance to value future estates, etc.
- 10400.22. Appraisal at clear market value—value of future interests, how computed.
- 10400.23. Contingent encumbrances.
- 10400.24. Interest determinable by death.
- 10400.25. Tax payable forthwith on contingent estate.
- 10400.26. Postponed tax on undiminished value.
- 10400.27. Order determining tax—contents.
- 10400.28. Rehearing within sixty days.
- 10400.29. Reappraisal in the district court within one year.
- 10400.30. Collection of unpaid taxes.
- 10400.31. Special administration to determine tax—compensation.
- 10400.32. Special administration to determine tax where transfer made in contemplation of death.
- 10400.33. Public administrator's duty to investigate concerning tax—compensation.
- 10400.34. State board of equalization to supervise inheritance tax.
- 10400.35. Powers and duties of the board.
- 10400.36. Powers and duties in nonresident estates.
- 10400.37. Duty of the legal department of state.
- 10400.38. Forms and blanks.
- 10400.39. Duties of clerks of district courts.
- 10400.40. Quarterly report of county treasurer—payment of tax to state treasurer—interest on unpaid amounts.
- 10400.41. Composition and compromise.
- 10400.42. Receipts, copies, recording.
- 10400.43. Definitions.
- 10400.44. Disposition of taxes.

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Ref. to
and
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- 10400.45. Employment of assistants by board and fixing compensation.
- 10400.46. Hearings by board—witnesses—false testimony as perjury—compensation.
- 10400.47. Repealing clause—effect of repeal.
- 10400.48. To what estates act applicable.
- 10400.49. Disposition of moneys received from tax.
- 10400.50. List of deaths to be made by registrar of vital statistics—county clerks to receive.
- 10400.51. Checking by county clerk of records and transfers—report to board of equalization.

10400.1. Taxes on transfer—when and how imposed. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation except the state of Montana, or any of its institutions, county, town or municipal corporations within the state, for strictly county, town, municipal or other public purposes, and corporations of this state organized under its laws, or voluntary associations, organized solely for religious, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

(1) By a resident of state. When the transfer is by will or by intestate laws of this state from any person dying possessed of the property while a resident of the state.

(2) Nonresident's property within state. When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death.

(3) In contemplation of death. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within the state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within three years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without a fair consideration in money or money's worth shall, unless shown to the contrary be deemed to have been made in contemplation of death within the meaning of this section.

(4) When imposed. Such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer whether made before or after the passage of this act; provided that the provisions of this act shall apply to all estates of all decedents who have died since the first day of April, 1921, and which estates remain undistributed on the date when this act takes effect, to the same extent and in the same manner as though this act had been in full force and effect at the dates of death of such decedents, and if any tax shall have been paid by any executor, administrator, heir, legatee or devisee of any such decedent before the date when this act takes effect, the amount of such tax so paid shall be allowed as a credit on the total amount of tax required to be paid by such executor, administrator, heir, legatee, or devisee under the provisions of this act.

(5) Transfer under power of appointment. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act, shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related, had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

(6) Joint estates. Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving tenant by the entirety, joint tenant, or joint tenants, person or persons, to the immediate ownership or possession of such property shall be deemed a transfer of one-half or other proper fraction thereof as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants, or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant, or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant, or joint depositor, by will, except such part thereof as may be shown to have originally belonged to the survivor and never to have belonged to the decedent.

10400.1 (6)
 195 P. (2d)
 991-997

10400.1 (6)
 206 P. (2d) 818

(7) Insurance part of estate. All insurance payable upon the death of any person over and above fifty thousand dollars (\$50,000.00), shall be deemed a part of the property and estate passing to the person or persons entitled to receive the same and if payable to more than one person the said fifty thousand dollars (\$50,000.00) exemption shall be prorated between such persons in proportion to the amount of insurance payable to each.

10400.1
 subd. 7
 129 P. (2d) 628-
 633

(8) On clear market value—deductions. The tax so imposed shall be upon the clear market value of such property passing by any such transfer to each person, institution, association, corporation, or body politic, at the rates hereinafter prescribed and only upon the excess of the exemption hereinafter granted to such person, institution, association, corporation or body politic, and in determining the clear market value of the property so passing by any such transfer the following deductions, and no other shall be allowed; debts of the decedent owing at the date of death, expenses of funeral and last illness, all state, county and municipal taxes which are a lien against property situated in this state at the date of death, the ordinary expenses of administration, including the commissions and fees

10400.1 (8)
 74 P. (2d) 404

10400.1
 Subsec. 8
 96 P. (2d) 940

10400.1 (8)
 106 P. (2d) 343

of executors and administrators and their attorneys actually allowed and paid, and federal estate taxes due or paid.

All transfers of property real, personal, or mixed, or of any interest therein, coming within the provisions of this section shall be prima facie proof, for the purposes of this act, to have been made as of the date upon which the papers evidencing such transfer are recorded, and all such transfers, if recorded after the death of the person or persons making such transfer, whatever the form of such transfer, shall be deemed, for the purposes of taxation under the provisions of this act, to have been made by will.

History: En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935.

Constitutionality

Held, that this section, imposing an inheritance tax upon all estates of persons who died since April 1, 1921, remaining undistributed on the date of its approval, March 5, 1923, is a valid enactment and not open to attack on the grounds that it violates the equal protection of the law clause of the constitution, is class legislation and authorizes the taking of property without due process of law. *State ex rel. Rankin v. District Court*, 70 M 322, 324 et seq., 225 P 804.

Id. Section 11, article XII, of the constitution, providing that taxes shall be levied and collected by general laws and for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, relates to property taxes only, and not to such as are imposed on inheritance.

Nature of Tax

An inheritance tax is not one on property and there is no natural right to receive property by will or inheritance, it being within power of the state to impose such conditions to succession to property within its jurisdiction as it may deem appropriate, the term "jurisdiction" in this connection meaning power over the particular res or subject. *State ex rel. Bankers' Trust Co. v. Walker*, 70 M 484, 491 et seq., 226 P 894.

The beneficiary of an estate has no claim by right of blood or otherwise to the estate of a decedent, except as the law gives it to him, and the state may impose such taxes or conditions on distributive shares as it deems proper. *Estate of Oppenheimer*, 75 M 186, 198, 243 P 589.

Id. The inheritance tax is imposed upon the right to transfer, not upon the estate.

What Transfers or Gifts Taxable

Under this section, held that where a transfer or gift is not to take effect

in possession or enjoyment until after the death of the transferor, or donor, whether made in contemplation of death or not, it is subject to the inheritance tax therein provided for. *Estate of Oppenheimer*, 75 M 186, 198, 243 P 589.

Id. Where under an antenuptial agreement certain sums of money were to be paid to the wife after the death of the husband in certain annual installments by his executors, in consideration of her relinquishment of her right of dower and any other claims she might be entitled to assert against his estate as his widow or next of kin, the total amount of such gifts was subject to the inheritance tax provided for by this section.

Id. For a gift or transfer to escape the imposition of an inheritance tax, it must have been made for a valuable consideration in praesenti.

Held, that under this section, providing for a tax on direct and collateral inheritances, the state may not lawfully collect an inheritance tax upon the right of a nonresident legatee to succeed to shares of the capital stock of a foreign corporation doing business in the state, bequeathed to him by a nonresident, where the certificates representing the stock are kept at the place of domicile of the testator. *State ex rel. Bankers' Trust Co. v. Walker*, 70 M 484, 491 et seq., 226 P 894.

Id. For the purpose of imposing a succession tax jurisdiction exists only when the exercise of some essential privilege relation to the transfer of title (to stock in a foreign corporation in this instance) depends for its legality upon the law of the state levying the tax.

Id. Shares of stock of a corporation chartered under the laws of another state and belonging to a nonresident are not subject to an inheritance tax in this state.

By enacting chapter 150, laws of 1925, amending this section, (applicable to the case considered) the legislature intended to impose an inheritance tax on the succession or devaluation of all real and personal property, of every kind and description, within the jurisdiction of the

state, and upon any interest therein (inter alia, upon mortgages), whether owned by a resident or nonresident at the time of his death. State ex rel. Walker et al. v. Jones, 80 M 574, 582, 261 P 356.

A voluntary transfer of property made "in contemplation of death" and as such taxable under the inheritance tax law as amended (Chap. 105, L. 1927), is one the making of which is induced by the same consideration which leads to a testamentary disposition thereof and as a substitute therefor, i. e., the thought of death, irrespective of whether or not death is believed to be near or imminent. In re Wadsworth's Estate, 92 M 135, 145, 11 P 2d 788.

When Shares of Stock in a Foreign Corporation Not Subject to Tax

Held, that under this section, providing for a tax on direct and collateral inheritances, the state may not lawfully collect an inheritance tax upon the right of a

nonresident legatee to succeed to shares of the capital stock of a foreign corporation doing business in the state, bequeathed to him by a nonresident, where the certificates representing the stock are kept at the place of domicile of the testator. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 491 et seq., 226 P 894.

Id. For the purpose of imposing a succession tax jurisdiction exists only when the exercise of some essential privilege incident to the transfer of title (to stock in a foreign corporation in this instance) depends for its legality upon the law of the state levying the tax.

Id. Shares of stock of a corporation chartered under the laws of another state and belonging to a nonresident are not subject to an inheritance tax in this state.

References

State ex rel. Walker et al. v. Jones, 80 M 574, 582, 261 P 356.

10400.2. Primary rates, where not in excess of \$25,000.00. When the property or any beneficial interest therein passes by any such transfer to any person, institution, association, corporation or body politic, where the amount of the property shall exceed in value the exemption herein-after specified, and shall not exceed in value twenty-five thousand dollars (\$25,000.00), the tax hereby imposed shall be:

(1) Two per cent. Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent, or any child adopted as such in conformity with law, or any child to whom such decedent for not less than ten (10) years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth (15) birthday, and was continuous for ten (10) years, or any lineal issue of such adopted or mutually acknowledged child, at the rate of two per cent. (2%) of the clear value of such interest in such property passing to such person.

(2) Four per cent. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife of a son, or the husband of a daughter of the decedent, at the rate of four per cent. (4%) of the clear value of such interest in such property passing to such person.

(3) Six per cent. Where the person or persons entitled to any beneficial interest in such property shall be the uncle, aunt or first cousin of the decedent, at the rate of six per cent. (6%) of the clear value of such interest in such property passing to such person.

(4) Eight per cent. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of eight per cent. (8%) of the clear value of such interest in such property passing to such person, institution, association, corporation or body politic.

History: En. Sec. 2, Ch. 65, L. 1923; amd. Sec. 1, Ch. 48, Ex. L. 1933.

10400.3. Other rates, where in excess of \$25,000.00—estate tax. The foregoing rates in section 10400.2 are for convenience termed the primary rates:

When the amount of the clear value of such property or interests exceeds twenty-five thousand dollars (\$25,000.00), the rates of tax upon such excess shall be as follows:

(1) Rate where amount \$25,000.00 to \$50,000.00. Upon all in excess of twenty-five thousand dollars (\$25,000.00), and up to fifty thousand dollars (\$50,000.00), two (2) times the primary rates.

(2) Rate where amount \$50,000.00 to \$100,000.00. Upon all in excess of fifty thousand dollars (\$50,000.00), and up to one hundred thousand dollars (\$100,000.00), three (3) times the primary rates.

(3) Rate where amount over \$100,000.00. Upon all in excess of one hundred thousand dollars (\$100,000.00), four (4) times the primary rates.

(a) **Estate tax.** In addition to the taxes hereinabove imposed, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States Revenue Act of 1926, and amendments thereto, where the decedent, at the time of his decease, was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent. (80%), allowable under said United States Revenue Act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payments will effect a saving or diminution in the amount of the United States estate tax payable by, or out of the estate of the decedent, had subdivisions (a) to (h) not been enacted. The tax imposed herein shall be collected by the several county treasurers or the state treasurer and distributed as hereafter provided.

(b) When payable. The estate tax shall be payable to the county treasurer of the county in which such estate is being probated at the same time, or times, at which the United States tax is payable and shall bear interest, if any, at the same rate and for the same period as such United States tax.

(c) Liability. Administrators, executors, trustees and grantees under a conveyance, made during the grantor's life and taxable hereunder, shall be liable for such taxes with interest, until the same have been paid.

(d) Lien. Said taxes and interest shall be, and remain, a lien on the property subject to the taxes until the same are paid.

(e) Extension of time. The district court of the county in which such estate is being probated may, for cause shown, extend the time of payment of said tax whenever the circumstances of the case require.

(f) Duplicate returns. It shall be the duty of the legal representative of the estate of any decedent, who was a resident of this state at the time of his death and whose estate may be subject to the payment of a United States estate tax, to file duplicates of the United States estate tax returns with the district court of the county in which such estate is being probated.

He shall also file with such court a certificate or other evidence from the Bureau of Internal Revenue showing the amount of the United States estate tax as computed by that department. The district court shall hear all parties desiring to be heard with respect to the amount of state estate tax and shall enter an order determining such tax and the amount thereof so due and payable. Any person in interest aggrieved by such determination shall have the same right of rehearing and appeal as is now provided for in the determination of inheritance taxes.

(g) Intent of subdivisions (a) to (h). It is hereby declared to be the intent and purpose of subdivisions (a) to (h) to obtain for this state the benefit of the credit allowed under the provisions of said United States Revenue Act, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose.

(h) Provisions applicable. The provisions of sections 10400.1 to 10400.47, inclusive, relating to the tax on inheritances and transfers, shall apply to the taxes imposed by subdivisions (a) to (h), in so far as the same are applicable and not in conflict with the provisions hereof.

History: En. Sec. 3, Ch. 65, L. 1923; amd. Sec. 1, Ch. 141, L. 1927; amd. Sec. 2, Ch. 48, Ex. L. 1933.

10400.4. Exemptions from first \$25,000. The following exemptions from the tax are hereby allowed, the exemption allowed to each person, institution, association, corporation and body politic to be taken out of the first twenty-five thousand dollars passing by any such transfer to such person, institution, association, corporation or body politic.

10400.4
 S.L. '23, Ch. 65
 Sec. 4, subsec. 2
 102 Mont. 180-
 205
 56 P (2d) 734-739

(1) Transfers totally exempt. All property transferred to the state or any of its institutions, or to municipal corporations within the state for strictly county, city, town, or municipal purposes, or to corporations or voluntary associations of this state organized under its laws solely for religious, charitable, educational or other public purposes, which shall use the property so transferred exclusively for the purpose of their organization within the state, shall be exempt.

10400.4
 Rel. matter
 S.L. '43 c. 236
 Sec. 1 p. 506

(2) \$17,500; \$5,000; \$2,000 exempt, when. Property of the clear value of seventeen thousand five hundred dollars, transferred to the wife, or five thousand dollars transferred to the husband of the decedent, and two thousand dollars transferred to each of the other persons described in the first subdivision of section 10400.2 shall be exempt. Such exemption to the widow shall include all her statutory dower and other allowances. Any child of the decedent shall be entitled to credit for so much of the tax paid by the widow as applied to any property which shall thereafter be transferred by or from such widow to any such child, provided the widow does not survive said decedent to exceed ten years.

(3) \$500 exempt, when. Property of the clear value of five hundred dollars transferred to each of the persons described in the second subdivision of section 10400.2 shall be exempt.

(4) Property without the state exempt, when. No tax shall be imposed upon any tangible personal property of a resident decedent when such property is located without this state, and when the transfer of such property is subject to an inheritance or transfer tax in the state where located and which tax has actually been paid, secured or guaranteed,

provided such property is not without this state temporarily nor for the sole purpose of deposit or safekeeping; and provided the laws of the state where such property is located allow a like exemption in relation to such property left by a resident of that state and located in this state.

History: En. Sec. 4, Ch. 65, L. 1923.

10400.5. When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed. All taxes imposed by this act shall be due and payable at the time of the death of the decedent, except as hereinafter provided; and every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment.

The tax shall be paid to the state treasurer or to the treasurer of the county in which the district court is situated having jurisdiction as herein provided, and if paid to the county treasurer said treasurer shall make triplicate receipts of such payment, one of which he shall immediately send to the state treasurer, whose duty it shall be to charge the county treasurer so receiving the tax, with the amount thereof, and the other receipt shall be delivered to the executor, administrator, or trustee, whereupon it shall be a proper voucher in the settlement of his accounts. One he shall keep on file in his office.

No executor, administrator, or trustee shall be entitled to a final accounting of an estate, in settlement of which a tax is due under the provisions of this act, unless he shall produce such receipt or a certified copy thereof or unless a bond shall have been filed as prescribed by section 10400.9.

History: En. Sec. 5, Ch. 65, L. 1923.

10400.6. Discount—interest. If such tax is paid within eighteen months from the accruing thereof, a discount of five per cent. shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per cent. per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax shall not be determined and paid as herein provided, in which case interest at the rate of six per cent. shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per cent. shall be charged, provided that litigation to defeat the payment of the tax shall not be considered necessary litigation. In all cases when a bond shall be given under the provisions of section 10400.9, interest shall be charged at the rate of six per cent. after one year from the date of death, until the date of payment thereof.

History: En. Sec. 6, Ch. 65, L. 1923.

10400.7. Powers of representative in collection and payment of tax—collection from legatees or distributees. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might

be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor, or trustee, having in charge or in trust any legacy or property for distribution, subject to such tax, shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof, from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this law, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor, or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator, or trustee in the same manner that payment of the legacy might be enforced, or by the attorney-general under section 10400.30 of this act. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor, or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him to make an apportionment if the case require it, of the sum to be paid into the hands of such legatees, and for such further order relative thereto as the case may require.

History: En. Sec. 7, Ch. 65, L. 1923.

10400.8. Refunding of tax—when authorized—manner of refunding—advance payment of tax for relief from penalty and interest. If any debt shall be proved against the estate of the decedent, after the payment of any legacy or distributive share thereof, from which any such tax has been deducted, or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required by the order of the district court having jurisdiction of the tax so deducted or paid, to refund the amount of such debts or any part thereof, an equitable proportion thereof shall be repaid to such person by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or state treasurer, or by them, in the proper proportionate shares, if it has been so paid.

When any amount of said tax shall have been paid erroneously to the county and state treasurer, or to either of them, it shall be lawful for them, on satisfactory proof to the state board of equalization of such erroneous payment, to refund to the executor, administrator, person or persons who shall have paid any such tax in error, the county's and state's proportionate amount of such tax so paid; provided that all such applications for refund shall be made within two (2) years from the date of such payment.

Any person from whom such tax is or may be due may make an estimate of and pay the same to the clerk of court, who shall receipt therefor, at any time before the same is determined by the court, and shall thereupon be relieved from any interest or penalty upon the amount so paid in the same manner as if the tax were then determined. The money shall be paid to the clerk of the district court who must deposit same with the county treasurer for credit to the clerk of the district court's deposit or

trust fund until the correct amount of the tax has been determined. As soon as the correct amount of inheritance tax has been determined, any excess so paid shall be refunded to the person so paying or entitled thereto by such clerk of court out of said trust fund, and the county treasurer shall receipt for the amount of the inheritance tax so determined by the court.

History: En. Sec. 8, Ch. 65, L. 1923; amd. Sec. 1, Ch. 47, L. 1935.

10400.9
74 P (2d) 415,
416
..... Mont.

10400.9. Bond for deferred payment of tax. Any beneficiary of any property chargeable with a tax under this act, and any executors, administrators and trustees thereof, may elect, within eighteen months from the date of the death of decedent or transfer thereof as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. The person or persons so electing shall give a bond to the state in a penalty of three times the amount of any such tax, with such sureties as the district court of the proper county or the state board of equalization, as the case may be, may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the district court, or in the office of the state treasurer as the case may be. Such bond must be executed and filed and a full return of such property upon oath made to the district court within eighteen months from the date of the death of decedent or transfer as herein provided, and such bond must be renewed every five years, and said deferred tax shall bear interest at 6% per cent. per annum after such eighteen months.

History: En. Sec. 9, Ch. 65, L. 1923.

10400.10. Bequests to executors or trustees—when taxable. If a testator bequeaths property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed, above the amount of commissions or allowances prescribed by law in similar cases, shall be taxable by this act.

History: En. Sec. 10, Ch. 65, L. 1923.

10400.11
74 P (2d) 404,
405
..... Mont.

10400.11. Payment of tax on transfer of securities by foreign representative—duty of holder of securities or assets of nonresident decedent—apportionment of deductions—information to be given board of equalization—amount of tax to be retained on delivery of assets—penalties. If a foreign executor, administrator, or trustee shall assign or transfer any stocks, bonds, mortgages, or other securities, in this state, or within the jurisdiction of this state, standing in the name of a decedent or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the state treasurer on the transfer thereof; otherwise the corporation permitting such transfer shall become liable to pay such tax.

No safe deposit company, bank, or other institution, person or persons, holding securities or assets of a nonresident decedent, nor any corporation

10400.11
Reciprocal
Exemption
S.L. '45 c. 3
Secs. 1, 2 p. 4

organized under the laws of this state, in which a nonresident decedent held stock, bonds, mortgages, or other securities, at his decease, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the state board of equalization at least ten days prior to the said transfer; nor shall any such safe deposit company, bank, or other institution, person or persons, nor any corporation, deliver or transfer any securities or assets of the estate of a nonresident decedent without retaining a sufficient portion or amount thereof to pay any tax which may thereafter be assessed on account of the transfer of such securities or assets under the provisions of the inheritance tax laws, without an order from the proper court authorizing such transfer; and it shall be lawful for the state board of equalization, personally or by representative, to examine said securities or assets at any time before such delivery or transfer. Failure to serve such notice or to allow such examination or to retain a sufficient portion or amount to pay such tax as herein provided, shall render said safe deposit company, trust company, bank, or other institution, person or persons, or such corporation, liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of the inheritance tax laws. The state board of equalization may issue a certificate authorizing the transfer of any such stock, securities or assets whenever it appears to the satisfaction of the said board that no tax is due thereon.

Whenever a tax may be due from the estate, or the beneficiaries therein, of any resident or nonresident decedent upon the transfer of any property, when the property or the estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages, or other securities representing property or estate partly within and partly without this state, any beneficiary of such estate shall be entitled to deduct only his proper proportion of that portion of the total debts and expenses of administration which the gross estate in Montana or within its jurisdiction bears to the gross estate both within and without this state, but no deduction shall be made for any federal estate, inheritance, succession or transfer taxes paid to the United States. As to his Montana exemption, each beneficiary shall be entitled to deduct only that portion represented by the ratio between his interest in the property in this state or within its jurisdiction and his interest in the entire estate.

The state board of equalization shall require such reports and information and shall make such orders, rules, and regulations as it may deem necessary to enable the said board to secure the necessary information from domestic corporations, and to ascertain the amount of and collect such tax; and no holding company or other corporation subject to the provisions of this section shall deliver or transfer any such stocks, bonds, mortgages, or other securities of a Montana corporation without retaining a sufficient portion thereof to pay any tax which may thereafter be assessed under the provisions of this act on account of such transfer, except upon order of the proper court or a certificate of consent of the state board of equalization.

Any corporation or holding company violating the provisions of this section shall be liable to the state for the amount of the tax together with a penalty of ten per centum (10%) thereof.

History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929.

When Shares of Stock in a Foreign Corporation Not Subject to Tax

Held, that under this section, providing for a tax on direct and collateral inheritances, the state may not lawfully collect

an inheritance tax upon the right of a nonresident legatee to succeed to shares of the capital stock of a foreign corporation doing business in the state, bequeathed to him by a nonresident, where the certificates representing the stock are kept at the place of domicile of the testator. *State ex rel. Bankers' Trust Co. v. Walker*, 70 M 484, 491 et seq., 226 P 894.

10400.12. Retroactive nature of act. This act is hereby expressly declared to be retroactive and shall apply to all estates where the decedent died on or after the first day of June, 1924, and which estates remain undistributed on the date when this act is passed and approved.

History: En. Sec. 2, Ch. 130, L. 1929.

10400.13. Jurisdiction of district court—certificate of board required before distributing estate. The district court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws, and to do any act in relation thereto authorized by law to be done by a district court in other matters or proceedings coming within its jurisdiction; and if two or more district courts shall be entitled to exercise any such jurisdiction, the district court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other district court.

Before decree of distribution in any estate shall be issued by the district judge, or the issuance of an order discharging the executor, administrator or trustee of any estate, there shall be filed with the clerk of the district court a certificate signed by the state board of equalization stating that the amount of inheritance tax determined to be due to the state of Montana, as appearing in the order of the court determining tax, has been properly computed, or if no tax is due such certificate shall so state.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925.

10400.14. Ancillary letters—notice—hearing and determination of tax. Every petition for ancillary letters testamentary or of administration shall include the state board of equalization as a person to be notified, and a true and correct statement of all the decedent's property in this state with the value thereof; upon presentation thereof the district court shall cause the order for hearing to be served upon the said board; and upon the hearing the district court shall determine the amount of the inheritance tax which may be or become due and the decree awarding the letters may contain provisions for the payment of such tax or giving of security thereof.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925.

10400.15. Determination of tax due from estate of nonresident decedent—application—appeals. Any personal representative, trustee, heir, devisee or legatee of a nonresident decedent leaving no estate requiring administration in this state, desiring to transfer any stocks, bonds, mortgages or other securities, or other personal property in this state or within the jurisdiction of this state, may make application to the state board of equalization for the determination whether there is any tax due upon account of the transfer thereof, and the amount of any such tax, and such applicant shall furnish to the state board of equalization therewith, an affidavit setting forth a description and statement of the property owned by the decedent situated within this state, or within its jurisdiction at the time of his death, the true value of said property at the time of decedent's death; a description and statement of the true value of all property owned by the decedent at the time of his death situated outside of this state, and without its jurisdiction; and containing a schedule or statement of all valid claims against the estate of the decedent, including the expenses of his last illness, funeral expenses and expenses of administering his estate. Such applicant shall also, at the same time, furnish the state board of equalization with a certified copy of the last will of the decedent, in case he died testate, or an affidavit setting forth the names, ages, and residence of the heirs at law of decedent in case he died intestate, and the proportion of the entire estate of said decedent inherited by each of said persons, and the relation, if any, which each legatee, devisee, heir, or transferee sustained to the decedent, or person from whom the transfer was made. Such affidavit shall be subscribed and sworn to by the personal representative of the decedent, or some other person having knowledge of the facts therein set forth.

The statement contained in any affidavits, statements or schedules as to values, or otherwise, shall not be binding upon the state board of equalization in case they believe the same to be erroneous or untrue. From the information so furnished them and such other information as they may be able to obtain with reference thereto, the state board of equalization shall, with reasonable diligence, proceed to ascertain and determine the amount of tax, if any, due under the provisions of this act, and notify the person making the application of the amount of the tax so ascertained and determined to be due; or in case there is no tax to be paid, the state board of equalization shall issue a consent to the transfer of the property so owned by the decedent.

Any person aggrieved by the determination of the state board of equalization in any matter herein provided for in this section may, within thirty (30) days thereafter, appeal to the district court of Lewis and Clark county, by serving on the state board of equalization a notice in writing setting forth his objections to such determination, and by filing such notice, after so serving the same, in the office of the clerk of such court, and thereupon, and within ten (10) days after the service of such notice on them the state board of equalization shall transmit full and complete copies of all original papers and records which have been filed with them in relation to such application, to the clerk of said district court, and thereupon the said district court shall have jurisdiction of such

application and proceeding. Upon ten days' notice given by either the applicant or the state board of equalization, the matter may be brought on for hearing and determination by said court, either in term time or in vacation, at a general or special term of court, or at chambers, as may be directed by the order of the court.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925.

10400.16. Determination when application not made. Whenever any nonresident decedent, leaving no estate requiring administration in this state, shall leave any stocks, bonds, mortgages, or other securities, or other personal property within the state or within the jurisdiction thereof, and no personal representative, trustee, heir, devisee, or legatee of such nonresident decedent has made application to the state board of equalization for the determination as to whether there is any tax due for the transfer thereof and the amount of such tax, if any, the state board of equalization, upon such matter being called to its attention, shall make an order, and cause a copy thereof to be served upon the personal representative, trustee, heirs, devisees or legatees of such nonresident decedent, ordering and directing that a statement and return, under oath, containing the statements and information prescribed in section 10400.15, be filed with such board within sixty (60) days from the date of such order, or within such further time as the state board of equalization may grant therefor; and if such statement is not filed with the state board of equalization within such time the state board of equalization may then procure such information in any manner it may deem advisable. Upon the filing of such statement, or the procuring of such information by the state board of equalization in the event of a failure to file the same in compliance with such order, the state board of equalization shall proceed in the same manner as prescribed by section 10400.15, and all provisions thereof with reference to hearings and appeals shall be applicable thereto.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925.

10400.17. Special appraiser. The district court, upon the application of any interested party, including the state board of equalization, shall appoint a competent person as special appraiser to fix the fair market value at the time of the transfer thereof of the property of persons whose estate shall be subject to the payment of any tax imposed by this act.

History: En. Sec. 13, Ch. 65, L. 1923; amd. Sec. 2, Ch. 141, L. 1927.

10400.18. Duties, powers and compensation of appraisers. Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state board of equalization, and to such persons as the district court may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said district court, together with the depositions of the witnesses examined, and such other facts in

relation thereto and to the said matter as the said district court may order or require. Every appraiser shall be paid on the certificate of the district court at the rate of not to exceed ten dollars (\$10.00) per day for every day actually and necessarily employed in such appraisal, and shall receive his actual and necessary traveling expenses, and witnesses shall be allowed the same fees as are allowed witnesses in civil actions in courts of record and the same shall be paid by the executor, administrator or trustee of such estate in the same manner as provided for the payment of other administration expenses.

History: En. Sec. 14, Ch. 65, L. 1923; amd. Sec. 4, Ch. 150, L. 1925.

10400.19. Hearing by the court. The report of the special appraiser shall be made in triplicate, and not less than ten (10) days before the hearing thereon one of said triplicates shall be filed in the office of the district court, one to the administrator or the executor, and the other shall be mailed to the state board of equalization. At the time and place of hearing the administration account the district court shall examine such report, and from the report and other proofs relating to any such estate shall forthwith determine the cash value of such estate and the amount of tax to which the same is liable; or, the district court without appointing such appraiser may at the time so fixed hear the evidence and determine the cash value of such estate and the amount of tax to which the same is liable.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.20. Notice of hearing. Notice of such hearing to determine the inheritance tax shall be given in the same manner and may be included in the notice of hearing the administration account as provided by law. Notice in writing of such hearing shall be mailed to the state board of equalization not less than ten (10) days before such hearing upon such blanks and containing such information as the state board of equalization may provide.

10400.20
Amended
S.L. '49, C. 80
Sec. 1, P. 167

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.21. Commissioner of insurance to value future estates, etc. The commissioner of insurance shall, on application of any district court or of the state board of equalization, determine the value of any such future or contingent estates, income, or interests therein limited, contingent, dependent, or determinable upon the life or lives of the person or persons in being, upon the facts contained in the district court's finding and determination and contained in such special appraiser's report, and upon the facts certify the same to the district court or to the state board of equalization, and his certificate shall be presumptive evidence that the method of computation adopted therein is correct.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.22. Appraisal at clear market value—value of future interests, how computed. Whenever a transfer of property is made upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon the transfer

10400.22
Amended
S.L. '47, C. 101
Sec. 1, p. 132

or as soon thereafter as practicable. The value of every future or limited estate, income, interest, or annuity dependent upon any life or lives in being, shall be determined by the rule, method, and standard of mortality and value employed by the commissioner of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per cent. (5%) per annum. The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the estate equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said property produced after death. Such tax shall be due and payable forthwith, except as otherwise provided in this act.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.23. Contingent encumbrances. In estimating the value of any estate or interest in property to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent encumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof, or interest therein, might be abridged, defeated or diminished; provided, however, that in the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat, or diminution of such estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the encumbrance when taking effect or so much as will reduce the same to the amount which would have been assessed in respect to the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided in section 10400.8.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.24. Interest determinable by death. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase of benefit from the person from whom the title to their respective estate or interest is derived.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.25. Tax payable forthwith on contingent estate. When property is transferred in trust or otherwise, and the rights, interests, or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged,

a tax shall be imposed upon such transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this act, and such tax so imposed shall be due and payable forthwith out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of this act is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in this act.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.26. Postponed tax on undiminished value. Estates in expectancy which are contingent or defeasible, and in which proceedings for determination of the tax have not been taken, or where the taxation thereof has been held in abeyance, shall be appraised at their full undiminished clear value when the person entitled thereto shall come into the beneficial enjoyment or possession thereof without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.27. Order determining tax—contents. Upon the determination by the district court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be substantially in the form prescribed by the state board of equalization. A copy of the same shall be delivered or mailed to the county treasurer, the state treasurer, the administrator or executor, and the state board of equalization, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed, and receipts are filed with such court showing the payment of all such taxes, or proof is filed showing that the bond authorized by section 10400.9 has been given.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.28. Rehearing within sixty days. The attorney general, state board of equalization, public administrator, county attorney, or any person

dissatisfied with the appraisement or assessment and determination of such tax may apply for a rehearing thereof before the district court within sixty (60) days from the fixing, assessing and determination of the tax by the district court as herein provided on filing a written notice which shall state the grounds of the application for a rehearing. The rehearing shall be upon the records, proceedings, and proofs had and taken on the hearing as herein provided unless additional or newly discovered evidence be alleged therefor, and a new trial shall not be had or granted unless specially ordered by the district court.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.29. Reappraisement in the district court within one year. Within one year after the entry of an order or decree of the district court determining the value of an estate and assessing the tax thereon, the attorney general or the state board of equalization may, if he (or they) believes that such appraisal, assessment, or determination has been erroneously, fraudulently or collusively made, make application to the district judge for a reappraisal thereof. The district court to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties, shall give the notice and receive the compensation provided by sections 10400.18 to 10400.29, inclusive. Such compensation shall be payable by the county treasurer out of any funds he may have on account of any tax imposed under the provisions of this act, upon the certificate of the district judge. The report of such appraiser shall be filed in the office of the clerk of the district court, and thereafter the same proceedings shall be taken and had by and before such district court as herein provided to be taken and had by and before the said court. The determination and assessment of such district court shall supersede the former determination and assessment of such court, and shall be filed in the office of the county treasurer, state treasurer, and state board of equalization.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

10400.30. Collection of unpaid taxes. If any county treasurer, state treasurer, or the state board of equalization shall have reason to believe that any tax is due and unpaid under the provisions of this act, after the refusal or neglect of any person liable therefor to pay the same, he or they, shall notify the attorney general in writing of such failure or neglect, and the attorney general, if he have probable cause to believe that such tax is due and unpaid, shall apply to the district court for a citation citing the person liable to pay such tax to appear before the court on the day specified, not more than three months from the date of such citation, and show cause why the tax should not be paid. The judge of the district court upon such application and whenever it shall appear to him that any such tax accruing under this act has not been paid as required by law, shall issue such citation, and the service of such citation and the time, manner and proof thereof, and the hearing and determination thereof, shall conform as near as may be to the provisions of the laws governing probate practice of this state, and whenever it shall appear that

any such tax is due and payable, and the payment thereof cannot be enforced under the provisions of this act, in said district court, the person or corporation from whom the same is due is hereby made liable to the state for the amount of such tax, and it shall be the duty of the attorney general, in the name of the state, to sue for and enforce the collection of such tax, and it is made the duty of the county attorney of the county to appear for and act on behalf of any county treasurer, who shall be cited to appear before any district court under the provisions of this act.

History: En. Sec. 16, Ch. 65, L. 1923.

10400.31. Special administration to determine tax—compensation.

When no application for administration of the estate of any deceased person is made within six months after the demise of such person, and such estate appears to come under the provisions of the inheritance tax laws, or when administration has been completed without determining the tax, the public administrator of the proper county, or any person interested in such estate, may make application for such special or general administration as may be necessary for the purpose of the adjustment and payment of such tax, if any, or if no tax is due, for an order determining that fact. In cases arising under this and the following section, the public administrator, if appointed such special administrator, shall be entitled in the discretion of the court to the fees allowed by law to administrators, or to other reasonable compensation, unless it be found that no tax is due.

History: En. Sec. 17, Ch. 65, L. 1923.

10400.32. Special administration to determine tax where transfer made in contemplation of death. Where it appears that the estate of a deceased person subject to the inheritance tax laws was transferred in contemplation of the death of the grantor without the adjustment and payment of the inheritance taxes and no application for such adjustment is made within six months after the demise of such grantor, the public administrator of the proper county shall notify the state board of equalization and on its order make application for and shall be entitled to such general or special administration as may be necessary for the purpose of the adjustment and payment of the inheritance taxes provided by law and shall administer such estate the same as other estates are administered as though such estate had not been transferred by the grantor.

History: En. Sec. 17, Ch. 65, L. 1923.

10400.33. Public administrator's duty to investigate concerning tax—compensation. It shall be the duty of the public administrator, under the general supervision of the state board of equalization, and with the assistance of the county attorney, when required by the said board or district judge, to investigate the estates of deceased persons within his county and to appear for and act in behalf of the county and state in the district court in such estates as the court may in its discretion deem necessary, and for such services the public administrator shall be entitled to five per cent. of the gross inheritance tax as determined in each such estate, to be paid by the county treasurer out of the inheritance tax funds upon an order of the district judge, provided that the minimum fee for each such estate shall not be less than five dollars, and that it shall not exceed

twenty-five dollars; but in cases of unusual difficulty, in estates of resident decedents, where the tax exceeds five hundred dollars, the district judge may allow the public administrator such additional compensation as he may deem just and reasonable.

History: En. Sec. 17, Ch. 65, L. 1923.

10400.34. State board of equalization to supervise inheritance tax. It shall be the duty of the state board of equalization to supervise the administration of, and to investigate and cause to be investigated the administration of the inheritance tax laws, and such particular estates to which the inheritance tax laws apply throughout the various counties of the state, and to cause to be made and filed in its office reports of such investigation together with specific information and facts as to particular estates that may seem to require special consideration and attention by the legal department of the state; but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials and persons interested in such estate.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925.

10400.35. Powers and duties of the board. The state board of equalization in the conduct of inheritance tax affairs, shall have the same and similar powers and authority for gathering information and making investigations as is conferred by law on said board in the performance of its other duties. The said board shall biennially report to the governor and to the legislature at the opening of the sessions the general result of its labors and investigations in inheritance tax matters during the previous biennial period, together with specific reports of the several counties where the administration of the inheritance tax laws has been lax and unsatisfactory, with such recommendations for action thereon by the legislature as may be deemed advisable and proper.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925.

10400.36. Powers and duties in nonresident estates. The state board of equalization shall also gather information and make investigations and reports concerning the estates of nonresident decedents within the provisions of the inheritance tax laws, and shall especially investigate the probate and other records for such probable estates without the state and report thereon from time to time to the legal department of the state and to the proper district court for appropriate legal action, but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials, and persons interested in such estate.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925.

10400.37. Duty of the legal department of state. It shall be the duty of the legal department of the state to carry out and enforce the recommendations and directions of the state board of equalization in all matters pertaining to the conduct of inheritance tax affairs; and in every estate in which the amount of inheritance tax collectible shall exceed or probably exceed the sum of one thousand dollars, there shall be no compounding, composition, or settlement of the taxes under the authority conferred by

section 10400.41 or otherwise, until the state board of equalization shall have investigated such estate and made a report thereon, nor until the said board consents to such compounding, compromise, or settlement.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925.

10400.38. Forms and blanks. The state board of equalization shall prescribe such forms and prepare such blanks as may be necessary in inheritance tax proceedings in the districts courts of the state; and such blanks shall be printed at the expense of the state and furnished to the district court upon the request of the judge or clerk thereof.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925.

10400.39. Duties of clerks of district courts. It shall be the duty of the clerk of the district court to furnish to the state board of equalization copies of such documents filed in connection with probate matters as said board may require.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925.

10400.40. Quarterly report of county treasurer—payment of tax to state treasurer—interest on unpaid amounts. Each county treasurer shall make a report under oath to the state treasurer, on prior to the 5th days of January, April, July and October of each year, of all taxes received by him under the inheritance tax laws, up to the first day of each of said months, stating for what estate, by whom and when paid. Said report shall be made in duplicate, the original to be mailed to the state treasurer, and the duplicate to the state board of equalization. The form of such report may be prescribed by the state treasurer. He shall at the same time pay the state treasurer all the taxes received by him under the inheritance tax laws and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within five days from the time herein required, he shall pay interest at the rate of ten per cent. per annum.

History: En. Sec. 19, Ch. 65, L. 1923; amd. Sec. 7, Ch. 150, L. 1925.

10400.41. Composition and compromise. The state board of equalization is authorized to enter into an agreement with the executor, administrator, or trustee of any estate in which remainders or expectant estates have been of such a nature or so disposed and circumstanced that the taxes therein were held not presently payable or where the interests of the legatees or devisees are not ascertainable under the provisions of this act, or whenever a tax is claimed on account of the transfer of any property of a nonresident decedent, and to compound such taxes upon such terms as may be deemed equitable and expedient and to grant discharges to said executors, administrators, or trustees upon the payment of the taxes provided for in such composition, provided, however, that no such composition shall be conclusive in favor of such executors, administrators, or trustees as against the interests of such cestui que trust as may possess either present rights of enjoyment or fixed, absolute, on indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto either personally when competent or by guardian. Composition or settlement made or

effected under the provisions of this section shall be executed in triplicate and one copy shall be filed in the office of the clerk of the district court of the county in which the tax was paid; one copy to be delivered to the executors, administrators, or trustees, who shall be parties thereto, and one copy to be retained by said board.

History: En. Sec. 20, Ch. 65, L. 1923.

10400.42. Receipts, copies, recording. Any person shall be entitled to a receipt from the county treasurer of any county, or the state treasurer, or at his option to a copy of a receipt that may have been given by such county treasurer or state treasurer, for the payment of any tax under this act, under the official seal of such county treasurer, or state treasurer, which receipt shall designate upon whose estate such tax shall have been paid, by whom, and whether in full of such tax. Such receipt may be recorded in the office of the county recorder of the county in which such estate is situate in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

History: En. Sec. 21, Ch. 65, L. 1923.

10400.43. Definitions. The words "estate" and "property" as used in this act shall be taken to mean the real and personal property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and not as the property or interest therein of the decedent, grantor, donor, or vendor, and shall include all personal property within or without the state. The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein prescribed to each individual or corporation. The word "decedent" as used in this act shall include the testator, intestate, grantor, bargainor, vendor, or donor. "Intangible" or "intangible property" when used in this act without other qualifications, shall be taken to include all moneys, stocks, bonds, notes, securities and credits of all kinds, secured or unsecured. The words "county treasurer," "public administrator" and "county attorney," as used in this act shall be taken to mean the treasurer, public administrator, and county attorney of the county in which the district court has jurisdiction of the proceedings.

History: En. Sec. 22, Ch. 65, L. 1923.

10400.44. Disposition of taxes. Fifty per cent. (50%) of all taxes levied and collected under the provisions of this act, less any deductions authorized under this act, shall be paid into the state treasury and deposited to the credit of the general fund of the state; and fifty per cent. (50%) shall be deposited to the credit of an "inheritance tax fund" and distributed as follows:

The county superintendent of schools of each county in the state must, between the 15th day of August and the 1st day of September, in each year, make and file with the state treasurer a statement and certificate showing the total number of teaching positions, in which teachers were employed for a period of at least four months, during the school year ending June 30th immediately preceding, in all of the public schools in

such county, including primary, grade, district high and county high schools, provided, however, that if during such school year, or after the close thereof and before the making of such statement and certificate, any portion of the county has been detached therefrom and added to another county, or detached therefrom and included in a new county, the number of teaching positions within the portion of such county so detached shall not be included in the statement and certificate of the county superintendent of schools of the county from which the same is detached, but such teaching positions shall be included in the statement and certificate of the county superintendent of schools of the county from which the same is attached, or in the statement and certificate of the county superintendent of schools of the new county.

Between August 15th and September 1st of each year, the state treasurer shall apportion the said inheritance tax fund to the several counties of the state in proportion to the total number of teaching positions in which teachers were employed for a period of at least four months, in each county, during the preceding school year, as shown by the statements and certificates of the county superintendents of schools, filed with the state treasurer for such school year, and said state treasurer must, at the time of making such apportionment, notify the county superintendent of schools of each county of the amount of such fund which has been apportioned and distributed to his respective county. Within ten days after receiving each such notice from the state treasurer, each county superintendent of schools must apportion the amount received and paid over to his county by the state treasurer, in the following manner, to-wit: (a) sixty per centum (60%) thereof shall be apportioned between and among the several school districts, district high schools and county high schools in proportion to the total number of teaching positions in which teachers were employed for at least four months, during the last preceding school year for which a statement and certificate was filed with the state treasurer by the county superintendent of schools, in each such school district, district high and county high school; (b) thirty-five per centum thereof shall be apportioned between and among the several school districts, district high and county high schools in proportion to the aggregate number of days' attendance of all eligible pupils who attended for a period of not less than six weeks during the aforesaid school year in each district school, district high and county high school; (c) five per centum (5%) thereof shall be apportioned between and among the district high schools and county high school in proportion to the number of years of accredited high school work during the aforesaid school year in each such district high and county high school.

Immediately after making such apportionment the county superintendent of schools must make and file with the county treasurer a statement and certificate showing the total amount apportioned to each school district, district high and county high school, and the county treasurer must, on receiving such statement and certificate, immediately credit the general fund of each school district, district high and county high school with the amount to which each is entitled as shown by such statement and certificate,

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and such amounts shall be expended for the same purpose for which other moneys deposited to the credit of such funds may be expended, and for no other purpose.

History: En. Sec. 23, Ch. 65, L. 1923.

NOTE.—See also section 10400.49 for provisions concerning distribution of inheritance taxes.

10400.45. Employment of assistants by board and fixing compensation.

The state board of equalization may employ such other persons as experts and assistants as may be necessary to perform the duties that may be required of the board and fix their compensation.

History: En. Sec. 24, Ch. 65, L. 1923.

10400.46. Hearings by board—witnesses—false testimony as perjury—compensation. Oaths to witnesses in any matter under the investigation or consideration of the state board of equalization may be administered by the secretary of the board or by any member thereof. In case any witness shall fail to obey any summons to appear before said board or shall refuse to testify or answer any material questions or to produce records, books, papers, or documents, when required to do so, such failure or refusal shall be reported to the attorney general, who shall thereupon institute proceedings in the proper district court to compel obedience to any summons or order of the board or to punish witnesses for any such neglect or refusal. Any person who shall testify falsely in any material manner under the consideration of the said board shall be guilty of and punished for perjury. In the discretion of the said board, officers who serve summons or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the district court.

History: En. Sec. 25, Ch. 65, L. 1923.

10400.47. Repealing clause—effect of repeal. Sections 10377 to 10400, both inclusive, of the Revised Codes of Montana, 1921, and all other acts and parts of acts in conflict herewith are hereby repealed, provided, however, that such repeal shall not in any wise affect any suit, prosecution or proceeding pending at the time this act shall take effect, or any right which the state of Montana may have at the time of the taking effect of this act to claim a tax upon any property, or from any person, under the provisions of any of the sections or acts hereby repealed or under any prior laws repealed by such acts and which rights were reserved therein, for which no proceeding has been commenced to collect any tax arising thereunder, and where no proceeding has been commenced to collect any such tax the procedure to collect the same shall conform to the provisions hereof, and such repeal shall not affect any appeal or right of appeal in any suit now pending, or any order or orders fixing or determining the amount of any tax or taxes existing in this state at the time of the taking effect of this act.

History: En. Sec. 26, Ch. 65, L. 1923.

10400.48. To what estates act applicable. The provisions of this act shall apply to all estates of all decedents dying after the date when this act takes effect, and shall also apply to the estate of any decedent on which the inheritance tax has not been determined by the court and paid

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prior to the date when this act takes effect to the same extent, and in the same manner, as though this act had been in full force and effect at the date of death of such decedent.

History: En. Sec. 3, Ch. 48, Ex. L. 1933.

10400.49. Disposition of moneys received from tax. For the two years immediately following the approval of this act all inheritance taxes provided herein and by other laws of the state of Montana, shall until March 1, 1937, be for the use and benefit of and by the state treasurer credited and distributed as follows: fifteen per cent. (15%) thereof to the common school interest and income fund; fifteen per cent. (15%) thereof to the state common school equalization fund; seventy per cent. (70%) thereof to the conservation revolving fund of the water conservation board until such time as said conservation revolving fund shall have received the aggregate sum of three hundred fifty thousand dollars (\$350,000.00), then the said seventy per cent. (70%) to the relief fund of the state of Montana until the said relief fund shall receive in the aggregate the sum of two hundred fifty thousand dollars (\$250,000.00) then the said seventy per cent. (70%) shall thereafter be distributed to the general fund of the state of Montana. After March 1, 1937, all inheritance taxes provided herein and by other laws of the state shall be for the use and benefit of and by the state treasurer credited and distributed as follows: fifty per cent. (50%) thereof to the general fund of the state, twenty-five per cent. (25%) thereof to the common school interest and income fund, and twenty-five per cent. (25%) thereof to the state common school equalization fund.

History: En. Sec. 4, Ch. 48, Ex. L. 1933;
amd. Sec. 20 (E), Ch. 109, L. 1935.

NOTE.—See also section 10400.44 for provisions concerning distribution of inheritance taxes.

10400.50. List of deaths to be made by registrar of vital statistics—county clerks to receive. The state registrar of vital statistics shall prepare on or before the fifth of January, April, July and October of each year a list of all deaths, together with the date of such death, reported to him during such period and shall send a copy of such list of deaths to the county clerk of each county in the state.

History: En. Sec. 2, Ch. 186, L. 1935.

10400.51. Checking by county clerk of records and transfers—report to board of equalization. The county clerk, upon the receipt of the list of deaths provided for in section 10400.50, shall immediately check the records of his county to determine whether any of the deceased persons whose names appear upon such list may have made any transfer of property or of property rights within such county during the three years preceding the death of such person or whether such deceased person may have been possessed of any property in such county at the time of his death.

If he shall find that any such deceased person may have made any such transfers of property or of property rights, or have died possessed of such, he shall immediately transmit such information to the state board of equalization.

History: En. Sec. 3, Ch. 186, L. 1935.

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repealed
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CHAPTER 146

GUARDIANS OF MINORS

- Section 10401. Judge to appoint guardian, when, and on what petition.
 10402. When minor may nominate guardian—when not.
 10403. When appointment may be made by judge, when minor is over fourteen.
 10404. Nomination by minors after arriving at fourteen.
 10405. Father or mother entitled to guardianship.
 10406. Minor having no father or mother.
 10407. Powers and duties of guardians.
 10408. Bond of guardians, conditions of.
 10409. Maintenance of minor out of income of his own property.
 10410. Testamentary guardian to give bond—powers limited.
 10411. Power of courts to appoint guardian and next friend not impaired.

10401. Judge to appoint guardian, when, and on what petition. The district court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court or judge must cause such notice as the court or judge deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor in the county as the court or judge may deem proper.

History: En. Sec. 351, p. 331, L. 1877; re-en. Sec. 351, 2nd Div. Rev. Stat. 1879; re-en. Sec. 351, 2nd Div. Comp. Stat. 1887; amd. Sec. 2950, C. Civ. Proc. 1895; re-en. Sec. 7753, Rev. C. 1907; re-en. Sec. 10401, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1747.

References

Cited or applied as section 351, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 97, 66 P 702; as section 7753, Revised Codes, in *State ex rel. Carroll v. District Court*, 50 M 428, 432, 147 P 612; *August v. Burns*, 79 M 198, 214, 255 P 737.

10402. When minor may nominate guardian—when not. If the minor is under the age of fourteen years, the court or judge may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court or judge, must be appointed accordingly.

History: En. Sec. 352, p. 331, L. 1877; re-en. Sec. 352, 2nd Div. Rev. Stat. 1879; re-en. Sec. 352, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2951, C. Civ. Proc. 1895; re-en. Sec. 7754, Rev. C. 1907; re-en. Sec. 10402, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1748.

10403. When appointment may be made by judge, when minor is over fourteen. If the guardian nominated by the minor is not approved by the court or judge, or if the minor resides out of the state, or if, after being duly cited by the court or judge, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years.

History: En. Sec. 353, p. 331, L. 1877; re-en. Sec. 353, 2nd Div. Rev. Stat. 1879; re-en. Sec. 353, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2952, C. Civ. Proc. 1895; re-en. Sec. 7755, Rev. C. 1907; re-en. Sec. 10403, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1749.

10404. Nomination by minors after arriving at fourteen. When a guardian has been appointed by the court or judge for a minor under the

age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the court or judge.

History: En. Sec. 354, p. 331, L. 1877; re-en. Sec. 354, 2nd Div. Rev. Stat. 1879; re-en. Sec. 354, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2953, C. Civ. Proc. 1895; re-en. Sec. 7756, Rev. C. 1907; re-en. Sec. 10404, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1750.

10405. Father or mother entitled to guardianship. The father of the minor, if living, and in case of his decease, the mother, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor. A married woman may be appointed guardian.

History: En. Sec. 355, p. 332, L. 1877; re-en. Sec. 355, 2nd Div. Rev. Stat. 1879; re-en. Sec. 355, 2nd Div. Comp. Stat. 1887; amd. Sec. 2954, C. Civ. Proc. 1895; re-en. Sec. 7757, Rev. C. 1907; re-en. Sec. 10405, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1751.

10406. Minor having no father or mother. If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same.

History: En. Sec. 356, p. 332, L. 1877; re-en. Sec. 356, 2nd Div. Rev. Stat. 1879; re-en. Sec. 356, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2955, C. Civ. Proc. 1895; re-en. Sec. 7758, Rev. C. 1907; re-en. Sec. 10406, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1752.

10407. Powers and duties of guardians. Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged.

History: En. Sec. 357, p. 332, L. 1877; re-en. Sec. 357, 2nd Div. Rev. Stat. 1879; re-en. Sec. 357, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2956, C. Civ. Proc. 1895; re-en. Sec. 7759, Rev. C. 1907; re-en. Sec. 10407, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1753.

References

Cited or applied as section 2956, Code of Civil Procedure, in *In re Scheuer's Estate*, 31 M 606, 613, 79 P 244; *State ex rel. Sheedey v. District Court*, 66 M 427, 434, 213 P 802; *August v. Burns*, 79 M 198, 214, 255 P 737.

10408. Bond of guardians, conditions of. Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court or judge must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court or judge may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward.

3. To render an account on oath of the property, estate, and moneys of the ward in his hands, and all the proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court or judge directs, and at the expiration of his trust to settle his accounts with

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10407
136 P. (2d) 541

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193 P. (2d) 377

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the court or judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law.

History: En. Sec. 358, L. 1877; re-en. Sec. 358, 2nd Div. Rev. Stat. 1879; re-en. Sec. 358, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2957, C. Civ. Proc. 1895; re-en. Sec. 7760, Rev. C. 1907; re-en. Sec. 10408, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1754.

Operation and Effect

If the order of restoration terminates the guardianship, then the expression "the expiration of his trust," as used in this section, and the order for the restoration of the ward to capacity, as provided for in section 10415, must of necessity refer to the same event in point of time, and it becomes the duty of the guardian to settle his accounts with the court or judge, or with the ward, and pay over and deliver

all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person lawfully entitled thereto. In *re Scheuer's Estate*, 31 M 606, 612, 79 P 244.

Id. The powers, duties, and liabilities of a guardian of a person of unsound mind are the same, and subject to the same restrictions, as those of a guardian of a minor.

References

Cited or applied as section 358, Second Division Compiled Statutes 1887, in *Botkin v. Kleinschmidt*, 21 M 1, 52 P 563; as section 2957, Code of Civil Procedure, in *Power v. Lenoir*, 22 M 169, 178, 56 P 106; *Hughes v. Goodale*, 26 M 93, 97, 93 P 702.

10409. Maintenance of minor out of income of his own property. If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court or judge, and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.

History: En. Sec. 361, p. 333, L. 1877; re-en. Sec. 361, 2nd Div. Rev. Stat. 1879; re-en. Sec. 361, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2958, C. Civ. Proc. 1895; re-en. Sec. 7761, Rev. C. 1907; re-en. Sec. 10409, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1757.

10410. Testamentary guardian to give bond—powers limited. Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court or judge, except so far as his powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed.

History: En. Sec. 362, p. 333, L. 1877; re-en. Sec. 362, 2nd Div. Rev. Stat. 1879; re-en. Sec. 362, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2959, C. Civ. Proc. 1895; re-en. Sec. 7762, Rev. C. 1907; re-en. Sec. 10410, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1758.

Operation and Effect

Where a father assumed to act as guardian for his minor children without having qualified, and appeared for them in an action concerning property devised to them by their mother, the minors,

though legally served, were not bound by the proceedings. *Power v. Lenoir*, 22 M 169, 178, 56 P 106.

Id. Where a father appeared as guardian for his minor children without having qualified as their guardian, and defended an action against them with reference to their separate property, a *nunc pro tunc* order appointing him their guardian *ad litem* before judgment rendered against them was unauthorized, and they were not bound by the judgment so entered.

References Division Compiled Statutes 1887, in
Cited or applied as section 362, Second Hughes v. Goodale, 26 M 93, 97, 66 P 702.

10411. Power of courts to appoint guardian and next friend not impaired. Nothing contained in this chapter affects or impairs the power of any court or judge to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

History: En. Sec. 363, p. 333, L. 1877; re-en. Sec. 2960, C. Civ. Proc. 1895; re-en. Sec. 363, 2nd Div. Rev. Stat. 1879; Sec. 7763, Rev. C. 1907; re-en. Sec. 10411, re-en. Sec. 363, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1759.

CHAPTER 147

GUARDIANS OF INSANE AND INCOMPETENT PERSONS

- Section 10412. Guardians of insane and other incompetent persons.
- 10413. Appointment by judge after hearing.
- 10414. Powers and duties of such guardians.
- 10415. Petition for restoration to capacity.
- 10416. Sale of dower of insane married woman.
- 10416.1. Power to mortgage dower of insane married woman—guardian.

10412. Guardians of insane and other incompetent persons. When it is represented to the district court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing.

History: En. Sec. 364, p. 334, L. 1877; re-en. Sec. 364, 2nd Div. Rev. Stat. 1879; re-en. Sec. 364, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2970, C. Civ. Proc. 1895; re-en. Sec. 7764, Rev. C. 1907; re-en. Sec. 10412, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1763.

incompetent. In re Murphy's Estate, 43 M 353, 375, 116 P 1004.

A person may be mentally incompetent, and yet not be a maniac, an idiot, nor an insane person. State ex rel. Carroll v. District Court, 50 M 428, 433, 147 P 612.

Id. The words "mentally incompetent," as used in this section, mean a person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, without assistance, to properly manage and take care of himself and his property.

Held, that an instruction to the effect that a person may be mentally incompetent to make a will and yet not be an insane person was proper, since the word "incompetent," when applied to an individual's capacity to make a will, means any person who, whether insane or not, is, by reason of immaturity, old age, disease, weakness of mind or from any other cause, unable to understand what property he has, the relationship he bears to those who would naturally be the objects of his bounty, and what disposition he may be making of his property at the time. In re Carroll's Estate, 59 M 403, 410, 196 P 996.

Notice
On petition for the appointment of a guardian for an insane person, service of notice of time and place of hearing as required by this section is essential to the validity of the order of appointment. State v. District Court et al., 73 M 84, 89 et seq., 235 P 751.

Id. The notice required by this section, to be served upon a person sought to be placed under guardianship as an incompetent must be served as a citation, which in turn must be served as a summons; therefore, since a summons cannot be served by a party to the proceeding, service made by petitioner for letters of guardianship was void.

Operation and Effect
In a proceeding to appoint a guardian for an alleged incompetent, the adversary parties are the petitioner and the alleged

10413. Appointment by judge after hearing. If, after a full hearing and examination upon such petition, it appear to the court or judge that

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200 P.(2d) 251

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81 P.(2d) 425
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10413
163 P. 2d 644

the person in question is incapable of taking care of himself and managing his property, such court or judge must appoint a guardian of his person and estate, with the powers and duties in this chapter specified.

History: En. Sec. 365, p. 334, L. 1877; re-en. Sec. 365, 2nd Div. Rev. Stat. 1879; re-en. Sec. 365, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2971, C. Civ. Proc. 1895; re-en. Sec. 7765, Rev. C. 1907; re-en. Sec. 10413, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1764.

Operation and Effect

While the person and estate of a minor are independent in guardianship matters,

and the court may appoint a guardian for either the person or estate, or for both, as provided in section 10401, no such authority exists with respect to an incompetent person. In the latter case, the necessity for a guardian of the person is as great as the necessity for a guardian of the estate. State ex rel. Carroll v. District Court, 50 M 428, 432, 147 P 612.

10414. Powers and duties of such guardians. Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

History: En. Sec. 366, p. 334, L. 1877; re-en. Sec. 366, 2nd Div. Rev. Stat. 1879; re-en. Sec. 366, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2972, C. Civ. Proc. 1895; re-en. Sec. 7766, Rev. C. 1907; re-en. Sec. 10414, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1765.

Operation and Effect

The authority of a guardian of an incompetent over the person or estate of the ward is not extended by this section to the time when he is "legally discharged" by an order of court, but such guardianship is, under section 10415, terminated, ipso facto, by the judicial determination that the ward is of sound mind, and the adjudication of his restoration to capacity. In re Scheuer's Estate, 31 M 606, 611, 79 P 244.

Id. The language of this section cannot be construed to extend the guardian's authority over the person or estate of the ward beyond the time when he is "legally discharged" by an order of court. It would be an intolerable imposition upon a person sui juris to compel him to submit to the control of a guardian, either of his

person or property, and such an imposition was not intended by the law-making authority in enacting this section.

Id. If the seeming conflict between the provisions of this section and the next succeeding section is not entirely reconcilable, the provisions of the latter must prevail.

The position of guardian is one of trust and not of agency; the funds coming into his hands as such are trust funds which he must keep safely, and such of them as are necessary to be kept on hand for the care and maintenance of the ward he may, though not required to do so by the statute, deposit in a reliable bank, exercising due care in its selection, without being open to the charge of having violated the law of his trust, or rendering himself personally liable for the deposit in case of failure of the bank. Pethybridge v. First State Bk. of Livingston, 75 M 173, 179, 243 P 569.

References

Cited or applied as section 7766, Revised Codes, in State ex rel. Carroll v. District Court, 50 M 428, 432, 147 P 612.

10415. Petition for restoration to capacity. A person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the district court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane or competent. Upon receiving the petition, the court or judge must appoint a day for a hearing before the court, and, if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court or judge shall cause notice of the trial to be given to the guardian of a person so declared insane or incompetent, if there be a

guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court or judge, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court or judge on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person shall be not a minor, shall cease.

History: En. Sec. 2973, C. Civ. Proc. 1895; re-en. Sec. 7767, Rev. C. 1907; re-en. Sec. 10415, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1766.

Operation and Effect

The right of a person, mentally incompetent, to appeal from an order appointing a guardian of his person and estate is not affected by the pendency of a proceeding to have the fact of his restoration to capacity judicially determined. In re Kane's Estate, 12 M 197, 202, 29 P 424.

The language of this section is susceptible of but one construction, namely, that the judicial determination that the ward is of sound mind, and capable of taking care of himself and his property, and the adjudication of his restoration, ipso facto terminate the guardianship. In re Scheuer's Estate, 31 M 606, 611, 79 P 244.

Id. The term of the guardian's office is limited by this section, and immediately thereafter the guardian should make his final report and be discharged, and, after the termination of his office by the restoration of the ward, the only power or authority possessed by the guardian is to make such report, and turn over to the proper person all property with which he is chargeable on such report.

In a proceeding under this section either party may disqualify the judge for imputed bias. State ex rel. Carroll v. District Court, 50 M 506, 509, 148 P 312; State ex rel. Brandegee v. Clements, 52 M 57, 61, 155 P 271.

Upon the hearing of a petition for restoration to capacity the question whether the order declaring petitioner incompetent was correctly made is not a proper subject of inquiry; allegations as to its validity or invalidity are immaterial, and, therefore, since a pleader cannot be estopped by an immaterial averment, contention that by an allegation in the petition admitting the validity of the order and averring that it was in full force and effect petitioner was estopped on certiorari to attack the court's jurisdiction in making it has no merit. State v. District Court et al., 73 M 84, 92, 235 P 751.

References

Cited or applied as section 7767, Revised Codes, in State ex rel. Carroll v. District Court, 50 M 428, 433, 147 P 612; State ex rel. Carroll v. District Court, 50 M 506, 509, 148 P 312; In re Carroll's Estate, 59 M 403, 410, 196 P 996.

10416. Sale of dower of insane married woman. The right of dower of an insane married woman may be sold by her guardian, and the title to the real estate transferred to the purchaser, under the direction of the court or judge, in the same manner and with like effect as the property of any insane person may be sold and transferred.

History: En. Sec. 2974, C. Civ. Proc. 1895; re-en. Sec. 7768, Rev. C. 1907; re-en. Sec. 10416, R. C. M. 1921.

10416.1. Power to mortgage dower of insane married woman--guardian. The right of dower of an insane married woman may be mortgaged by her guardian for the purpose of paying either debts, costs and charges of maintenance, charges of administration or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said dower right in real property or for the purpose of benefiting or improving the real estate in which said insane married woman has a dower right and to obtain an order to mortgage such dower interest, the guardian shall take

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the same proceedings provided by section 10427. The right of dower of an insane married woman shall be deemed property for the purpose of authorizing the appointment of a guardian of her estate.

History: En. Sec. 1, Ch. 79, L. 1935.

CHAPTER 148

POWERS AND DUTIES OF GUARDIANS

- Section 10417. Guardian to pay debts of ward out of ward's estate.
 10418. Guardian to recover debts due his ward, and represent him.
 10419. Guardian to manage his estate, maintain ward, and sell real estate.
 10420. Maintenance, support, and education of ward—how enforced.
 10421. May assent to partition of real estate.
 10422. Guardian to return inventory of estate of ward—appraisers to be appointed—like proceedings when other property acquired.
 10423. Settlements of guardians.
 10424. Allowance of accounts of joint guardians.
 10425. Expenses and compensation of guardians.
 10426. Mortgage or lease of ward's real property.
 10427. Procedure to mortgage.

10417. Guardian to pay debts of ward out of ward's estate. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof and disposing of the same in the manner provided in sections 10018 to 10464 of this code for the sale of real estate of decedents.

History: En. Sec. 367, p. 335, L. 1877;
 re-en. Sec. 367, 2nd Div. Rev. Stat. 1879;
 re-en. Sec. 367, 2nd Div. Comp. Stat. 1887;
 re-en. Sec. 2980, C. Civ. Proc. 1895; re-en.
 Sec. 7769, Rev. C. 1907; re-en. Sec. 10417,
 R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1768.

References

Cited or applied as section 367, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 101, 66 P 702; *Pethybridge v. First State Bk. of Livingston*, 75 M 173, 179, 243 P 569.

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10418. Guardian to recover debts due his ward, and represent him. Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court or judge, compound for the same and give discharge to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose.

History: En. Sec. 368, p. 335, L. 1877;
 re-en. Sec. 368, 2nd Div. Rev. Stat. 1879;
 re-en. Sec. 368, 2nd Div. Comp. Stat. 1887;
 re-en. Sec. 2981, C. Civ. Proc. 1895; re-en.
 Sec. 7770, Rev. C. 1907; re-en. Sec. 10418,
 R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1769.

References

Barbarich v. Chicago etc. Ry. Co. et al., 92 M 1, 11, 9 P 2d 797.

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10419. Guardian to manage his estate, maintain ward, and sell real estate. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court or judge therefor, as provided, and must apply the

proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

History: En. Sec. 369, p. 335, L. 1877; re-en. Sec. 369, 2nd Div. Rev. Stat. 1879; re-en. Sec. 369, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2982, C. Civ. Proc. 1895; re-en. Sec. 7771, Rev. C. 1907; re-en. Sec. 10419, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1770.

Operation and Effect

A guardian who, without an order of court, loaned the funds of the ward on an interest-bearing note, was properly directed to account for the interest due thereon at the rate of final settlement, even though the ward refused to accept the note, which was then due, in lieu of

cash. In re Allard Guardianship, 49 M 219, 223, 141 P 661.

Id. A guardian must account for all accumulations from the use of his ward's funds, and will, under no circumstances, be permitted to profit from their use.

Id. A guardian or other trustee has no moral or legal right to mingle trust funds with his own private property, or to profit by the use of the funds belonging to the cestui que trust.

References

Cited or applied as section 369, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 101, 66 P 702.

10420. Maintenance, support, and education of ward—how enforced.

When the guardian has advanced, for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court or judge, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable or necessary maintenance, support, or education for his ward, the court or judge may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court or judge may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

History: En. Sec. 370, p. 336, L. 1877; re-en. Sec. 370, 2nd Div. Rev. Stat. 1879; re-en. Sec. 370, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2983, C. Civ. Proc. 1895; re-en. Sec. 7772, Rev. C. 1907; re-en. Sec. 10420, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1771.

Operation and Effect

Where the appointment of a guardian of his then wife, an incompetent, was declared invalid upon restoration of his ward to capacity, after six years' service as guardian, he was during that time a guardian de facto and as such subject to all the duties and liabilities of a guardian and having acted in good faith in the be-

lief that he was a guardian de jure, entitled to credit for such expenditures made for the ward as would have been allowed had his appointment been legal. *Kelly v. Kelly et al.*, 89 M 229, 235, 297 P 470.

Id. While it is the better practice for a guardian to obtain an order allowing expenditures of his ward's funds, it is not necessary that he do so, but if he acts without an order he assumes the risk of having his claims therefor disallowed in an action for an accounting, in which the court must determine whether the expenditures were reasonable, necessary and proper, the burden of making such showing resting upon the guardian.

10421. May assent to partition of real estate. The guardian may join in and assent to a partition of the real estate of the ward, whenever such assent may be given by any person.

History: En. Sec. 371, p. 336, L. 1877; re-en. Sec. 371, 2nd Div. Rev. Stat. 1879; re-en. Sec. 371, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2984, C. Civ. Proc. 1895; re-en. Sec. 7773, Rev. C. 1907; re-en. Sec. 10421, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1772.

10422. Guardian to return inventory of estate of ward—appraisers to be appointed—like proceedings when other property acquired. Every

guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the court. The court or judge may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estate of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

History: En. Sec. 372, p. 336, L. 1877; re-en. Sec. 372, 2nd Div. Rev. Stat. 1879; re-en. Sec. 372, 2nd Div. Comp. Stat. 1887; amd. Sec. 2985, C. Civ. Proc. 1895; re-en. Sec. 7774, Rev. C. 1907; re-en. Sec. 10422, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1773.

Operation and Effect

This section was enacted to be obeyed, and a failure to return any inventory whatever is a flagrant violation of the

guardian's trust. In re Allard Guardianship, 49 M 219, 225, 141 P 661.

Where a guardian fails to return into court inventories of the estate in his charge as provided by this section, or render his account to the court for allowance as required by the succeeding section, the court may, in its discretion, disallow fees to his guardian and those paid or contracted to be paid by him to his counsel as penalty for such failure. In re Cuffe's Estate, 63 M 399, 408, 207 P 640.

10423. Settlements of guardians. The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court or judge for settlement and allowance.

History: En. Sec. 373, p. 337, L. 1877; re-en. Sec. 373, 2nd Div. Rev. Stat. 1879; re-en. Sec. 373, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2986, C. Civ. Proc. 1895; re-en. Sec. 7775, Rev. C. 1907; re-en. Sec. 10423, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1774.

Operation and Effect

It is remissness of duty, where a period of more than thirteen years has elapsed without any report having been rendered by the guardian or required by the court. In re Allard Guardianship, 49 M 219, 225, 141 P 661.

Id. Where a guardian of minors, within little more than a year after his appointment, withdraws from his accounts as guardian about thirty thousand dollars in round numbers, and is asked many years afterward as to the purpose for which he gave a particular check, it is no explanation for him to say, "I do not know." It is his duty to be able to say for what pur-

pose the money was used, and to present vouchers for it.

Id. The allowance of attorney's fees on final settlement of a guardian's account is in the court's discretion, and its action will not be disturbed in the absence of a clear abuse thereof.

The district court has jurisdiction, under this section, over the subject-matter of the account of a guardian, and may decree a settlement; and its decree is not void because of the fact that the court erroneously determined matters foreign to what was then before it; but, after exercising its jurisdiction by rendering such decree, it is without power, of its own motion, to set that decree aside. State ex rel. Mc-Hatton v. District Court, 55 M 324, 328, 176 P 608. See also State ex rel. Smith v. District Court, 55 M 602, 606, 179 P 831.

The decree of settlement by a guardian may, upon proper application by a party

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vested with an interest in the ward's estate, be subjected to amendment. *State ex rel. McHatton v. District Court*, 55 M 324, 328, 176 P 608.

Where a guardian fails to return into court inventories of the estate in his charge as provided by the preceding sec-

tion, or render his account to the court for allowance as required by this section, the court may, in its discretion, disallow fees to his guardian and those paid or contracted to be paid by him to his counsel as penalty for such failure. *In re Cuffe's Estate*, 63 M 399, 408, 207 P 640.

10424. Allowance of accounts of joint guardians. When an account is rendered by two or more joint guardians, the court or judge may, in its or his discretion, allow the same upon the oath of any of them.

History: En. Sec. 374, p. 337, L. 1877; re-en. Sec. 374, 2nd Div. Rev. Stat. 1879; re-en. Sec. 374, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2987, C. Civ. Proc. 1895; re-en. Sec. 7776, Rev. C. 1907; re-en. Sec. 10424, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1775.

10425. Expenses and compensation of guardians. Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court or judge in which his accounts are settled deems just and reasonable.

History: En. Sec. 375, p. 337, L. 1877; re-en. Sec. 375, 2nd Div. Rev. Stat. 1879; re-en. Sec. 375, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2988, C. Civ. Proc. 1895; re-en. Sec. 7777, Rev. C. 1907; re-en. Sec. 10425, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1776.

Operation and Effect

This section contemplates a faithful management of the estate by the guardian, and, while a mere technical breach of duty not resulting in injury to the ward will not ordinarily justify a court in withholding compensation altogether, a flagrant violation of the duties of the trust will do

so. *In re Allard Guardianship*, 49 M 219, 225, 141 P 661.

Id. Where a guardian not only failed for more than thirteen years to render the annual account required by statute, or make any inventory, but mingled guardianship funds with his own, giving checks for large amounts of his ward's money for purposes which he was unable to disclose, the court properly denied him compensation for his services.

References

In re Cuffe's Estate, 63 M 399, 409, 207 P 640; *Kelly v. Kelly et al.*, 89 M 229, 235, 297 P 470.

10426. Mortgage or lease of ward's real property. Whenever it appears to the court or judge to be for the advantage of the ward or his estate to raise money upon a note or notes to be secured by a mortgage upon all or any part of the real property of the ward, or to make a lease of said real property, or any part thereof, the court or judge, as often as occasion shall arise in the administration of any such estate, may, on a petition, notice, and hearing, as provided for in the following section, authorize, empower, and direct the guardian to mortgage or lease such real estate or any part thereof, and to execute a note or notes to be secured by such mortgage.

History: En. Sec. 1, Ch. 48, L. 1905; re-en. Sec. 7778, Rev. C. 1907; amd. Sec. 1, Ch. 59, L. 1921; re-en. Sec. 10426, R. C. M. 1921.

10427. Procedure to mortgage. To obtain an order to mortgage or lease such real estate, the proceedings to be taken and the effect thereof must be as follows:

1. The guardian, or any person interested in the estate of the ward, shall file a verified petition showing, in the case of an application to mortgage real property, the following matters: The particular purpose or purposes for which it is proposed to make the mortgage, which shall be either to pay the debts, costs, and charges of maintenance, charges of

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administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said realty, or some part thereof, or for the purpose of benefiting or improving the real estate of the ward; a statement of such debts, charges, costs of administration, or liens or mortgages to be paid, reduced, extended, or renewed, or the purpose and advisability of improving the real estate, as the case may be; the advantage that may accrue to the estate from raising money, the amount proposed to be raised, together with the general description of the property proposed to be mortgaged, and the names of the ward and next of kin, if any, so far as known to the petitioner. In the case of an application to lease, said petitioner shall show the advantage that may accrue to the estate from giving the lease; a general description of the property proposed to be leased; the terms, rental, and general conditions of the proposed lease; and the names of the ward and next of kin so far as known to the petitioner.

2. Thereafter the same procedure shall be had in all respects as provided in sections 10250 to 10255 of this code in all applications for leave to mortgage, and the same procedure shall be had as provided in section 10256 of this code in all applications to lease; the provisions of said sections 10250 to 10256 are hereby made applicable, except as herein otherwise provided, to procedure for the mortgaging and leasing of the property of wards.

History: En. Sec. 1, Ch. 48, L. 1905; re-en. Sec. 7779, Rev. C. 1907; amd. Sec. 2, Ch. 59, L. 1921; re-en. Sec. 10427, R. C. M. 1921.

CHAPTER 149

SALE OF PROPERTY BY GUARDIANS AND DISPOSITION OF PROCEEDS

- Section 10428. May sell property in certain cases.
10429. Sale of real estate to be made upon order of court.
10430. Application of proceeds of sales.
10431. Investments of proceeds of sales.
10432. Order for sale—how obtained.
10433. Notice to next of kin—how given.
10434. Service or publication of order to appear—consent to order of sale.
10435. Hearing of application.
10436. Who may be examined on such hearing.
10437. Costs to be awarded, to whom.
10438. Order of sale to specify, what.
10439. Bond for selling—real estate.
10440. Proceedings to conform to certain provisions of code.
10441. Limit of order of sale.
10442. Conditions of sales of real estate of minor heirs—bond and mortgage to be given for deferred payments.
10443. Court may order the investment of money of the ward.

10428. May sell property in certain cases. When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward, when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

History: En. Sec. 376, p. 337, L. 1877; re-en. Sec. 3000, C. Civ. Proc. 1895; re-en. re-en. Sec. 376, 2nd Div. Rev. Stat. 1879; Sec. 7780, Rev. C. 1907; re-en. Sec. 10428, re-en. Sec. 376, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1777.

10429. Sale of real estate to be made upon order of court. When it appears to the satisfaction of the court or judge, upon the petition of the

guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, or his ward being an insane married woman, and it is necessary for all the parties interested that her dower right be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his or her guardian may sell the same for such purpose, upon obtaining an order therefor.

History: En. Sec. 377, p. 337, L. 1877; re-en. Sec. 377, 2nd Div. Rev. Stat. 1879; re-en. Sec. 377, 2nd Div. Comp. Stat. 1887; amd. Sec. 3001, C. Civ. Proc. 1895; re-en. Sec. 7781, Rev. C. 1907; re-en. Sec. 10429, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1778.

References

Cited or applied as section 377, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 101, 66 P 702.

10430. Application of proceeds of sales. If the estate be sold for the purposes mentioned in this chapter, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

History: En. Sec. 378, p. 337, L. 1877; re-en. Sec. 378, 2nd Div. Rev. Stat. 1879; re-en. Sec. 378, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3002, C. Civ. Proc. 1895; re-en. Sec. 7782, Rev. C. 1907; re-en. Sec. 10430, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1779.

10431. Investments of proceeds of sales. If the estate be sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court or judge.

History: En. Sec. 379, p. 337, L. 1877; re-en. Sec. 379, 2nd Div. Rev. Stat. 1879; re-en. Sec. 379, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3003, C. Civ. Proc. 1895; re-en. Sec. 7783, Rev. C. 1907; re-en. Sec. 10431, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1780.

References

Cited or applied as section 7783, Revised Codes, in *In re Allard Guardianship*, 49 M 219, 223, 141 P 661.

10432. Order for sale—how obtained. To obtain an order of such sale, the guardian must present to the district court or judge of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

History: En. Sec. 380, p. 338, L. 1877; re-en. Sec. 380, 2nd Div. Rev. Stat. 1879; re-en. Sec. 380, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3004, C. Civ. Proc. 1895; re-en. Sec. 7784, Rev. C. 1907; re-en. Sec. 10432, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1781.

10433. Notice to next of kin—how given. If it appears to the court or judge from the petition, that it is necessary, or would be beneficial to the ward, that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be

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granted for the sale of such estate. If it appear that it is necessary, or would be beneficial to the ward, to sell the personal estate, or some part of it, the court or judge must order the sale to be made.

History: En. Sec. 381, p. 338, L. 1877; re-en. Sec. 3005, C. Civ. Proc. 1895; re-en. re-en. Sec. 381, 2nd Div. Rev. Stat. 1879; Sec. 7785, Rev. C. 1907; re-en. Sec. 10433, re-en. Sec. 381, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1782.

10434. Service or publication of order to appear—consent to order of sale. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published, and the hearing may be had at any time.

History: En. Sec. 382, p. 338, L. 1877; Sec. 7786, Rev. C. 1907; re-en. Sec. 10434, re-en. Sec. 382, 2nd Div. Rev. Stat. 1879; R. C. M. 1921; amd. Sec. 1, Ch. 73, L. 1927. re-en. Sec. 382, 2nd Div. Comp. Stat. 1887; Cal. C. Civ. Proc. Sec. 1783. re-en. Sec. 3006, C. Civ. Proc. 1895; re-en.

10435. Hearing of application. The court or judge, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of next of kin, and of all other persons interested in the estate who oppose the application.

History: En. Sec. 383, p. 338, L. 1877; re-en. Sec. 3007, C. Civ. Proc. 1895; re-en. re-en. Sec. 383, 2nd Div. Rev. Stat. 1879; Sec. 7787, Rev. C. 1907; re-en. Sec. 10435, re-en. Sec. 383, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1784.

10436. Who may be examined on such hearing. On hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the court or judge, in the same manner and with like effect as in other cases provided for in sections 10018 to 10464 of this code.

History: En. Sec. 384, p. 339, L. 1877; re-en. Sec. 3008, C. Civ. Proc. 1895; re-en. re-en. Sec. 384, 2nd Div. Rev. Stat. 1879; Sec. 7788, Rev. C. 1907; re-en. Sec. 10436, re-en. Sec. 384, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1785.

10437. Costs to be awarded, to whom. If any person appears and objects to the granting of any order prayed for under the provisions of this chapter, and it appears to the court or judge that either the petition or the objection thereto is sustained, the court or judge may, in granting or refusing the order, award the costs to the party prevailing, and enforce the payment thereof.

History: En. Sec. 385, p. 339, L. 1877; re-en. Sec. 3009, C. Civ. Proc. 1895; re-en. re-en. Sec. 385, 2nd Div. Rev. Stat. 1879; Sec. 7789, Rev. C. 1907; re-en. Sec. 10437, re-en. Sec. 385, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1786.

10438. Order of sale to specify, what. If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part of it, should be sold, the court or judge may grant an order

therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

History: En. Sec. 386, p. 339, L. 1877; re-en. Sec. 386, 2nd Div. Rev. Stat. 1879; re-en. Sec. 386, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3010, C. Civ. Proc. 1895; re-en. Sec. 7790, Rev. C. 1907; re-en. Sec. 10438, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1787.

10439. Bond for selling real estate. Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with sufficient sureties, to be approved by the court or judge, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided for in this chapter, and in sections 10195 to 10256 of this code.

History: En. Sec. 387, p. 339, L. 1877; re-en. Sec. 387, 2nd Div. Rev. Stat. 1879; re-en. Sec. 387, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3011, C. Civ. Proc. 1895; re-en. Sec. 7791, Rev. C. 1907; re-en. Sec. 10439, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1788.

Operation and Effect

Upon a misappropriation of funds by the guardian of a minor realized from the

sale of real estate, the sureties on the bond are liable therefor, though the condition of the bond is that prescribed by section 10408. *Botkin v. Kleinschmidt*, 21 M 1, 52 P 563.

A sale by a guardian duly appointed and qualified, but who omitted to give the special bond required by this section, was not void. *Hughes v. Goodale*, 26 M 93, 95, 66 P 702.

10440. Proceedings to conform to certain provisions of code. All the proceedings under the petition of guardians for sales of property of their wards, giving notice, and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale, and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of sections 10018 to 10464 concerning the estates of decedents, unless otherwise specially provided in this chapter.

History: En. Sec. 388, p. 340, L. 1877; re-en. Sec. 388, 2nd Div. Rev. Stat. 1879; re-en. Sec. 388, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3012, C. Civ. Proc. 1895; re-en. Sec. 7792, Rev. C. 1907; re-en. Sec. 10440, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1789.

Operation and Effect

This section provides that all the proceedings as to accounting, and the settlement of accounts of guardians, must be had and made as required concerning estate of deceased persons; but this does not make section 10303, as to the conclusive-

ness of the settlement of administrators' accounts, applicable to guardians' accounts. The code does not in terms provide that the settlement of a guardian's intermediate account shall be conclusive. It may, therefore, be said to be merely prima facie evidence of its correctness, subject to be inquired into. In *re Kostohris' Estate*, 96 M 226, 234, 29 P 2d 829.

References

Cited or applied as section 388, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 95, 66 P 702.

10441. Limit of order of sale. No order of sale, granted in pursuance of this chapter, continues in force more than one year after granting the same, without a sale being had.

History: En. Sec. 389, p. 340, L. 1877; re-en. Sec. 389, 2nd Div. Rev. Stat. 1879; re-en. Sec. 389, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3013, C. Civ. Proc. 1895; re-en. Sec. 7793, Rev. C. 1907; re-en. Sec. 10441, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1790.

10442. Conditions of sales of real estate of minor heirs—bond and mortgage to be given for deferred payments. All sales of real estate of

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wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court or judge is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes and a mortgage on the real estate sold, with such additional security as the court or judge deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon.

History: En. Sec. 390, p. 340, L. 1877; re-en. Sec. 390, 2nd Div. Rev. Stat. 1879; re-en. Sec. 390, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3014, C. Civ. Proc. 1895; re-en. Sec. 7794, Rev. C. 1907; re-en. Sec. 10442, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1791.

10443. Court may order the investment of money of the ward. The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court or judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court or judge may make such other orders, and give such directions, as are needful for the management, investment, and disposition of the estate and effects, as circumstances require.

History: En. Sec. 391, p. 340, L. 1877; re-en. Sec. 391, 2nd Div. Rev. Stat. 1879; re-en. Sec. 391, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3015, C. Civ. Proc. 1895; re-en. Sec. 7795, Rev. C. 1907; re-en. Sec. 10443, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1792.

Operation and Effect

While a guardian is not an insurer of the safety of the investments of the ward's money, and a mere error of judgment will not subject him to personal liability for its loss, if he invests or loans it without an order of court he assumes the entire risk, and will be held to strict accountability, irrespective of the degree of care exer-

cised in the premises. *Kelly v. Kelly et al.*, 89 M 229, 239, 297 P 470.

A guardian making loans of funds of his ward on chattel mortgages without being authorized to do so by an order of court (this section) assumes the risk of loss, and, it appearing on final accounting that principal and interest are uncollectible, the loans are properly chargeable to the guardian. In *re Kostohris' Estate*, 96 M 226, 240, 29 P 2d 829.

References

Cited or applied as section 7795, Revised Codes, in *In re Allard Guardianship*, 49 M 219, 223, 141 P 661.

CHAPTER 150

NONRESIDENT GUARDIANS AND WARDS

- Section 10444. Guardians of nonresident persons.
 10445. Powers and duties of guardians appointed under preceding section.
 10446. Such guardians to give bond.
 10447. To what guardianship shall extend.
 10448. Removal or sale of nonresident ward's property.
 10449. Proceedings on such removal or sale.
 10450. Appraisal and sale of property.
 10451. Report of sale.
 10452. Order of confirmation.
 10453. Power of attorney.
 10454. Discharge of person in possession.

10444. Guardians of nonresident persons. When a person liable to be put under guardianship, according to the provisions of sections 10401 to 10464 of this code, resides without this state and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the district court of any county in which there

is any estate of such absent person, for the appointment of a guardian, and if, after notice given to all interested, in such manner as such court or judge orders, by publication or otherwise, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

History: En. Sec. 392, p. 341, L. 1877; re-en. Sec. 392, 2nd Div. Rev. Stat. 1879; re-en. Sec. 392, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3030, C. Civ. Proc. 1895; re-en. Sec. 7796, Rev. C. 1907; re-en. Sec. 10444, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1793.

References

State v. District Court et al., 73 M 84, 91, 235 P 751.

10445. Powers and duties of guardians appointed under preceding section. Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

History: En. Sec. 393, p. 341, L. 1877; re-en. Sec. 393, 2nd Div. Rev. Stat. 1879; re-en. Sec. 393, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3031, C. Civ. Proc. 1895; re-en. Sec. 7797, Rev. C. 1907; re-en. Sec. 10445, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1794.

10446. Such guardians to give bond. Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.

History: En. Sec. 394, p. 341, L. 1877; re-en. Sec. 394, 2nd Div. Rev. Stat. 1879; re-en. Sec. 394, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3032, C. Civ. Proc. 1895; re-en. Sec. 7798, Rev. C. 1907; re-en. Sec. 10446, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1795.

10447. To what guardianship shall extend. The guardianship which is first lawfully granted of any person residing without this state extends to all the estate of the ward within this state, and excludes the jurisdiction of the district court of every other county.

History: En. Sec. 395, p. 341, L. 1877; re-en. Sec. 395, 2nd Div. Rev. Stat. 1879; re-en. Sec. 395, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3033, C. Civ. Proc. 1895; re-en. Sec. 7799, Rev. C. 1907; re-en. Sec. 10447, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1796.

10448. Removal or sale of nonresident ward's property. When the guardian and ward are both nonresidents, and the ward is the owner of or entitled to property in this state, which may be removed to another state or territory or foreign country or sold, without conflict with any restriction or limitation thereupon, and without injuring the right of the ward thereto, such property may be removed to the state or territory or foreign country of the residence of the ward, or sold, and the proceeds of the sale thereof removed to such state or territory or foreign country, upon application to the district judge of the county in which the estate of the ward, or the principal part thereof, is situated.

History: En. Sec. 396, p. 342, L. 1877; re-en. Sec. 396, 2nd Div. Rev. Stat. 1879; amd. Sec. 396, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3034, C. Civ. Proc. 1895; re-en. Sec. 7800, Rev. C. 1907; re-en. Sec. 10448, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1797.

10449. Proceedings on such removal or sale. The application must be made upon ten days' notice to the resident executor, administrator, or

guardian, if there be such, otherwise without notice, and upon such application the nonresident guardian must produce and file a certificate, under the hand of the clerk or judge and seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment;
2. That he has entered upon the discharge of his duties;
3. That he is entitled, by the laws of the state or territory or foreign country of his appointment, to the possession of the estate of his ward; or, must produce and file a certificate, under the hand of the clerk or judge and seal of the court having jurisdiction in the state or territory or foreign country of his residence, of the estate of persons under guardianship, or of the highest court of such state or territory or foreign country, showing that, by the laws of such state or territory or foreign country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. The said application shall also contain a description of the property of such ward, together with an estimate of its value. Upon such application, unless good cause to the contrary is shown, the judge must make an order granting such guardian leave to take and remove the property of his ward to the state or territory or foreign country of his residence, or to sell the same, as may be requested or prayed for in said application, which order shall be authority to such guardian to sue for and receive the property therein described in his own name, for the use and benefit of his ward.

History: En. Sec. 397, p. 342, L. 1877; re-en. Sec. 397, 2nd Div. Rev. Stat. 1879; amd. Sec. 397, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3035, C. Civ. Proc. 1895; re-en. Sec. 7801, Rev. C. 1907; re-en. Sec. 10449, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1798.

10450. Appraisement and sale of property. Property authorized to be sold under the provisions of the preceding section may be sold at public or private sale, with or without notice, as the order of the district court may direct, and upon such terms as such order may prescribe, but before any sale thereunder, the property must be appraised by three appraisers to be appointed by the judge granting such order, either before or after the issuance of the order of sale, and the property must not be sold for less than ninety per cent. of the appraised value thereof.

History: En. Sec. 397, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3036, C. Civ. Proc. 1895; re-en. Sec. 7802, Rev. C. 1907; re-en. Sec. 10450, R. C. M. 1921.

10451. Report of sale. Upon making the sale of such property, or any part thereof, the guardian shall make a report thereof to the judge, showing the person or persons to whom, and the price or prices for which, the said property, or any part thereof, was sold. Thereupon the judge shall proceed to hear such report, and if the sale appears to have been fairly conducted, and the price or prices obtained appear to be the reasonable market value of the property sold, the judge shall make an order confirming such sale or sales, and directing a proper deed or deeds of real property, or a proper bill of sale or other transfer, conveying the property sold to the purchaser or purchasers.

History: En. Sec. 397, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3037, C. Civ. Proc. 1895; re-en. Sec. 7803, Rev. C. 1907; re-en. Sec. 10451, R. C. M. 1921.

10452. Order of confirmation. A certified copy of each order confirming the sale of real property must be recorded in the office of the county clerk of the county where such real property is situated. The guardian shall make and deliver to the purchaser or purchasers the deed or other conveyance authorized by the said order, and in conformity thereto, and thereupon all right, title, interest, and estate of such ward shall be fully vested in such purchaser or purchasers.

History: En. Sec. 397, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3038, C. Civ. Proc. 1895; re-en. Sec. 7804, Rev. C. 1907; re-en. Sec. 10452, R. C. M. 1921.

10453. Power of attorney. Any guardian mentioned in this and the preceding section may, by power of attorney, executed and acknowledged in the manner provided by law for the execution and acknowledgment of conveyances of real property, empower and authorize any person capable in law of executing a power of attorney for the sale of real estate, as attorney in fact, to do any and all of the things that the guardian himself might otherwise do, and in such case the acts and proceedings of such attorney in fact have the same force and effect as the acts and proceedings of such guardian.

History: En. Sec. 397, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3039, C. Civ. Proc. 1895; re-en. Sec. 7805, Rev. C. 1907; re-en. Sec. 10453, R. C. M. 1921.

10454. Discharge of person in possession. The order mentioned in section 10449 is a discharge of the executor or administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the court the receipt therefor of the foreign guardian of such absent ward.

History: En. Sec. 398, p. 342, L. 1877; re-en. Sec. 3040, C. Civ. Proc. 1895; re-en. Sec. 398, 2nd Div. Rev. Stat. 1879; Sec. 7806, Rev. C. 1907; re-en. Sec. 10454, re-en. Sec. 398, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1799.

CHAPTER 151

GENERAL AND MISCELLANEOUS PROVISIONS

Section 10455. Examination of persons suspected of defrauding wards or concealing property.

10456. Removal and resignation of guardian, and surrender of estate.

10457. Guardianship—how terminated.

10458. New bond—when required.

10459. Guardian's bond to be filed—action on.

10460. Limitation of actions on guardian's bond.

10461. Limitation of actions for the recovery of property sold.

10462. More than one guardian of a person may be appointed.

10463. Orders to be entered in minutes—provisions applicable to practice.

10464. Provisions applicable to guardians.

10455. Examination of persons suspected of defrauding wards or concealing property. Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or any instrument in writing belonging to the ward or to his estate, the court or judge may cite such suspected person to appear before such court or judge, and may examine and proceed with him on such charge in

the manner provided in sections 10124 to 10128 of this code with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent.

History: En. Sec. 399, p. 343, L. 1877; re-en. Sec. 399, 2nd Div. Rev. Stat. 1879; re-en. Sec. 399, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3050, C. Civ. Proc. 1895; Sec. 7807, Rev. C. 1907; re-en. Sec. 10455, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1800.

10456. Removal and resignation of guardian, and surrender of estate.

When a guardian, appointed either by the testator or a court or judge, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the court or judge may, upon such notice to the guardian as the court or judge may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court or judge may appoint another in place of the guardian who resigns or was removed.

History: En. Sec. 400, p. 343, L. 1877; re-en. Sec. 400, 2nd Div. Rev. Stat. 1879; re-en. Sec. 400, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3051, C. Civ. Proc. 1895; Sec. 7808, Rev. C. 1907; re-en. Sec. 10456, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1801.

10457. Guardianship—how terminated. The marriage of a minor ward terminates the guardianship of the person of such ward, but not of the estate; and the guardian of an insane or other person may be discharged by the court or judge, when it appears, on the application of the ward, or otherwise, that the guardianship is no longer necessary.

History: En. Sec. 401, p. 343, L. 1877; re-en. Sec. 401, 2nd Div. Rev. Stat. 1879; re-en. Sec. 401, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3052, C. Civ. Proc. 1895; Sec. 7809, Rev. C. 1907; re-en. Sec. 10457, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1802.

10458. New bond—when required. The court or judge may require a new bond to be given by a guardian whenever such court or judge deems it necessary, and may discharge the existing securities from further liability, after due notice given as such court or judge may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

History: En. Sec. 402, p. 343, L. 1877; re-en. Sec. 402, 2nd Div. Rev. Stat. 1879; re-en. Sec. 402, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3053, C. Civ. Proc. 1895; Sec. 7810, Rev. C. 1907; re-en. Sec. 10458, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1803.

References

Cited or applied as section 402, Second Division Compiled Statutes 1887, in Hughes v. Goodale, 26 M 93, 101, 66 P 702; Oliveri v. Maroncelli et al., 94 M 476, 481, 22 P 2d 1054.

10459. Guardian's bond to be filed—action on. Every bond given by a guardian must be filed and preserved in the office of the clerk of the district court, and in case of a breach of condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate.

History: En. Sec. 403, p. 344, L. 1877; re-en. Sec. 403, 2nd Div. Rev. Stat. 1879; re-en. Sec. 403, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3054, C. Civ. Proc. 1895; Sec. 7811, Rev. C. 1907; re-en. Sec. 10459, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1804.

10460. Limitation of actions on guardian's bond. No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

History: En. Sec. 404, p. 344, L. 1877; re-en. Sec. 404, 2nd Div. Rev. Stat. 1879; re-en. Sec. 404, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3055, C. Civ. Proc. 1895; re-en. Sec. 7812, Rev. C. 1907; re-en. Sec. 10460, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1805.

Operation and Effect

The death of a ward is a discharge of the guardian within the meaning of this section. *Berkin v. Marsh*, 18 M 152, 159, 44 P 528.

Id. A legal disability to sue pertains to the person desiring to sue and not to the

cause of action, and therefore, though a cause of action on a guardian's bond may not accrue until after the guardian's final accounting, this does not place the administrator of a deceased ward under a disability from the time of the ward's death until the accounting.

Id. The provision of this section, requiring action against the sureties on a guardian's bond to be brought within three years, is a special statute of limitations for the benefit of the sureties, and not for the principal.

10461. Limitation of actions for the recovery of property sold. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

History: En. Sec. 405, p. 344, L. 1877; re-en. Sec. 405, 2nd Div. Rev. Stat. 1879; re-en. Sec. 405, 2nd Div. Comp. Stat. 1879; re-en. Sec. 3056, C. Civ. Proc. 1895; re-en. Sec. 7813, Rev. C. 1907; re-en. Sec. 10461, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1806.

10462. More than one guardian of a person may be appointed. The court or judge, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

History: En. Sec. 406, p. 344, L. 1877; re-en. Sec. 406, 2nd Div. Rev. Stat. 1879; re-en. Sec. 406, 2nd Div. Comp. Stat. 1887; amd. Sec. 3057, C. Civ. Proc. 1895; re-en. Sec. 7814, Rev. C. 1907; re-en. Sec. 10462, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1807.

10463. Orders to be entered in minutes—provisions applicable to practice. All orders must be entered in the minutes of the court kept for probate proceedings. The provisions of sections 10018 to 10464 of this code relative to the estates of decedents, so far as they relate to the practice in the district court, apply to proceedings under sections 10401 to 10464 of said code.

History: En. Sec. 3058, C. Civ. Proc. 1895; re-en. Sec. 7815, Rev. C. 1907; re-en. Sec. 10463, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1808.

Operation and Effect

In an action to recover on a guardian's bond, in which defendant surety's contention was that the decree of settlement of the guardian's account was not binding upon it because it had not received notice of hearing thereon, held, that posted notice given under section 10299 (relating to

settlement of accounts of executors and administrators made applicable by this section to proceedings in guardianship) was constructive notice to defendant, and that the court's recital in the decree of settlement that notice had been given, was sufficient proof of notice. *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054.

References

In *re Kostohris' Estate*, 96 M 226, 231, 29 P 2d 829.

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10464. Provisions applicable to guardians. The provisions of section 9824 are hereby declared to apply to guardians appointed by the court or judge, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.

History: En. Sec. 3059, C. Civ. Proc. 1895; re-en. Sec. 7816, Rev. C. 1907; re-en. Sec. 10464, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1809.

CHAPTER 152

PROCEEDINGS FOR THE PROTECTION OF DEPENDENT AND NEGLECTED CHILDREN

Section 10465.	Dependent and neglected children—definition.
10466.	Jurisdiction of courts—jury trial.
10467.	Applications to courts with reference to dependent or neglected children.
10468.	Citation and procedure.
10469.	Hearing—witnesses—duty of county attorney.
10470.	Commitment of child to orphans' home or other disposition.
10471.	Committed child becomes ward of custodian.
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10474.	Custody of child upon suspension of sentence.
10475.	Forfeiture of bonds and termination of suspended sentence on breach of conditions.
10476.	Actions on bonds.
10477.	Act to be construed liberally.
10478.	This act not to repeal existing laws.
10479.	Jurisdiction of justices' courts.
10479.1.	Transportation to homes without the state—authorization—expense.

10465. Dependent and neglected children—definition. For the purpose of this act, the words "dependent child" or "neglected child" shall mean any child of the age of sixteen years, or under that age, who is dependent upon the public for support, and who is destitute, homeless, or dependent, or who has no proper parental care or guardianship, or who habitually begs or receives alms, or who is found living in any house of ill-fame, or in any house of prostitution, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child, or whose environment is such as to warrant the state, in the interest of the child, to assume its guardianship or support.

History: En. Sec. 1, Ch. 92, L. 1907; re-en. Sec. 7829, Rev. C. 1907; re-en. Sec. 10465, R. C. M. 1921.

References

Cited or applied as section 7829, Revised Codes, in *Kelly v. Independent Publishing Co.*, 45 M 127, 141, 122 P 735.

10466. Jurisdiction of courts—jury trial. The district courts in the several counties in the state shall have original jurisdiction in all cases coming within the terms of this act. In all trials under this act, any person interested therein may demand a jury, or the judge of his own motion may order a jury to try the case. Any person interested in any cause under this act shall have the right to appear therein and be represented by counsel; all cases within the provisions of this act shall be known as "juvenile cases."

History: En. Sec. 2, Ch. 92, L. 1907; re-en. Sec. 7830, Rev. C. 1907; re-en. Sec. 10466, R. C. M. 1921.

10467. Applications to courts with reference to dependent or neglected children. Any officer of the state bureau of child and animal protection, or any person who is a resident of the county, having knowledge of a child in his county who appears to be a dependent or neglected child, may file with the clerk of the district court a petition in writing, setting forth the facts which constitute the child dependent or neglected, which petition shall be verified by an affidavit of the petitioner. It shall be sufficient if the affidavit is upon information and belief. The court may, upon its own motion, or on the application of any person interested, require that such petition set forth an additional information as to the parentage or relatives of such child, or the cause of its dependency, as to the court may seem necessary and proper to the ends of justice, or the proper disposition of any such case; provided, however, that when any such child, within the provisions of this act, is in immediate or apparent danger of violence or serious injury, or is apt to be removed from the jurisdiction of the court for the purpose of evading proceedings under this act for its protection, any officer of the state bureau of child and animal protection, or any sheriff, may take immediate custody of such child without any process whatever; but, in any such case, it shall be the duty of said officer, within forty-eight hours thereafter, to file a petition and proceed as herein provided for. In any such case, the court may provide for the temporary care and custody of such child pending the final hearing and disposition of such case.

History: En. Sec. 3, Ch. 92, L. 1907; re-en. Sec. 7831, Rev. C. 1907; re-en. Sec. 10467, R. C. M. 1921.

10468. Citation and procedure. Upon the filing of such petition, if it shall appear that one or both of said parents, or guardian, if there be no parent, reside in said county, the judge of said court shall issue a citation fixing the day and time of hearing of such petition, which shall be served upon one or both of said parents or guardian, if any, if either can be found in said county, not less than two days before the time fixed for said hearing, requiring them to appear on said day and hour and show cause, if any, why said child should not be declared, by said court, to be a dependent or neglected child, and sent to the state orphans' home, or otherwise cared for. In case it shall appear by said petition that neither of said parents is living, or does not reside in said county, or in case one or both of said parents, or guardian, in case there be no parents, shall indorse on said petition a request that the child be declared to be a dependent child, then the citation herein provided for need not be issued, and the court may thereupon proceed to the examination and hearing provided for. It shall be the duty of the officer receiving such citation to use diligence to find and serve the same on one or both of said parents, or upon the guardian, who shall represent such child in court; and in case there is neither of these found, then the court shall appoint an officer of the bureau of child and animal protection, or some responsible taxpayer of said county, to represent said child in court, and the court may also appoint an attorney to represent said child. In case one or both of said parents of such child appear in court, it shall be the duty of the district judge to explain to the one so appearing the effect of an order of court,

10467
Ref. to
S.L. '43 c. 145
Sec. 2 p. 246

10468
Ref. to and
New matter
S.L. '43 c. 145
Secs. 1-4
pp. 246, 247

10468
Amended
S.L. '47, C. 209
Sec. 1, p. 275

sending their child to the state home, or declaring it to be a dependent child. In case any dependent child is taken away from its parents or guardian under the provisions of this act, such parents or guardian shall thereafter have no right over or to the custody, service, or earnings of said child, except upon condition, in the interest of such child, as the court may impose, or where, upon proper proceedings, such child may lawfully be restored to the parents or guardian.

History: En. Sec. 4, Ch. 92, L. 1907; re-en. Sec. 7832, Rev. C. 1907; re-en. Sec. 10468, R. C. M. 1921.

10469. Hearing—witnesses—duty of county attorney. On such hearing or examination, the child shall be brought before said court, whereupon it shall be the duty of said court to investigate the facts and ascertain whether said child is a dependent child, its residence, and, as far as possible, the whereabouts of the parents, guardian, or nearest adult relatives; when and how long the child has been maintained, in whole or in part, by public or private charity; the occupation of the parents, if living; whether they are supported by the public, or have abandoned their child; and to ascertain, as far as possible, if the child is found dependent, the cause thereof. The court may compel the attendance of witnesses upon such examination; and it shall be the duty of the county attorney of the county, when requested by the court, to appear in any such examination in behalf of the petitioner. It shall be the duty of the county attorney, upon the request of the court, or any petitioner, to file petitions and conduct the necessary proceedings in any case within the terms of this act. Any friend of the child may appear in its behalf.

History: En. Sec. 5, Ch. 92, L. 1907; re-en. Sec. 7833, Rev. C. 1907; re-en. Sec. 10469, R. C. M. 1921.

10470. Commitment of child to orphans' home or other disposition. Upon the hearing of any such case, if the said child shall be found to come within any of the provisions of section 10465, it shall be deemed a dependent child, and an order may be entered committing it to the state orphans' home; and if said home is unable to receive said child, or if, from any other reason, it shall appear to be to the best interest of said child, the court may make such disposition of said child as seems best for its moral and physical welfare.

History: En. Sec. 6, Ch. 92, L. 1907; re-en. Sec. 7834, Rev. C. 1907; re-en. Sec. 10470, R. C. M. 1921.

10471. Committed child becomes ward of custodian. In any case where the court shall award any dependent child to the care and custody of any association or individual, in accordance with the provisions of this act, the child shall, unless otherwise ordered, become a ward, and be subject to the guardianship of the association or individual to whose care it is committed. Such association or individual shall, by and with the consent of the court, have authority to place such child in a suitable family home, with or without any indenture, and may, by attorney or agent, appear in any court, where adoption proceedings are pending, and assent to its adoption. Such assent shall be sufficient to authorize the court to enter the proper order or decree of adoption. The guardianship provided for herein shall not include the guardianship of any estate of the child. Any

association or individual receiving the care, custody, and guardianship of any such child shall be subject to visitation or inspection by the state bureau of child and animal protection, or any officer or person appointed by the court for such purpose, and the court may, at any time, require from such association or person a report or reports containing such information or statements as to the judge may seem proper and necessary to be fully advised as to the care, maintenance, moral, or physical training of the child, as well as the standing or ability of such association or individual to care for such child. The court may change the guardianship of such child, if, at any time, it is made clear to the court that the same is detrimental to the child, or unsatisfactory to the court. In providing guardianship under the terms of this act for any dependent child, the court may, as far as practicable, provide such guardianship as conforms to the religious faith of the parents of the child. If, in the opinion of the court, the causes of dependency of any child may be removed under such conditions or supervision for its care, protection, and maintenance as may be imposed by the court, so long as it may be for its best interest, the child may be permitted to remain in its own home and under the control of its own parents, parent, or guardian, subject to the jurisdiction and direction of the court, the condition imposed, and reasonable visitation of the officer, or person appointed by the court for that purpose. When necessary, and when it shall appear to the court that it is no longer to the interest of such child to remain with such parent, parents, or guardian, the court may proceed with the final disposition of the case.

History: En. Sec. 7, Ch. 92, L. 1907;
re-en. Sec. 7835, Rev. C. 1907; re-en. Sec.
10471, R. C. M. 1921.

References

Cited or applied as section 7835, Revised
Codes, in *Kelly v. Independent Publishing*
Co., 45 M 127, 141, 122 P 735.

10472. Punishment of parents. In all cases where any child shall be a "dependent child" or a "neglected child," as defined by the statutes of this state, or by this act, the parent or parents, guardian, or other person or persons responsible in law for its care, custody, maintenance, or support, who shall by any act cause, contribute to, or encourage such dependency, or who shall, by failing, refusing, or neglecting without legal excuse or good cause, to care for, maintain, support, guard, and protect, contribute to, cause, permit, the delinquency or neglect of such child, or who shall, by reason of failing, refusing, or neglecting to do and perform any of his or her or their legal duties or obligations to such child, cause, encourage, or contribute to the neglect or to the delinquency of such child, shall be guilty of a misdemeanor, and, upon trial and conviction thereof, shall be fined in a sum not exceeding six hundred dollars, or imprisoned in the county jail for a period not exceeding nine months, or by both such fine and imprisonment.

History: En. Sec. 8, Ch. 92, L. 1907; re-en. Sec. 7836, Rev. C. 1907; re-en. Sec. 10472, R. C. M. 1921.

10473. Suspension of sentence. The court may suspend any sentence hereunder, or release any person sentenced under this act from custody, upon condition that such person shall furnish a good and sufficient bond or undertaking to the state of Montana, in such penal sum, not exceeding two thousand dollars, as the court shall determine, conditioned for the

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payment of such amount as the court may order, not exceeding twenty-five dollars per month for each child, for the support, care, and maintenance of such child while under the guardianship or in the custody of any individual or any public, private, or state home, institution, association, or orphanage to which the child may have been committed or entrusted under the provisions of the law of the state concerning dependent and neglected children.

History: En. Sec. 9, Ch. 92, L. 1907; re-en. Sec. 7837, Rev. C. 1907; re-en. Sec. 10473, R. C. M. 1921.

10474. Custody of child upon suspension of sentence. The court may also suspend any sentence imposed under this act, and may permit any dependent child to remain in the custody of any such person found guilty, upon conditions to be prescribed or imposed by the court as may seem most calculated to remove the cause of such dependence or neglect, and while such conditions are accepted and complied with by any such person, such sentence may remain suspended, and such persons shall be considered on probation in said court. In case a bond is given as provided herein, the conditions prescribed by the court may be made a part of the terms and conditions of such bond.

History: En. Sec. 10, Ch. 92, L. 1907; re-en. Sec. 7838, Rev. C. 1907; re-en. Sec. 10474, R. C. M. 1921.

10475. Forfeiture of bonds and termination of suspended sentence on breach of conditions. Upon the failure of any such person to comply with the terms and conditions of such bond, or of the conditions imposed by the court, such bond or the term of probation may be declared forfeited and terminated by the court, and the original sentence executed as though it had never been suspended, and the term of any jail sentence imposed in any such case shall commence from the date of incarceration of any such person after the forfeiture of such bond or term of probation. There shall be deducted from any such period of incarceration any part of such sentence which may have already been served.

History: En. Sec. 11, Ch. 92, L. 1907; re-en. Sec. 7839, Rev. C. 1907; re-en. Sec. 10475, R. C. M. 1921.

10476. Actions on bonds. It shall not be necessary to bring a separate suit to recover the penalty of any such bond so forfeited; but the court may cause a citation to issue to the surety or sureties thereon, requiring that he or they appear at a time named therein by the court, which time shall be not less than ten nor more than twenty days from the issuance thereof, and show cause, if any there be, why judgment should not be entered for the penalty of such bond, and execution issue for the amount thereof against the property of the surety or sureties thereon, as in civil cases; and, upon failure to appear or failure to show any such sufficient cause, the court shall enter such judgment in behalf of the state of Montana against such surety or sureties. Any moneys collected or paid upon any such execution, or in any case upon said bond, shall be turned over to the county treasurer of the county in which such bond is given, to be applied to the care and maintenance of the child or children for whose dependency such conviction was had, in such manner and upon such terms as the district court may direct; provided, that if it shall not be necessary,

in the opinion of the court, to use such fund, or any part thereof, for the support and maintenance of such child, the same shall be paid into the county treasury and become a part of the funds of such county.

History: En. Sec. 12, Ch. 92, L. 1907; re-en. Sec. 7840, Rev. C. 1907; re-en. Sec. 10476, R. C. M. 1921.

10477. Act to be construed liberally. This act shall be liberally construed, to the end that its purposes may be carried out, to-wit: That proper guardianship may be provided for in order that the child may be educated and cared for, as far as practicable, in such manner as best subserves his moral and physical welfare, and, as far as practicable, in any proper case, that the parent, parents, or guardian of such child may be compelled to perform their moral or legal duties in the interest of the child, and in case of failure to perform said duties, that they may be properly punished therefor.

History: En. Sec. 13, Ch. 92, L. 1907; re-en. Sec. 7841, Rev. C. 1907; re-en. Sec. 10477, R. C. M. 1921.

10478. This act not to repeal existing laws. Nothing in this act shall be construed to repeal any portion of sections 11017 to 11021 of the Penal Code of the state of Montana, or any amendments thereof; nor shall anything in this act be construed to repeal any law provided for the support by parents of their minor child, and nothing in said laws shall prevent proceedings under this act, in any proper case.

History: En. Sec. 14, Ch. 92, L. 1907; re-en. Sec. 7842, Rev. C. 1907; re-en. Sec. 10478, R. C. M. 1921.

10479. Jurisdiction of justices' courts. Whenever the district court in and for any county of this state is not in session, a sworn complaint may be filed before any justice of the peace, or police magistrate, in said county, against any person for a violation of any of the provisions of this act, and in case any person is arrested and brought before such justice of the peace, or police magistrate, he shall have jurisdiction as an examining and committing magistrate only, and the proceedings before such justice of the peace, or police magistrate, shall be such as are prescribed in sections 11773 to 11797 of the Penal Code, as far as consistent with the purposes of this act; but no child held by said justice or magistrate pending a hearing, or committed by him after hearing to await the action of the district court, shall be confined in a common jail or locked up, but such child shall be cared for and held in the same manner as is provided for the care and custody of such child or children in cases pending before a district court, and the justice or magistrate shall be empowered to make the proper orders in such cases provided.

History: En. Sec. 15, Ch. 92, L. 1907; re-en. Sec. 7843, Rev. C. 1907; re-en. Sec. 10479, R. C. M. 1921.

10479.1. Transportation to homes without the state—authorization—expense. The bureau of child protection is authorized to transport to proper homes without the state when such homes are offered minor orphans, half orphans, abandoned children or children of a father who is incapacitated for gainful work by permanent physical disability, who does not have an income sufficient to care for his children, or who is a patient in a sanitarium, or other institution by reason of a tubercular condition;

10479.1
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provided, that the county from which the children are removed shall pay one-half ($\frac{1}{2}$) of the total expense necessarily incurred by the state in effecting such transportation.

History: En. Sec. 1, Ch. 86, L. 1933.

CHAPTER 153

FINANCIAL AID OF DEPENDENT CHILDREN (MOTHERS' PENSION ACT)

- Section 10480. Allowance for dependent children.
10481. Amount of allowance.
10482. Conditions of allowance.
10483. County commissioners to determine amount of allowance—order, contents of—warrants, how paid.
10484. When allowance shall be made.
10485. Allowance in case of conviction of father, of a felony.
10486. Penalty for fraud.
10487. New trials and appeals.

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10480. Allowance for dependent children. Each child under the age of sixteen years, whose father is dead or an inmate of some Montana state institution, except the Montana state prison, or who is physically or mentally incapacitated, which said act of disability shall have occurred while he was a resident of the state of Montana, and who has, for a period of one year or more, failed to provide for said child, or whose father is an inmate of the Montana state prison and has, for a period of ninety days or more, failed to provide for such child, shall be entitled to such assistance which will help make it possible for such child to be cared for in his or her own home without being sent to some public institution, said financial aid to be given to the mother of said child or children as in this act provided.

History: En. Sec. 1, Ch. 86, L. 1915;
amd. Sec. 1, Ch. 83, L. 1917; re-en. Sec.
10480, R. C. M. 1921.

Operation and Effect

Under this section to section 10487, one-half of the county poor fund is automatically set aside for the payment of mothers' pensions, if such amount is needed for that purpose, the remaining half only being thus available for the payment of warrants for other charges against the poor fund. State v. District Court et al., 62 M 275, 277, 204 P 600.

Id. Courts cannot inquire into or control matters of legislative policy; hence they may not, in the construction of a statute, pass upon the question whether legislation, such as the mothers' pension

law, is wise or unwise, or whether in its practical application it fails to meet the needs of any particular county.

Id. On supervisory control to review an order adjudging county commissioners guilty of contempt for refusing to issue a warrant on the poor fund in payment of a mother's pension, held that contemnors were not justified in their refusal based upon an erroneous construction of the mothers' pension act, where after setting apart a sum sufficient to redeem outstanding warrants registered prior to July 1, the day on which the act became effective, there remained an ample amount which could be devoted to the payment of the claim under the act.

10481
repealed
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10481. Amount of allowance. Each child, as provided for in the preceding section, whose mother is financially or physically unable to support such child, shall be allowed from the public moneys of the county in which the mother resides the sum of twenty dollars per month, if there is one child in said family only; if there be more than one child, then the sum of fifteen dollars per month for the first child, and ten dollars per month for the second child, and five dollars per month for each additional

child, provided that the total amount paid to any one mother shall not exceed fifty dollars per month, said money to be paid to the mother of said child or children.

History: En. Sec. 2, Ch. 86, L. 1915; amd. Sec. 2, Ch. 83, L. 1917; re-en. Sec. 10481, R. C. M. 1921.

10482. Conditions of allowance. The allowance herein referred to shall be made subject to the following conditions: (1) The child or children for whose benefit allowance is made must be living with the mother of such child or children; the word "mother" as used herein shall include the mother of such child by birth or by legal adoption and shall also include any woman possessing the other qualifications hereinafter specified, who shall, for a period of one (1) year or more, immediately prior to the application for relief under this act, have provided the sole support for any child entitled to the benefits of this act; (2) the allowance shall be made only when in the absence of such allowance, the mother is unable to properly provide and care for said child or children without being required to work regularly away from her own home and children, provided that the mother may be at times absent for work with the approval of the board of county commissioners of the county, if they should deem it for the best interests of said child or children; (3) the mother must, in the judgment of the board of county commissioners, be a proper person physically, mentally, and morally for the bringing up of her children; (4) such allowance shall in the judgment of the board of county commissioners be actually necessary for the support and maintenance of the child or children in the home; (5) no person shall receive the benefit of this act who is not a citizen of the United States, or who has not declared her intention to become such citizen, and who shall not have been a resident of the county in which said application is made for at least one year prior to the making of such application for such allowance; (6) the provisions of this act shall not apply in the case of any child who has property of its own sufficient for its support; (7) application shall be made by the mother to the board of county commissioners by a petition setting forth the facts above required, and in addition thereto, the age and the residence of such child or children, the residence of the mother, and the financial conditions of such mother and child or children, which petition shall bear the signatures of at least ten (10) taxpayers, residents in the community where applicant has last made her home; that upon the filing of such petition, the board of county commissioners shall make personal investigation, or may designate the bureau of child and animal protection of the state of Montana, the county probation officers, or some other responsible resident of the county wherein the mother resides, to make a thorough investigation of all the facts of the case, and the board of county commissioners must make an order setting said petition for hearing at the next regular meeting of said board. At least five (5) days before the time set for the hearing, any person designated to make the investigation must file with the board of county commissioners his report under oath, and must appear at the hearing of said petition and testify in support of his findings and report, if required. Any person having any knowledge of the facts may appear at said hearing and be

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examined under oath as to such facts, and any taxpayer may appear at said hearing and file objection to the allowance of the application, and may be heard upon such objection at said hearing at the time fixed therefor in said notice or at any time to which said hearing may be continued; (8) every person receiving an allowance under this act shall every month file with the county clerk and recorder a report in writing upon blanks to be supplied by the county, verified under oath, showing a detailed statement of all income of the family from whatever source for the preceding month, whether or not she has remarried, whether any of the children for whom she is receiving an allowance for support have died, or are not living with her, or are not being supported by her, her present place of residence, and the present place of residence of the children for whom she is receiving an allowance, whether any of such children have attained the age of sixteen (16) years or have acquired property sufficient for their support; provided, however, that if such person receiving allowance under this act lives more than five (5) miles from the county seat, then said report need not be verified, but shall be sufficient if signed by the person receiving the allowance and two (2) witnesses; (9) it shall be the duty of the board of county commissioners to inspect the monthly report required by this act, and when it shall appear from such report that the beneficiary is no longer entitled to the allowance, said order of allowance shall be revoked and set aside.

History: En. Sec. 3, Ch. 86, L. 1915; 1921; re-en. Sec. 10482, R. C. M. 1921; amd. amd. Sec. 3, Ch. 83, L. 1917; amd. Sec. 1, Sec. 1, Ch. 12, L. 1927; amd. Sec. 1, Ch. Ch. 198, L. 1919; amd. Sec. 1, Ch. 257, L. 133, L. 1933; amd. Sec. 1, Ch. 126, L. 1935.

10483. County commissioners to determine amount of allowance—order, contents of—warrants, how paid. Whenever the board of county commissioners shall determine that the allowance under this act shall be made, they shall make an order in writing which order among other things shall set out the full name of the mother, her place of residence by street and number where possible, the names and ages of the children, and the amount allowed to each child, and monthly warrants shall be drawn therefor subject to the other provisions of this act. All warrants shall be drawn upon the poor fund of the county provided that the aggregate amount of such warrants shall not exceed fifty per cent. (50%) of such fund.

History: En. Sec. 4, Ch. 86, L. 1915; re-en. Sec. 4, Ch. 83, L. 1917; amd. Sec. 2, Ch. 257, L. 1921; re-en. Sec. 10483, R. C. M. 1921; amd. Sec. 2, Ch. 133, L. 1933.

10484. When allowance shall be made. No allowance for any child shall continue after such child has reached the age of sixteen years. Whenever the mother of any child on whose account any allowance shall have been made, under the provisions of this act, shall marry, such allowance shall cease.

History: En. Sec. 5, Ch. 86, L. 1915; amd. Sec. 5, Ch. 83, L. 1917; re-en. Sec. 10484, R. C. M. 1921.

10485. Allowance in case of conviction of father, of a felony. Be it further provided, that under the conditions of this act, when the father of the child or children, on whose behalf application for assistance is being made, has been convicted of a crime and is confined in the state prison,

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repealed
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10484
repealed
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10485
repealed
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the county in which he was a resident at the time of conviction shall pay the allowance made for such child or children to the mother.

History: En. Sec. 6, Ch. 86, L. 1915; re-en. Sec. 6, Ch. 83, L. 1917; re-en. Sec. 10485, R. C. M. 1921; amd. Sec. 1, Ch. 77, L. 1935.

10486. Penalty for fraud. Anyone who has fraudulently made an application to receive the benefits of this act, or who files a false report or who misrepresents the names of the applicants, or the place of residence or the names, ages, or necessities of the children in order to receive the benefit of said act, or who fraudulently aids or abets or assists any person or persons in making such fraudulent application, shall be guilty of a misdemeanor and shall be subject to a fine of not less than twenty-five dollars, nor more than five hundred dollars, or imprisonment in the county jail for not more than six months, or both.

History: En. Sec. 7, Ch. 83, L. 1917; amd. Sec. 3, Ch. 257, L. 1921; re-en. Sec. 10486, R. C. M. 1921.

10487. New trials and appeals. New trials may be had and appeals may be taken to the supreme court from orders granting or refusing new trials, making or refusing allowances, revoking or refusing to revoke the order of allowance, in the same manner as provided for taking appeals from orders in probate proceedings.

History: En. Sec. 4, Ch. 257, L. 1921; re-en. Sec. 10487, R. C. M. 1921.

NOTE.—Under the original provisions relating to allowance of mothers' pensions, the judge of the district court, instead of the county commissioners, determined the necessity of the pension and made the order allowing the pension.

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CHAPTER 154

DEFINITIONS, KINDS AND DEGREES OF EVIDENCE

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| Section | 10488. Definition of evidence. |
| | 10489. Definition of proof. |
| | 10490. Definition of law of evidence. |
| | 10491. The degree of proof required to establish facts. |
| | 10492. Four kinds of evidence specified. |
| | 10493. Several degrees of evidence specified. |
| | 10494. Primary evidence defined. |
| | 10495. Secondary evidence defined. |
| | 10496. Direct evidence defined. |
| | 10497. Indirect evidence defined. |
| | 10498. Prima facie evidence defined. |
| | 10499. Partial evidence defined. |
| | 10500. Satisfactory evidence defined. |
| | 10501. Indispensable evidence defined. |
| | 10502. Conclusive evidence defined. |
| | 10503. Cumulative evidence defined. |
| | 10504. Corroborative evidence defined. |

10488. Definition of evidence. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

History: En. Sec. 3100, C. Civ. Proc. 1895; re-en. Sec. 7844, Rev. C. 1907; re-en. Sec. 10488, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1823.

References

Cited or applied as section 3100, Code of Civil Procedure, in Benepe-Owenhouse

Co. v. Scheidegger, 32 M 424, 429, 80 P 1024; May v. Northern Pacific Ry. Co., 32 M 522, 536, 81 P 328; as section 7844, Revised Codes, in Da Rin v. Casualty Co. of America, 41 M 175, 186, 108 P 649.

10489. Definition of proof. Proof is the effect of evidence, the establishment of a fact by evidence.

History: En. Sec. 3101, C. Civ. Proc. 1895; re-en. Sec. 7845, Rev. C. 1907; re-en. Sec. 10489, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1824.

References

Cited or applied as section 3101, Code of Civil Procedure, in *State v. McClellan*, 23 M 532, 536, 59 P 924.

10490. Definition of law of evidence. The law of evidence, which is the subject of this part of the code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive;
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining, in certain cases, the value and effect of evidence.

History: En. Sec. 3102, C. Civ. Proc. 1895; re-en. Sec. 7846, Rev. C. 1907; re-en. Sec. 10490, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1825.

10491. The degree of proof required to establish facts. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind.

History: En. Sec. 3103, C. Civ. Proc. 1895; re-en. Sec. 7847, Rev. C. 1907; re-en. Sec. 10491, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1826.

Operation and Effect

Moral certainty is the very highest grade of certainty that human testimony can produce. *Territory v. McAndrews*, 3 M 158, 165; *State v. Powers*, 39 M 259, 264, 102 P 583.

The provision of this section, that moral certainty, or that degree of proof which produces conviction in an unprejudiced mind, is all that is required, is applicable to criminal causes. *State v. Powers*, 39 M 259, 263, 102 P 583; *State v. Cassill et al.*, 71 M 274, 281, 229 P 716.

In a civil case the law does not require that degree of proof which amounts to demonstration, moral certainty, or that degree which produces conviction in an un-

prejudiced mind, being sufficient to sustain the verdict of the jury. *Reilly v. City of Butte*, 64 M 355, 360, 209 P 1057.

An instruction on the degree of proof necessary to establish facts in the exact language of this section, held proper. *State v. Fredericks*, 65 M 25, 28, 212 P 495.

That degree of proof in a criminal case which produces conviction in an unprejudiced mind is denominated "moral certainty" (this section) and "moral certainty" and the phrase "beyond a reasonable doubt" as employed in section 10672 providing that conviction can be secured only upon evidence which establishes guilt beyond a reasonable doubt, are synonymous. *State v. Mun*, 76 M 278, 283, 246 P 257.

References

Moffett v. Bozeman Canning Co. et al., 95 M 347, 358, 26 P 2d 973.

10492. Four kinds of evidence specified. There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

History: En. Sec. 3104, C. Civ. Proc. 1895; re-en. Sec. 7848, Rev. C. 1907; re-en. Sec. 10492, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1827.

References

Cited or applied as section 3104, Code of Civil Procedure, in *Benepe-Owenhouse Co. v. Scheidegger*, 32 M 424, 429, 80 P 1024; *May v. Northern Pacific Ry.*, 32 M 522, 536, 81 P 328.

10493. Several degrees of evidence specified. There are several degrees of evidence:

1. Primary and secondary;
2. Direct and indirect;
3. Prima facie, partial, satisfactory, indispensable, and conclusive.

History: En. Sec. 3105, C. Civ. Proc. 1895; re-en. Sec. 7849, Rev. C. 1907; re-en. Sec. 10493, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1828.

References

Mellon v. Kelly et al., 99 M 10, 41 P 2d 49.

10494. Primary evidence defined. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

History: En. Sec. 3106, C. Civ. Proc. 1895; re-en. Sec. 7850, Rev. C. 1907; re-en. Sec. 10494, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1829.

the count, and therefore they, and not the poll book, are the primary evidence of the count, within the meaning of the term "primary evidence" as defined in this section. Dubie v. Batani, 97 M 468, 476, 37 P 2d 662.

Tally Sheets, Not Poll Books, Primary Evidence of Count of Votes

In an election contest, the tally sheets on which the clerk of election must, inter alia, note the number of votes cast for each candidate, the total then to be copied therefrom into the poll book, held to afford the greatest certainty as to the result of

References

Cited or applied as section 3106, Code of Civil Procedure, in Capell v. Fagan, 30 M 507, 511, 77 P 55, 2 Ann. Cas. 37; as section 7850, Revised Codes, in Adams v. Stenehjelm, 50 M 232, 238, 146 P 469.

10495. Secondary evidence defined. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents.

History: En. Sec. 3107, C. Civ. Proc. 1895; re-en. Sec. 7851, Rev. C. 1907; re-en. Sec. 10495, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1830.

References

Cited or applied as section 3107, Code of Civil Procedure, in Capell v. Fagan, 30 M 507, 511, 77 P 55; Angell v. Lewistown State Bank et al., 72 M 345, 350, 232 P 90.

10496. Direct evidence defined. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it is direct.

History: En. Sec. 3108, C. Civ. Proc. 1895; re-en. Sec. 7852, Rev. C. 1907; re-en. Sec. 10496, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1831.

References

Cited or applied as section 3108, Code of Civil Procedure, in State v. Calder, 23 M 504, 508, 59 P 903; Sylvain et al. v. Page, 84 M 424, 437, 276 P 16; Mellon v Kelly et al., 99 M 10, 41 P 2d 49.

10497. Indirect evidence defined. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact from which the fact in dispute is inferred.

History: En. Sec. 3109, C. Civ. Proc. 1895; re-en. Sec. 7853, Rev. C. 1907; re-en. Sec. 10497, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1832.

Operation and Effect

In the absence of direct and positive evidence that defendant stole a steer with the larceny of which he was charged, his

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possession of the meat of the animal and his exercise of ownership over it, under circumstances indicating knowledge of where the animal came from, furnished a basis for the inference that he killed it, sufficient to justify submission of the case to the jury. *State v. Evans*, 60 M 367, 374, 199 P 440.

The fact that a traumatic injury was the proximate cause of a totally disabling disease (shaking palsy) could be proved by circumstantial evidence or inferences having a substantial basis in the evidence, demonstration or such a degree of proof as produces absolute certainty not being required by the law. *Moffett v. Bozeman Canning Co. et al.*, 95 M 347, 358, 26 P 2d 973.

Id. Where the evidence showed that claimant under the workmen's compensation act was a strong, healthy young man prior to a traumatic injury sustained, that thereafter he was stricken with shaking palsy totally disabling him, which disease generally follows certain causes, including trauma, all of which causes, except trauma, were excluded by medical testimony, an inference that the industrial accident was the cause of his condition was justified.

References

Cited or applied as section 3109, Code of Civil Procedure, in *State v. Fisher*, 23 M 540, 544, 59 P 919; *State v. Riggs*, 61 M 25, 53, 201 P 272; *Sylvain et al. v. Page*, 84 M 424, 438, 276 P 16; *Mellon v. Kelly et al.*, 99 M 10, 41 P 2d 49.

10498. Prima facie evidence defined. Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example, the certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record.

History: En. Sec. 3110, C. Civ. Proc. 1895; re-en. Sec. 7854, Rev. C. 1907; re-en. Sec. 10498, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1833.

References

Cited or applied as section 7854, Revised Codes, in *State v. Nielsen*, 57 M 137, 187 P 639; *State ex rel. Merrell v. District Court*, 72 M 77, 82, 231 P 1107; *Silfvast v. Asplund et al.*, 99 M 152, 43 P 2d 452.

10499. Partial evidence defined. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example, on an issue of title to real property, evidence of the continued possession of a remote occupant is partial evidence, for it is of a detached fact, which may or may not afterward be connected with the fact in dispute.

History: En. Sec. 3111, C. Civ. Proc. 1895; re-en. Sec. 7855, Rev. C. 1907; re-en. Sec. 10499, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1834.

10500. Satisfactory evidence defined. The evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

History: En. Sec. 3112, C. Civ. Proc. 1895; re-en. Sec. 7856, Rev. C. 1907; re-en. Sec. 10500, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1835.

Operation and Effect

Where, in a civil action, circumstantial evidence solely is relied on by plaintiff to prove an issue of fact, it is sufficient to sustain the verdict or decision if it produces moral certainty in an unprejudiced mind as to the truth of his theory, to the exclusion of any theory opposed thereto;

the rule requiring proof beyond a reasonable doubt being applicable to criminal causes only. *Gilmore v. Ostronich*, 48 M 305, 308, 137 P 378.

Id. The solution of any issue in a civil case may rest entirely upon circumstantial evidence. All that is required is that the evidence shall produce moral certainty in an unprejudiced mind.

References

Moffett v. Bozeman Canning Co. et al., 95 M 347, 358, 26 P 2d 973.

10501. Indispensable evidence defined. Indispensable evidence is that without which a particular fact cannot be proved.

History: En. Sec. 3113, C. Civ. Proc. 1895; re-en. Sec. 7857, Rev. C. 1907; re-en. Sec. 10501, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1836.

10502. Conclusive evidence defined. Conclusive evidence or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

History: En. Sec. 3114, C. Civ. Proc. 1895; re-en. Sec. 7858, Rev. C. 1907; re-en. Sec. 10502, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1837.

References

In re Peters, 73 M 284, 287, 235 P 772.

10503. Cumulative evidence defined. Cumulative evidence is additional evidence of the same character to the same point.

History: En. Sec. 3115, C. Civ. Proc. 1895; re-en. Sec. 7859, Rev. C. 1907; re-en. Sec. 10503, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1838.

tending to prove the same proposition or ground of claim before canvassed, it is not cumulative. *Jenkins v. Kitsen*, 62 M 515, 520, 521, 205 P 243.

Operation and Effect

The question whether evidence is "cumulative" within the meaning of this section does not depend upon the quantity or probable effect of the evidence, but upon its character, and if it brings to light some new independent fact of a different character than that theretofore elicited, though

Id. In an action in claim and delivery, alleged newly discovered evidence which tended to prove plaintiff's ownership in the chattel by the same character of evidence as that given at the trial by plaintiff and her husband, was cumulative, and therefore did not warrant the granting of a new trial.

10504. Corroborative evidence defined. Corroborative evidence is additional evidence of a different character to the same point.

History: En. Sec. 3116, C. Civ. Proc. 1895; re-en. Sec. 7860, Rev. C. 1907; re-en. Sec. 10504, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1839.

CHAPTER 155

GENERAL PRINCIPLES OF EVIDENCE

- Section 10505. One witness sufficient to prove a fact.
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 10531. Facts which may be proved on trial.

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10505. One witness sufficient to prove a fact. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

History: En. Sec. 598, p. 195, L. 1877; re-en. Sec. 598, 1st Div. Rev. Stat. 1879; re-en. Sec. 616, 1st Div. Comp. Stat. 1887; re-en. Sec. 3120, C. Civ. Proc. 1895; re-en. Sec. 7861, Rev. C. 1907; re-en. Sec. 10505, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1844.

Operation and Effect

The uncorroborated evidence of the prosecutrix is sufficient to sustain a conviction of statutory rape. The rule requiring a prosecutrix raped by force to make immediate outcry or disclosure, or stand discredited on the trial, has no application to a prosecution for the rape of a female under the age of consent. *State v. Peres*, 27 M 358, 363, 71 P 162. See also *State v. Gaimos*, 53 M 118, 126, 162 P 596; *State v. Paddock*, 86 M 569, 577, 284 P 549.

In order for the direct evidence of one witness to be sufficient to prove a fact, he must be one who is entitled to full credit. *Bowen v. Webb*, 37 M 479, 484, 97 P 839; *In re Silver's Estate*, 98 M 141, 38 P 2d 277.

In a prosecution for statutory rape, the evidence of the prosecutrix, if believed by the jury, is sufficient to sustain a conviction of the crime charged. *State v. Vinn*, 50 M 27, 39, 144 P 773. See also *State v. Gaimos*, 53 M 118, 126, 162 P 596.

A preponderance of the evidence may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary. *Parchen v. Chessman*, 53 M 430, 434, 164 P 531; *Doane v. Marquisee*, 63 M 166, 171, 206 P 420.

Refusal of an instruction to the effect that the uncorroborated testimony of a witness is insufficient in law to prove a fact was proper. *Williams v. Thomas*, 58 M 576, 581, 194 P 500.

Since the burden of proof is not to be determined by the number of witnesses introduced, and the direct evidence of one witness entitled to full credit is sufficient to prove any fact (Sec. 10672 and this section), the direct evidence of the plaintiff, upon whom was the burden of showing nonpayment of the certificate of deposit in suit, was sufficient to establish that

fact. *O'Langhan v. First State Bank of Helena*, 59 M 190, 194, 196 P 149.

The party seeking reformation of a contract on the ground of mistake has the burden of establishing his claim by a preponderance of the evidence, and such preponderance may be established by the plaintiff's own testimony as against that of a greater number of witnesses to the contrary. *Ayers v. Buswell*, 73 M 518, 527, 238 P 591.

An instruction in the words of this section, that the "direct evidence of any witness who is entitled to full credit is sufficient proof of any fact," etc., objected to on the ground that such is the case only when the evidence is uncontradicted, held proper and not in conflict with section 10672, dealing with the weight and effect of evidence. *State v. Park*, 88 M 21, 31, 289 P 1037.

Perjury

Upon a trial for perjury, an instruction that "the direct evidence of one witness alone is not sufficient to convict of the crime of perjury, unless corroborated by other facts and circumstances proved on the trial," is not error under this section. *State v. Gibbs*, 10 M 213, 219, 25 P 289.

Whether or not a convict under sentence of imprisonment in the state prison, appearing as a witness for the state in a perjury trial, was entitled to full credit, under the rule that perjury may be proved by the testimony of two witnesses or one witness and corroborating circumstances, was, under the circumstances, for the determination of the jury. *State v. Jackson*, 88 M 420, 429, 293 P 309.

References

Cited or applied as section 3120, Code of Civil Procedure, in *Farleigh v. Kelley*, 28 M 421, 432, 72 P 756; as section 7861, Revised Codes, in *Lizott v. Big Blackfoot Milling Co.*, 48 M 171, 173, 136 P 46; *State v. Nielsen*, 57 M 137, 143, 187 P 639; *Independent M. & C. Co. v. Aetna L. I. Co.*, 68 M 152, 159, 216 P 1109; *Durocher v. Myers*, 84 M 225, 237, 274 P 1062; *Bitter Root Creamery Co. v. Muntzer et al.*, 90 M 77, 88, 300 P 251.

10506. Testimony confined to personal knowledge. A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

History: En. Sec. 599, p. 195, L. 1877; re-en. Sec. 599, 1st Div. Rev. Stat. 1879; re-en. Sec. 617, 1st Div. Comp. Stat. 1887; re-en. Sec. 3121, C. Civ. Proc. 1895; re-en. Sec. 7862, Rev. C. 1907; re-en. Sec. 10506, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1845.

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Operation and Effect

As to nonexpert witnesses, the general principles of evidence require them to testify as to facts within their own knowledge, and not to opinions, inferences, and conclusions from existing facts. *Watson v. Colusa-Parrot M. & S. Co.*, 31 M 513, 522, 79 P 14; *In re Silver's Estate*, 98 M 141, 38 P 2d 277.

Generally speaking, a witness is limited to the statement of such facts as are made known to him through his own senses. This is the meaning of this section. While personal identification is most commonly made by one who has seen the person identified, that means is not exclusive. One may be identified by his voice. *State v. Vanella*, 40 M 326, 338, 106 P 364.

Testimony is not hearsay where the witness can answer every question of his

own knowledge, and the value of the testimony given does not depend in any degree upon the veracity or competency of any other person. *State v. Crean*, 43 M 47, 59, 114 P 603.

However objectionable testimony may be, if it is not objected to as hearsay, when it is clearly not so, the objection must be passed upon as made, both by the trial court and on review. *State v. Crean*, 43 M 47, 60, 114 P 603.

References

Cited or applied as section 3121, Code of Civil Procedure, in *Erbes v. Smith*, 35 M 38, 50, 88 P 568; as section 7862, Revised Codes, in *McIntyre v. Northern Pacific Ry. Co.*, 56 M 43, 51, 180 P 971; *Solberg v. Sunburst Oil & Gas Co. et al.*, 73 M 94, 107, 235 P 761.

10507. Testimony to be in presence of persons affected. A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

History: En. Sec. 600, p. 195, L. 1877; re-en. Sec. 600, 1st Div. Rev. Stat. 1879; re-en. Sec. 618, 1st Div. Comp. Stat. 1887; re-en. Sec. 3122, C. Civ. Proc. 1895; re-en. Sec. 7863, Rev. C. 1907; re-en. Sec. 10507, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1846.

10508. Witness presumed to speak the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

History: En. Sec. 601, p. 195, L. 1877; re-en. Sec. 601, 1st Div. Rev. Stat. 1879; re-en. Sec. 619, 1st Div. Comp. Stat. 1887; re-en. Sec. 3123, C. Civ. Proc. 1895; re-en. Sec. 7864, Rev. C. 1907; re-en. Sec. 10508, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1847.

any material matter, unless corroborated. *State v. Beesskove*, 34 M 41, 54, 85 P 376.

In determining the weight to be given to testimony it is necessary to consider not only what is said, but also the manner of saying it. *Sanger v. Huguenel et al.*, 65 M 236, 242, 211 P 349.

The propriety of submitting instructions to the jury based upon the rules prescribed by section 10672, for weighing evidence, is a matter addressed to the trial court, and its determination is subject to review only for abuse of discretion; ordinarily an instruction in the words of this section is sufficient. *State v. Sedlacek*, 74 M 201, 215, 239 P 1002.

As against the contention that the testimony of the state's witnesses relative to occurrences incident to a homicide was incredible, the supreme court may not, in the absence of such inherent weakness therein as would destroy it as legal evidence, substitute its judgment for that of the jury, which is the exclusive judge of the credibility of witnesses and the weight to be given to their testimony. *State v. Gunn*, 89 M 453, 465, 300 P 212.

Operation and Effect

Error in refusing to permit cross-examination of plaintiff's witness to the extent of his admitted interest in the suit is not ground for reversal, where other evidence shows that, for purposes of collection, the witness had assigned to plaintiffs his account against defendants, which constituted one of the causes of action, it being thus apparent that the jury clearly understood the extent of his interest, and was thereby enabled to weigh properly his credibility. *Hefferlin v. Karlman*, 30 M 348, 350, 76 P 757.

An error in refusing an instruction that the jury should consider particular matters in weighing testimony of witnesses, is not cured by submitting the language of this section, supplemented by the words that they were at liberty to disregard the testimony of any witness who had wilfully and deliberately testified falsely to

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References

Cited or applied as section 619, First Division Compiled Statutes 1887, in *State v. Tipton*, 15 M 74, 38 P 222; as section 3123, Code of Civil Procedure, in *State v. Fuller*, 34 M 12, 28, 85 P 369; as section 7864, Revised Codes, in *White v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 49 M

419, 427, 143 P 561; *Flynn v. Poindexter & Orr L. Co.*, 63 M 337, 207 P 341; *State v. Jackson*, 71 M 421, 433, 230 P 370; *State v. Kessler*, 74 M 166, 168, 239 P 1000; *State v. Kacar*, 74 M 269, 282, 240 P 365; *State v. Wilson*, 76 M 384, 392, 247 P 158; *State ex rel. Hoatson v. District Court*, 95 M 174, 179, 26 P 2d 172.

10509. One person not affected by acts of another. The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another.

History: En. Sec. 602, p. 196, L. 1877; re-en. Sec. 602, 1st Div. Rev. Stat. 1879; re-en. Sec. 620, 1st Div. Comp. Stat. 1887;

re-en. Sec. 3124, C. Civ. Proc. 1895; re-en. Sec. 7865, Rev. C. 1907; re-en. Sec. 10509, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1848.

10510. Declarations of predecessor in title evidence. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

History: En. Sec. 603, p. 196, L. 1877; re-en. Sec. 603, 1st Div. Rev. Stat. 1879; re-en. Sec. 621, 1st Div. Comp. Stat. 1887; re-en. Sec. 3125, C. Civ. Proc. 1895; re-en. Sec. 7866, Rev. C. 1907; re-en. Sec. 10510, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1849.

Operation and Effect

Where, in an action involving the priority of appropriations of certain water rights, plaintiffs contended that the appropriation made by their predecessor in interest was made in July of a certain year, and the court found that the appropriation was made in October of that year, evidence of declarations made by plaintiffs' predecessor in interest, tending to show that in August of the year in question they had made no appropriation, was admissible under this section notwithstanding said finding. *Phillips v. Coburn*, 28 M 45, 50, 72 P 291.

In the absence of any offer of proof concerning what the defendant in an action for waste intended to show by a question to a witness, as to what the plaintiff's husband had said to him in relation to his or her interest in the land, the appellate court is not in a position to say from the mere reading of the question that its answer was erroneously excluded. *Erbes v. Smith*, 35 M 38, 50, 88 P 568.

In a suit to have the executor and heirs of the plaintiff's co-owners in a mining claim declared trustees for his benefit, declarations made by the decedent, after issuance of patent, that the plaintiff was still the owner of an interest in the claim, when in fact his name had been omitted from the patent, and evidence that the decedent at one time joined with the plaintiff in a lease of the property, are ad-

missible in evidence. *Delmoe v. Long*, 35 M 139, 154, 88 P 778.

This section is but declaratory of the common law. It does not add to or subtract from the rule as it existed prior to the adoption of the statute. *Washoe Copper Co. v. Junila*, 43 M 178, 185, 115 P 917.

Where a retrial of a water right suit was had upon a complaint which had been amended after the first trial, without, however, changing the issues, the only difference between the two pleadings being that in the amended one an allegation appeared, not found in the original pleading, that an agreement had been entered into by the predecessors of the parties fixing the amount of water each should be entitled to use, evidence relating to the agreement, given by one of them at the first trial, who had died in the interim, was admissible, the record showing that the witness had been thoroughly cross-examined touching its execution, terms and conditions. *Nelson v. Gough et al.*, 61 M 301, 304, 202 P 196.

Held in an action in ejectment that evidence that the grantor of the land in question had told the witness that he had moved the government monument in order to get land that belonged to a neighbor was inadmissible as having been made before he had title, and that a similar declaration, made when he thought he was dying, was likewise inadmissible because made after he had sold the land and had no longer any interest in it other than that represented by the warranty deed he had given his grantee, an interest insufficient to take the declaration out of the operation of the rule declared by this

section. *Kurth et al. v. Le Jeune*, 83 M 100, 108, 269 P 408.

On the question of priority of water rights, declarations against interest by the former owner of a right are admissible even though at the time of the trial the declarant be dead; such evidence, however, being the weakest and least satisfactory of any in persuasive value, should be received and weighed with caution. *Gilerest et al. v. Bowen et al.*, 95 M 44, 55, 24 P 2d 141.

10511. Declarations which are a part of the transaction. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.

History: En. Sec. 604, p. 196, L. 1877; re-en. Sec. 604, 1st Div. Rev. Stat. 1879; re-en. Sec. 622, 1st Div. Comp. Stat. 1887; re-en. Sec. 3126, C. Civ. Proc. 1895; re-en. Sec. 7867, Rev. C. 1907; re-en. Sec. 10511, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1850.

Operation and Effect

Where, in an action to enforce the performance of an agreement to devise, the evidence tended to show that in 1885 the agreement was made by the deceased, in consideration of the plaintiff's agreement to live with deceased and his wife, and to render to them the services and affection of a child of her age, the acts and declarations of deceased, made after the agreement and while plaintiff was living with him and his wife, were part of the *res gestae*, and were admissible in evidence under this section. *Burns v. Smith*, 21 M 251, 275, 53 P 742.

In an action against a railroad company for the killing of livestock, the testimony of a witness that the section boss showed him where the animal was when struck, and stated that after it was struck he killed it to end its sufferings, was not admissible as *res gestae*. *Poindexter & Orr Live Stock Co. v. Oregon Short Line R. R. Co.*, 33 M 338, 340, 83 P 886.

In an action to recover a sum of money for communicating to the defendant valuable information about a cross-cut in a mine intersecting a vein of ore, and for which information the defendant promised to pay, whatever the defendant said and did, while engaged in one of the preliminary steps leading up to the consummation of the contract, without the doing of which there would have been no contract, is a part of the *res gestae* and is competent. *McCrimmon v. Murray*, 43 M 457, 471, 117 P 73.

This provision was not intended to embody the statement of a rule by which to determine the competency of declarations

What Must be Shown to Admit This Type of Evidence

One who offers in evidence the declaration of a person through whom he traces his title to land must show that it was made while the declarant was holding title; that he was in fact the grantor of the party against whom the declaration is offered; and that the declaration was against interest. *Washoe Copper Co. v. Junila*, 43 M 178, 185, 115 P 917; *Kurth et al. v. Le Jeune*, 83 M 100, 108, 269 P 408.

relative to a transaction, but to be a mere direction that they must be deemed competent when they are so connected with the main transaction as to form a part of it. *Callahan v. Chicago, Burlington & Quincy Ry. Co.*, 47 M 401, 410, 133 P 687.

While declarations, to be admissible as part of the *res gestae*, need not have been strictly contemporaneous with the main incident which gave rise to them, they must have been made while the mind of the speaker was laboring under the excitement aroused by the incident, before there was time to reflect and fabricate. *Callahan v. Chicago, Burlington & Quincy Ry. Co.*, 47 M 401, 410, 133 P 687.

Under the rule, in effect declared by this section, that where two or more offenses are part of the same transaction, every element of the defendant's conduct therein may be shown for the purpose of illustrating the motive or intent of defendant in committing the act constituting the basis of the charge, held, that where husband and wife were murdered at about the same time, and defendant was placed on trial for the killing of the latter, evidence as to the condition of the body of the former was admissible as part of the *res gestae*. *State v. Schlaps*, 78 M 560, 574, 254 P 858.

Id. Under the law of evidence, *res gestae* are the circumstances, facts and declarations which grew out of the main fact, are contemporaneous with it and serve to illustrate its character.

Where the question whether parties were husband and wife is at issue their conduct during the entire time they were shown to have cohabited is part of the *res gestae*; and whatever they did or said during that time, which sheds light upon the matter and aids in disclosing the relations they sustained toward each other must be construed as part of the *res gestae*. *Welch v. All Persons*, 85 M 114, 129, 278 P 110.

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Testimony, given by the executor of an estate and its attorney, of conversations had at a meeting of the persons interested in it and which culminated in a note given by one heir to his brother by way of settlement of a dispute relative to advancements made to the maker, in an action on the note, held admissible in evidence under this section, prescribing, *inter alia*, when declarations may be admitted in evidence. *Stagg v. Stagg*, 96 M 573, 595, 32 P 2d 856.

While it is the general rule that where, in a personal injury action arising out of an automobile accident, the fact that defendant is protected by indemnity insurance against liability for damages may not be injected into the case by evidence or argument and if it is, it is reversible error, evidence thereof may be properly admissible where it is a part of a conversation involving an admission of responsibility by defendant; thus where defendant automobilist in answer to a query by plaintiff's husband, "What kind

of driving was that?" replied that she (defendant), was insured and that "the company will take care of me," the reply was admissible as an admission of negligence, as well as a part of the *res gestae*. *Tanner v. Smith*, 97 M 229, 240, 33 P 2d 547.

The declaration of a decedent to his brother, made in a building then on fire, that the smoke was caused by burning gas, held admissible as a part of the *res gestae*, as an exception to the hearsay rule on the theory that it was made while the mind of the speaker was laboring under excitement and before there was time to reflect, thus rendering the solemnity of an oath unnecessary to give it probative value. *Sellers v. Montana-Dakota Power Co.*, 99 M 39, 55, 41 P 2d 44.

References

Cited or applied as section 3126, Code of Civil Procedure, in *State v. Tighe*, 27 M 327, 337, 71 P 3.

10512. Evidence relative to third person. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties.

History: En. Sec. 605, p. 197, L. 1877; re-en. Sec. 605, 1st Div. Rev. Stat. 1879; re-en. Sec. 623, 1st Div. Comp. Stat. 1887; re-en. Sec. 3127, C. Civ. Proc. 1895; re-en. Sec. 7868, Rev. C. 1907; re-en. Sec. 10512, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1851.

Operation and Effect

Though the rights of one not made a party to an action are not affected by

the resultant judgment, the judgment-roll therein is admissible in a subsequent action, for the purpose of making out a *prima facie* case as to the rights of the party introducing it, in and to the subject matter of the action in which the judgment was entered. *Sunburst Oil & Refining Co. v. Callender*, 84 M 178, 187, 274 P 834.

10513. Declaration of decedent evidence of pedigree. The declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

History: En. Sec. 606, p. 197, L. 1877; re-en. Sec. 606, 1st Div. Rev. Stat. 1879; re-en. Sec. 624, 1st Div. Comp. Stat. 1887; re-en. Sec. 3128, C. Civ. Proc. 1895; re-en. Sec. 7869, Rev. C. 1907; re-en. Sec. 10513, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1852.

Operation and Effect

Under this section and section 10531 in an action to determine the right to a decedent's estate, the declarations and attitude of persons, since deceased or out of the jurisdiction, are admissible to show the relationship of the declarants to each other and to others, not the decedent whose estate is in issue, without any prior showing of relationship to such last named decedent. In *re Colbert's Estate*, 51 M 455, 469, 153 P 1022.

Declarations of a deceased member of a family on questions of pedigree, or in respect of relationship, birth, marriage or death of any person related by blood or marriage to the deceased, are made admissible in evidence under this section and subdivision 4 of section 10531. As no limitations are placed upon the admissibility of such declarations, the question as to the weight to be accorded them is: Were they made under circumstances justifying the conclusion that there was no probable motive to falsify the facts declared? In determining this question all the surrounding facts and circumstances must be taken into consideration. *Welch v. All Persons*, 85 M 114, 130, 278 P 110; In *re Wray's Estate*, 93 M 525, 538, 19 P 2d 1051.

10514. Declaration of decedent evidence against his successor in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

History: En. Sec. 607, p. 197, L. 1877; re-en. Sec. 607, 1st Div. Rev. Stat. 1879; re-en. Sec. 625, 1st Div. Comp. Stat. 1887; re-en. Sec. 3129, C. Civ. Proc. 1895; re-en. Sec. 7870, Rev. C. 1907; re-en. Sec. 10514, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1853.

Operation and Effect

Though evidence of declarations or admissions of a deceased person against his interest is not the most satisfactory kind of evidence, it is by this section made competent, and must be considered as any other fact by court or jury, the statements of the witnesses deposing to either, however, to be accepted with caution. *Roy v. King's Estate*, 55 M 567, 572, 179 P 821.

Id. Where, in an action against an estate to recover for goods, wares, and merchandise furnished to and services performed for decedent in his lifetime, a declaration or admission, which was definitely identified by the witness deposing to it, acknowledging the debt, was deliberately and understandingly made, it is evidence sufficient to make out a prima facie case.

Id. Where evidence of declarations or admissions by a decedent against his interest is aided by the testimony of witnesses who know of the dealings between plaintiff and decedent, and testify from such knowledge as to articles furnished to and services performed for the latter, it is entitled to added weight.

Though declarations against his interest made by a decedent are admissible under

this section, they constitute testimony of unsatisfactory character and should be received and weighed with caution. *Gray v. Grant et al*, 62 M 452, 206 P 410.

Since the widow of a homestead entryman on his death may obtain patent to the land involved in the entry, a declaration made by her that the entryman was not her husband is admissible as one made against her interest, under this section. *Welch v. All Persons*, 85 M 114, 132, 278 P 110.

Evidence that after the grantor referred to above had deeded to plaintiff the portion of his lands on which she was living, stated to the witness who desired to purchase the forty-acre tract claimed by plaintiff as having been mistakenly omitted from her deed, that he had deeded all his property away and that the tract belonged to plaintiff, was admissible against defendant heirs, as decedent's declaration against interest under subdivision 4, section 10531, and this section, as some evidence of the real intent of the grantor and of his mistake in making the deed to plaintiff. *Laundreville v. Mero et al*, 86 M 43, 57, 281 P 749.

On the question of priority of water rights, declarations against interest by the former owner of a right are admissible even though at the time of the trial the declarant be dead; such evidence, however, being the weakest and least satisfactory of any in persuasive value, should be received and weighed with caution. *Gilerest et al. v. Bowen et al*, 95 M 44, 55, 24 P 2d 141.

10515. When part of the transaction proved, the whole is admissible.

When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.

History: En. Sec. 608, p. 197, L. 1877; re-en. Sec. 608, 1st Div. Rev. Stat. 1879; re-en. Sec. 626, 1st Div. Comp. Stat. 1887; re-en. Sec. 3130, C. Civ. Proc. 1895; re-en. Sec. 7871, Rev. C. 1907; re-en. Sec. 10515, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1854.

Operation and Effect

It is not error to allow the state to read in evidence to the jury the whole of the testimony of the prosecuting witness, given at the preliminary examination,

where a portion of such testimony has been so read by the defense. *State v. Jackson*, 9 M 508, 518, 24 P 213.

Where plaintiffs, in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating the corporate funds, introduced in evidence some insufficiently identified by-laws, though denying the legality of their adoption, the remaining by-laws were thereby rendered admissible on behalf of the defendant. *McConnell v. Combination M. & M. Co.*, 30 M 239, 263, 76 P 194.

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Defendant's witnesses having testified to a remark made by plaintiff soon after an accident, to the effect that someone had pushed him off a car, but that he did not say that a brakeman had done so, rebuttal testimony that he had made the latter statement was improperly excluded; it was admissible under this section, even though the declaration thus made by him was self-serving. *Hulse v. Northern Pacific Ry. Co.*, 47 M 59, 63, 130 P 415.

Under this section, where one party introduces a part of a series of letters touching the transaction in controversy, the other party is entitled to introduce the remaining portion if material to a complete understanding of the entire transaction. *Northwestern E. E. Co. v. Leighton et al.*, 66 M 529, 536, 213 P 1094.

Under this section, as well as under settled law generally, where one introduces a part of a document or writing (here a city ordinance), so much of the remainder as may tend to explain or qualify that which has been received, is admissible in evidence at the instance of his adversary. *Varn v. Butte Electric Ry. Co. et al.*, 77 M 124, 131, 249 P 1070.

Where plaintiff landlord introduced in evidence a portion of the record in an action against defendant and his sublessee to abate the rented premises for violation of the liquor laws, for a certain purpose,

defendant was entitled to offer the entire files in that proceeding for the purpose of showing that he was not a party to and took no part in it (this section). *Lehman & Co. v. Skadan et al.*, 86 M 553, 234 P 769.

When General Rule is Not Applicable

Where at the time the county attorney asked defendant on cross-examination whether, when making a voluntary statement (reduced to writing) on the day of the homicide, he had not answered a question put to him in a certain way, no part of the statement had been put in evidence, defendant replying that he did not think so, refusal to permit his counsel to offer the entire statement under this section, providing that where a part of a writing is given in evidence by one party the whole may be inquired into by the other, was not error. *State v. Le Duc*, 89 M 445, 560, 300 P 919.

References

Cited or applied as section 608, First Division Revised Statutes 1879, in *Territory v. Rehberg*, 6 M 467, 13 P 132; as section 7871, Revised Codes, in *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 167, 108 P 1057; *McDonnell v. Huffine*, 44 M 411, 426, 120 P 792; *Croft v. Thurston*, 84 M 510, 516, 276 P 950.

10516. Contents of writing—how proved. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case the proof of loss or destruction must first be made.
2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
3. When the original is a record or other document in the custody of a public officer.
4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute.
5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions 3 and 4, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents.

History: En. Sec. 364, p. 119, *Bannack Stat.*; re-en. Sec. 422, p. 220, L. 1867; re-en. Sec. 496, p. 136, *Cod. Stat. 1871*; amd. Sec. 609, p. 197, L. 1877; re-en. Sec. 609, 1st Div. *Rev. Stat. 1879*; re-en. Sec. 627, 1st Div. *Comp. Stat. 1887*; re-en. Sec. 3131, *C. Civ. Proc. 1895*; re-en. Sec. 7872, *Rev. C. 1907*; re-en. Sec. 10516, *R. C. M. 1921*. *Cal. C. Civ. Proc. Sec. 1855*.

Subd. 1

How Former Existence of Instrument Must be Established

In order to establish the former existence of an instrument in writing, under which plaintiff claimed, he was compelled to prove its execution and contents, including all the substantial parts of the

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lost instrument, to such an extent as to constitute a practical reproduction of the instrument in all of its substantial parts. *Capell v. Fagan*, 30 M 507, 512, 77 P 55.

Letter Out of the Jurisdiction is Deemed Lost

In an action to recover a broker's commission, in which plaintiff's cause of action was founded upon a letter written to plaintiff by defendant giving a description of the lands, and stating price per acre, commission allowed, etc., but which had been forwarded by plaintiff to a prospective purchaser in another state and of which she had been unable to regain possession, refusal to permit secondary evidence of its contents was error, since under this section, a letter out of the jurisdiction is deemed to be "lost," making parole evidence of what it contained admissible. *Kyle v. Kingsbury*, 63 M 145, 150, 206 P 346.

Operation and Effect

If proof of the loss of the warrant had been introduced first, the competency of the oral testimony would be beyond question (this section; 3 Jones on Evidence, section 620). *Hawley v. Richardson*, 60 M 118, 126, 198 P 450.

A showing that the owner of a private writing removed to a foreign country sufficiently accounts for its nonproduction to warrant admission of oral testimony to prove its contents, the presumption being that he took it with him. *Nelson v. Gough et al.*, 61 M 301, 304, 202 P 196.

Id. Under the rule that proof of the contents of a lost writing is sufficient if the witness who has read it can state them substantially and with reasonable accuracy, testimony giving approximately the date of a written agreement adjusting water rights between two claimants, the circumstances under which it was made and the subject matter and disposition made of their respective contentions was not objectionable as not fully stating its terms.

In an action to recover on a lost instrument (promissory note) the evidence of the former existence, execution, delivery and loss of the instrument should be clear

and convincing; after proof of loss, its contents may be proved by the introduction of a proved copy of the original or by oral evidence. *St. Martin State Bank v. Steffes*, 88 M 85, 89, 290 P 259.

Subd. 4.
Operation and Effect

A certified copy of a location notice is competent evidence without first explaining the absence of the original. *McKinstry v. Clark & Cameron*, 4 M 370, 1 P 759.

It is not error to admit in evidence a certified copy of a mining location notice without first accounting for the original. *Garfield M. & M. Co. v. Hammer*, 6 M 53, 64, 8 P 153.

Certified copies of the records of the county commissioners, showing the result of a local option election, together with a certified copy of the affidavit of the publisher of the newspaper giving notice of the election, made by the county clerk, were properly admitted in evidence on the trial of one charged with an unlawful sale of liquor. *State v. O'Brien*, 35 M 482, 499, 90 P 514.

In General

Evidence of a parole agreement, at the time of the making of a promissory note, that in case the same was not paid at maturity subsequent payments might be applied upon the principal first, and the interest afterward, is improper. *Anderson v. Perkins*, 10 M 154, 160, 35 P 92.

Copies of the records of a hotel, though correct, are not admissible; they are not the best evidence. Under section 10585, the original writing must be proved, or its absence accounted for. *Cohen v. Clark*, 44 M 151, 158, 119 P 775.

Copies of accounts taken from a bank ledger, being secondary evidence, were inadmissible under this section, but the witness called to testify concerning them could properly show the general results shown by the ledger, such, for instance, as the balance deductible from computation. *Silver v. Eakins*, 55 M 210, 218, 175 P 876.

References

Burnett v. Burnett, 68 M 547, 549, 219 P 831.

10517. An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

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2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 10521, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

History: En. Sec. 610, p. 198, L. 1877; re-en. Sec. 610, 1st Div. Rev. Stat. 1879; re-en. Sec. 628, 1st Div. Comp. Stat. 1887; re-en. Sec. 3132, C. Civ. Proc. 1895; re-en. Sec. 7873, Rev. C. 1907; re-en. Sec. 10517, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1856.

Declaratory of Common Law

This section merely declares the common-law rule. *Gaffney Mercantile Co. v. Hopkins*, 21 M 13, 16, 52 P 561; *Riddell v. Peck-Williamson H. & V. Co.*, 27 M 44, 56, 69 P 241.

Effect of Written Contract

Where it was alleged that at the time of the execution of a written agreement it was agreed that a particular construction should be given to the terms of the writing, to the effect that it meant that the collateral security should be exhausted before an action was commenced on the notes, such contemporaneous construction was within the purview of this section. *Fisher v. Briscoe*, 10 M 124, 133, 25 P 30. See also *Bohn Mfg. Co. v. Harrison*, 13 M 293, 299, 34 P 313.

A written contract supersedes any oral negotiations theretofore had relative to the subject-matter of it, and must be considered as containing all of its terms agreed upon at the time it was executed. *Arnold v. Fraser*, 43 M 540, 550, 117 P 1064.

Where a contract supplemental to one made for the sale of lands recited that it was made for the purpose of granting the buyer additional time in which to make payment, it precluded the idea that it was made for any other purpose, and in the absence of allegation of mistake or other imperfection, the presumption is conclusive that the writing contained all the engagements then made by the parties. *Crawford v. Pierse*, 56 M 371, 385, 185 P 315.

Under this section and 7520, when a contract had been reduced to writing its contents cannot be added to, contradicted, altered or varied by parol or extrinsic evidence, and the writing supersedes all oral negotiations concerning its matter which preceded, accompanied or led up to its execution. *Webber v. Killorn et al.*, 66 M 130, 132, 212 P 852.

All oral negotiations relative to the covenant of seisin on a sale of land were superseded by the deed and a contempora-

neous writing executed with relation thereto. *Morehouse v. Northern Land Co.*, 68 96, 103, 216 P 792.

If the language of a contract is clear it needs no interpretation, and the intention of the parties in entering into it must be ascertained from the writing alone. *New Home Sewing M. Co. v. Songer et al.*, 91 M 127, 132, 7 P 2d 238.

Effect on a Parol Executed Agreement

The mere execution of a bill of sale by the seller does not exclude proof of a parol agreement for the sale of an animal offered by the buyer, the terms of which had been agreed upon and the purchase price paid before the execution of the bill. *Sutherland v. Green*, 49 M 379, 385, 145 P 636.

Exception to Establish Fraud

Where plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease, the evidence was admissible to show the purchase of the lease and defendant's fraudulent conduct, over objection that it varied the contract. *Sathre v. Rolfe*, 31 M 85, 88, 77 P 431.

Where a contract is sought to be avoided on the ground that the party bound was induced to enter into it by his opponent's fraudulent representations, the latter is not in a position to invoke the rule that a contract in writing may not be varied by parol testimony to prevent the former from testifying to such representations made during preliminary negotiations. *Advance-Rumely T. Co., Inc., v. Wenholz*, 80 M 82, 95, 258 P 1085.

Exception to Show Circumstances

A conversation between buyer and seller had prior to the execution of a bill of sale, with the terms of which it was not in conflict, and which was material to show the circumstances under which the writing was executed, was admissible in evidence and not open to the objection that it varied the written agreement. *Sutherland v. Green*, 49 M 379, 383, 142 P 636.

The rule excluding parol testimony to contradict or vary a written instrument does not forbid inquiry into the object

the parties had in executing, delivering and receiving instruments made the basis of an action for breach of grain buying contracts, which defendant claimed were to be used merely as memoranda to complete plaintiff's office files and not to hold him personally liable for delivery of the grain. *McCaull-Dinsmore Co. v. Stevens*, 59 M 206.

In an action on a promissory note which had never been previously negotiated and was overdue when plaintiff acquired it by assignment, and who was therefore not a holder in due course, parol evidence was admissible to show that defendants with plaintiff's knowledge had indorsed the note with the understanding that each was doing so as representative of an association and not in his personal capacity. *Anderson v. Border et al.*, 75 M 516, 529, 244 P 494.

The parol testimony rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument sued upon; while its language cannot be qualified or varied from its natural import, the circumstances under which it was entered into and the real intention of the parties may be shown by parol to prevent either of the parties to it from committing a fraud on the other by claiming it to be what it in fact is not. *Bridges & Co., Inc., v. Bank of Fergus Co.*, 77 M 524, 533 et seq., 251 P 1057.

Under this section, testimony of witnesses who were present at the time a contract of lease of oil lands was entered into, or just prior thereto, as to statements made by officers of the lessors in connection with conversations had with an officer of defendant with relation to offers received for drilling wells on the lands in question, was properly admissible in explanation of the circumstances under which the contract was made. *Brown v. Homestake Exploration Co.*, 98 M 305, 338, 39 P 2d 168.

Exception Where There is an Extrinsic Ambiguity

Instance of an agreement to furnish automobiles to be sold on commission, which agreement did not furnish its own interpretation, and as to which parol evidence was properly admitted to determine the intention of the parties. *Brockway v. Blair*, 53 M 531, 535, 165 P 455.

Exception Where There is a Mistake or Imperfection Put in Issue by the Pleadings Applicable Only to Parties to Contract

In a controversy between the parties to a written contract, or their privies, parol evidence cannot be introduced to vary, enlarge, or contradict its terms, except where a mistake or imperfection therein is put in issue by the pleadings, or when

the validity of the contract is the fact in dispute; but this rule does not apply in a controversy between a party to the contract and a stranger; as against such stranger, a party may assert that the agreement was other or different in any respect from that which the writing expresses. *Read v. Lewis and Clark County*, 55 M 412, 419, 178 P 177.

Introduction by One Party Warrants Introduction of Same Character Testimony by the Other

Where one party to an action on a written contract is permitted to introduce evidence of preceding oral negotiations leading up to the making of the writing, thus varying its terms, his opponent may properly give oral testimony as to the same matter, over an objection that the testimony offered tends to contradict the writing. *Peterson v. Nelson*, 77 M 539, 550, 252 P 368.

Test for Determining Whether Parol Testimony Varies Instrument

In determining whether parol testimony varied a written contract a satisfactory test is: Was the matter testified to mentioned, covered or dealt with in the writing? If it was, then presumably, the writing was meant to represent the entire transaction, and the testimony was inadmissible. *Continental Oil Co. v. Bell et al.*, 94 M 123, 131, 21 P 2d 65.

What Constitutes Oral Collateral Agreement Within Exception to the Rule

An oral agreement, to be collateral within the meaning of the exception to the parol testimony rule (section 7520 and this section), and as such admissible in evidence as against the objection that it varies a written instrument, must relate to a subject distinct from that to which the writing applies; the writing must remain intact after the reception of the parol testimony. *Continental Oil Co. v. Bell et al.*, 94 M 123, 131, 21 P 2d 65.

When Evidence is Not Admissible to Vary a Writing

Evidence of a parol agreement, at the time of the making of a promissory note, that in case the same was not paid at maturity subsequent payments might be applied upon the principal first, and the interest afterward, is improper. *Anderson v. Perkins*, 10 M 154, 160, 25 P 92. See also *Gaffney Mercantile Co. v. Hopkins*, 21 M 13, 17, 52 P 561; *York v. Steward*, 21 M 515, 518, 55 P 29.

Testimony by lessees that they would not have signed the lease of a lode mining claim but for an understanding that the time would be extended was not admissible to show a contemporaneous agreement to extend. Evidence of a contemporaneous

agreement between the parties to a written sublease of said claim, that in case the sublessors should buy the property the lease would be extended, was inadmissible. *Armington v. Stelle*, 27 M 13, 18, 69 P 115. See also *Kelly v. Ellis*, 39 M 597, 606, 104 P 873.

Evidence that at the time a written contract was made, an oral contract was entered into that payments should be made in conformity with a usage and custom, as the work was done and materials furnished, was not admissible. *Riddell v. Peck-Williamson H. & V. Co.*, 27 M 44, 56, 69 P 241.

Parol evidence that parties did not intend to include buildings described in a bill of sale was inadmissible. *Hogan v. Kelly*, 29 M 485, 488, 75 P 81.

Where there was nothing in a contract signed by a third party which showed a consideration affecting him or inducing him to become a party to it, or an intent on his part to be bound as surety for or joint promisor with one of the parties efficiently bound, parol evidence may not be resorted to for the purpose of furnishing the basis of an inference that he was or was not bound. *The Henry O. Shepard Co. v. Freeman*, 40 M 144, 155, 105 P 484.

Where, in an action on a written contract, there was not any issue of fraud or mistake in the execution of it, or any imperfection in the writing, but the provisions of such instrument were plain and unambiguous, parol evidence, the tendency of which was to vary the terms thereof, was properly excluded. *Western Loan & Savings Co. v. Smith*, 42 M 442, 450, 114 P 475.

In an action for damages for breach of a clause of a written contract of sale of a threshing-machine warranting it as being as well made, of good material, and that with proper use and management it would do as good work as any other machine of the same size manufactured for the like purpose, evidence of statements made by defendant's agent in making the sale that it would thresh and clean alfalfa as well as any other machine of the same size, etc., was properly rejected as an attempt to vary the terms of the written instruments by parol. *Rowe v. Emerson-Brantingham Co.*, 61 M 73, 78, 201 P 316.

Warehouse receipts for grain stored in an elevator issued under the provisions of the Grain Elevator Act constituted binding contracts between the bailor and bailee which could not be varied or contradicted by parol testimony, the effect of which was to show that the transaction amounted to a sale and not a bailment. *State v. Broadwater Elevator Co. et al.*, 61 M 215, 223, 201 P 687.

Prior oral negotiations and directions as to points at which livestock should be stopped for resting and feeding are merged in the contract of shipment, where it and the waybills bore notations stating the points at which stops were to be made, and therefore parol testimony of directions to make other stops was incompetent as an attempt to vary the terms of the written contract. *Cook et al. v. Northern Pac. Ry. Co.*, 61 M 573, 586, 203 P 512.

A written agreement must be considered as containing all prior oral ones concerning its subject matter and its terms may therefore not be varied by oral testimony. *Leigland v. Rundle L. & A. Co.*, 64 M 154, 165, 208 P 1075.

Id. Where in an action by a building contractor to foreclose a mechanic's lien, in which defendant set up a counterclaim for damages for failure to complete the building within the time stipulated, the contract provided that no additional time should be allowed unless request therefor was presented in writing to the architect, and plaintiff failed to make such request though the owner had directed alterations to be made, he was precluded from asserting that before signing the contract defendant had orally agreed that the penalty therein provided for would not be enforced.

Testimony concerning an alleged oral agreement between vendor and vendee that the latter bought the land subject to the right of possession of a tenant, in contravention of the recital in the deed, was inadmissible under the rule that execution and delivery of the deed supersede all former oral agreement. *Adams v. Durfee et al.*, 67 M 315, 323, 215 P 664.

An offer of proof by defendant directors, who had guaranteed payment of an account as represented by a note of the corporation, that it was their understanding that the guaranty was to be deemed merely an assurance on their part that plaintiff's account was recognized as a valid claim against the company, was properly rejected under this section, as contradicting the terms of the writing. *Schauer v. Morgan et al.*, 67 M 455, 468, 216 P 347.

Under the rule that in the absence of fraud or mistake a written contract supercedes all prior oral negotiations and agreements with relation thereto, parol testimony to show that the understanding of the parties to a promissory note which provided for the payment of interest but did not specify the rate per cent. to be paid was that no interest at all was payable was properly excluded. *Burnett v. Burnett*, 68 M 546, 549, 219 P 831.

In the absence of fraud, an unconditional written contract of purchase of building

material presumably embraced the whole agreement of the parties, and therefore evidence of an oral understanding to the effect that it should not become binding until the architect in charge had approved the materials was inadmissible. *Wheeler v. James*, 70 M 37, 43, 223 P 900.

Where the signers of a promissory note unqualifiedly bound themselves to pay a certain sum of money at a specified time, parol evidence was inadmissible for the purpose of showing that the payee in an oral contemporaneous stipulation had agreed that payment could be made in a certain manner; such oral agreement was superseded by the writing, and the evidence, erroneously admitted, tended to vary and contradict the writing, contrary to the provisions of this section, where the validity of the note was not attacked and a mistake or imperfection in the writing was not pleaded. *Swan v. Le Clair et al.*, 77 M 422, 427, 251 P 155.

Where a land contract required of the vendor the execution of a deed without reservations and the deed deposited in escrow excepted from its operation, among other things, the timber growing thereon, parol evidence to the effect that the witness understood from conversations with the vendee that the latter was buying the land without the timber was inadmissible under this section. *Hollensteiner v. Anderson*, 78 M 122, 131, 252 P 796.

Under section 7520 and this section, parol evidence of an oral agreement, made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time, is not admissible to extend the time of payment or to provide for payment in any other way than that so specified, or to make it depend upon condition. *Hosch v. Howe et al.*, 92 M 405, 409, 16 P 2d 699.

In an action to recover the balance due under a contract of sale of gasoline

to a dealer under a written contract fixing the price, parol testimony of defendant tending to prove an oral contract to refund a portion of the price, held inadmissible under the rule above. (*Mr. Justice Angstrom dissenting.*) *Continental Oil Co. v. Bell et al.*, 94 M 123, 131, 21 P 2d 65.

Validity of the Agreement is the Fact in Issue—Parol Testimony May be Admitted

Where, in an action to recover damages for breach of a contract of lease of farm lands for failure of the lessee to gain possession, a defense of the lessor was that the contract was entered into with the express understanding that it should not become effective until and unless a tenant in possession would relinquish possession or could be ousted, parol testimony was admissible to show that what appeared to be a valid and binding contract was in reality not such, under the exception provided for in this section, that where the validity of the agreement is the fact in issue, such testimony may be admitted. *Smith v. Fergus County*, 98 M 377, 389, 39 P 2d 193.

References

Cited or applied as section 3132, Code of Civil Procedure, in *Capell v. Fagan*, 30 M 507, 511, 77 P 55; as section 7873, Revised Codes, in *Hennessy v. Holmes*, 46 M 89, 96, 125 P 132; *Ford v. Drake*, 46 M 314, 319, 127 P 1019; *Koerner v. Northern Pacific Ry. Co.*, 56 M 511, 186 P 337; *Helena Light & Ry. Co. v. Northern Pac. Ry. Co.*, 57 M 93, 102, 186 P 702; *Kock v. Rhodes et al.*, 57 M 447, 188 P 933; *Baroch v. Greater Montana Oil Co.*, 70 M 93, 98, 225 P 800; *Humble v. St. John et al.*, 72 M 519, 522, 234 P 475; *Ayers v. Buswell*, 73 M 518, 524, 238 P 591; *Orem v. Hansen Packing Co.*, 91 M 222, 229, 230, 7 P 2d 546; *Minneapolis-Moline P. I. Co. v. Parent*, 93 M 207, 219, 17 P 2d 1088.

10518. Construction of language relates to place where used. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

History: En. Sec. 611, p. 198, L. 1877; re-en. Sec. 611, 1st Div. Rev. Stat. 1879; re-en. Sec. 629, 1st Div. Comp. Stat. 1887;

re-en. Sec. 3133, C. Civ. Proc. 1895; re-en. Sec. 7874, Rev. C. 1907; re-en. Sec. 10518, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1857.

10519. Construction of statutes and instruments—general rule. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

History: En. Sec. 612, p. 198, L. 1877; re-en. Sec. 612, 1st Div. Rev. Stat. 1879; re-en. Sec. 630, 1st Div. Comp. Stat. 1887;

re-en. Sec. 3134, C. Civ. Proc. 1895; re-en. Sec. 7875, Rev. C. 1907; re-en. Sec. 10519, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1858.

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48 P (2d) 1116
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50 P (2d) 859
101 Mont. 241
53 P (2d) 457
101 Mont. 384,
406
54 P (2d) 589, 599
101 Mont. 515
54 P (2d) 873
102 Mont. 462
59 P (2d) 789

10519
63 P (2d) 146

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64 P (2d) 1061

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64 P (2d) 118

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80 P.(2d) 379
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81 P.(2d) 426
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205 P.(2d)
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157 P. 2d 1011
159 P. 2d 339

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102 P. (2d) 16

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92 P.(2d) 772

10519
173 P.(2d) 894
173 P.(2d) 902
175 P.(2d) 414

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161 P. 2d 526
161 P. 2d 645
161 P. 2d 903
164 P. 2d 371

10519
146 P.(2d) 325
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151 P. 2d 1020

10519
96 P.(2d) 423
96 P.(2d) 431
96 P.(2d) 519

10519
207 P.(2d) 977

10519
180 P. (2) 481

Operation and Effect

In an action by an engineer for injuries received by jumping from his engine to avoid a collision, where the language of the defendant company's rules relative to the operation of its trains under the block signal system was plain and its meaning apparent, it was the duty of the trial court to declare that meaning and not leave it to the speculation of the jury. *Lynes v. Northern Pacific Ry. Co.*, 43 M 317, 330, 117 P 81.

The language of a statute must be construed in accordance with its usual and ordinary acceptance, with a view to giving vitality to and making operative all provisions of the law and accomplishing the intention of the legislature when ascertainable. *County of Hill v. County of Liberty*, 62 M 15, 17, 203 P 500.

Under this section, the office of courts, in construing a statute, is simply to ascertain and declare what is in terms or in substance contained therein, not to write into the act words which the legislature saw fit to omit. *Morrison v. Farmers' etc. State Bank*, 70 M 146, 155, 225 P 123.

It is the province of courts to construe and apply the law as they find it, to maintain its integrity as it has been written by a co-ordinate branch of the state government; when the terms of a statute are plain, unambiguous, direct and certain, it speaks for itself; there is no room for construction. *Chmielewska v. Butte & Superior Min. Co.*, 81 M 36, 42, 261 P 616.

In the construction of a statute the office of the court is to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. *Maki v. Anaconda Copper Min. Co.*, 87 M 314, 324, 287 P 170.

In construing a statute the supreme court will not read into it words necessary to make it conform to a supposed intention of the legislature; its intention in enacting

it must be gathered from the language employed therein, not from street rumors or other similar sources. *Mills v. State Board of Equalization et al.*, 97 M 13, 28, 33 P 2d 563.

The duty of the supreme court in interpreting a statute is not to enact but to expound the law; to apply the law as it finds it and to maintain its integrity as it is written; it may not insert what has been omitted or omit what has been inserted (this section). *Clark v. Olson*, 96 M 417, 431, 31 P 2d 283; *State ex rel. King v. Smith*, 98 M 171, 38 P 2d 274.

References

Cited or applied as section 612, p. 198, Laws of 1877, in *Taylor v. Oshby*, 3 M 248; as section 612, First Division Revised Statutes 1879, in *Lane v. Commissioners of Missoula County*, 6 M 473, 13 P 136; as section 630, First Division Compiled Statutes 1887, in *Vose v. Whitney*, 7 M 385, 390, 16 P 846; *State v. Kenney*, 10 M 533, 26 P 999; as section 3134, Code of Civil Procedure, in *Home B. & L. Assoc. v. Nolan*, 21 M 205, 210, 53 P 738; as section 7875, Revised Codes, in *City of Butte v. Industrial Accident Board*, 52 M 75, 78, 156 P 130; *State v. Stein*, 60 M 441, 446, 199 P 278; *State v. Mason*, 62 M 180, 204 P 358; *Square Butte State Bank v. Ballard*, 64 M 554, 559, 210 P 889; *State ex rel. Sheedy v. District Court*, 66 M 427, 433, 213 P 802; *State v. Certain. Intoxicating Liquors*, 71 M 79, 84, 227 P 472; *In re Trepp's Estate*, 71 M 154, 162, 227 P 1005; *Fergus Motor Co. v. Sorenson*, 73 M 122, 138, 235 P 422; *Gregg v. Bayers*, 73 M 165, 167, 235 P 337; *Novak v. Industrial Accident Board*, 73 M 196, 203, 235 P 754; *State v. Redmond*, 73 M 376, 380, 237 P 486; *State v. Brannon et al.*, 86 M 200, 209, 283 P 202; *McMullen v. Shields*, 96 M 191, 198, 29 P 2d 652; *State ex rel. Kurth et al. v. Grinde et al.*, 96 M 608; *In re Harper's Estate*, 98 M 356, 40 P 2d 51.

10520. The intention of the legislature or parties. In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

History: En. Sec. 613, p. 198, L. 1877; re-en. Sec. 613, 1st Div. Rev. Stat. 1879; re-en. Sec. 631, 1st Div. Comp. Stat. 1887; re-en. Sec. 3135, C. Civ. Proc. 1895; re-en. Sec. 7876, Rev. C. 1907; re-en. Sec. 10520, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1859.

Intention of Legislature to be Preserved

In the construction of a statute, the intention of the legislature is to be pursued,

if possible. *Lerch v. Missoula Brick & Tile Co.*, 45 M 314, 319, 123 P 25; *State ex rel. Carter v. Kall*, 53 M 162, 166, 162 P 385; *Wibaux Improvement Co. v. Breitenfeldt*, 67 M 206, 210, 215 P 222; *Cottonwood Coal Co. v. Junod*, 73 M 392, 397, 236 P 1080; *State ex rel. Kurth et al. v. Grinde et al.*, 96 M 608, 614, 32 P 2d 15; *State ex rel. Nagle v. The Leader Co. et al.*, 97 M 586, 593, 37 P 2d 561.

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65 P.(2d) 626

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109 P.(2d) 61
109 P.(2d) 1111

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In the interpretation of statutes in the case of doubt as to the legislative intent, which must control, recourse must first be had to the language employed, indulging the presumption that the terms used were intended to be understood in their ordinary sense unless it is apparent that they were intended to be given a different meaning, and if then there be room for doubt as to its intent, the title of the act, presumably indicating its intention, may be looked to. *Morrison v. Farmers' etc. State Bank*, 70 M 146, 151, 225 P 123.

In the construction of a statute the intention of the legislature must, if possible, be pursued, regard being had not only to the words employed, but also to the evil to be remedied. *State ex rel. Boone v. Tullock*, 72 M 482, 487, 234 P 277.

In the construction of a statute the intent of the legislature must be pursued, if possible, and if its language is of doubtful meaning, courts may refer to the history of the times when it was passed and of the act itself, in order to ascertain the reason as well as the meaning of particular provisions in it. *Fergus Motor Co. v. Sorenson*, 73 M 122, 126, 235 P 422.

In construing provisions of the liquor law, the intention of the legislature must be pursued so far as possible, and the language employed must be interpreted in accordance with its usual, ordinary and accepted meaning so as to give it validity and make operative all of its provisions; particular words and phrases being construed according to the context and their approved usage. *State v. Redmond*, 73 M 376, 380, 237 P 486.

In the construction of a statute the intention of the legislature must control, and to ascertain that intention, recourse must first be had to the language employed and the apparent purpose to be subserved. *McNair v. School District No. 1*, 87 M 423, 426, 288 P 188; *Campbell v. City of Helena*, 92 M 366, 16 P 2d 1; *O'Connell v. State Bd. of Equalization*, 95 M 91, 110, 25 P 2d 114.

Intention of Parties to be Pursued

In the interpretation of a contract the intention of the parties must be pursued, if possible, the intention to be gathered from the entire agreement, not from particular words or phrases or disjointed or particular parts of it, the subject matter and the purposes of its execution being material to the ascertainment of their intention and the meaning of the terms used. *Lee v. Lee Gold Mining Co. et al.*, 71 M 592, 599, 230 P 1091.

In the construction of an antenuptial agreement settling property rights, the rule appertaining to the interpretation of contracts that the intention of the

parties must govern, is controlling; further, such an agreement must be liberally construed. In *re Oppenheimer's Estate*, 73 M 560, 570, 238 P 599.

Mutual Intention of Parties to be Ascertained if Possible

In the construction of a contract the courts must, if possible, ascertain and give effect to the mutual intention of the parties at the time they entered into it so far as that may be done without contravening legal principles, greater regard being had to their clear intent than to any particular words used in the expression of that intent. *Winkelmann v. Minnesota M. L. Ins. Co.*, 66 M 451, 460, 213 P 1104.

In the construction of a contract the intention of the parties at the time of contracting must be pursued if possible, which intention must be gathered from the entire instrument and not from particular words or phrases or disjointed parts of it and in the ascertainment of such intention the subject matter of the contract and the purposes of its execution are material. *State v. Rosman et al.*, 84 M 207, 217, 274 P 850.

Particular Provisions Prevail Over General

In an action against the sureties upon the official bond of their principal, a city treasurer, for a breach thereof, where the sureties had limited their penal obligation to specified sums, which sums were also set opposite their respective signatures, and the bond contained a general provision reading, "for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents," it was held that this general provision of the bond, being inconsistent with the particular provision limiting the liability of the sureties, the latter would prevail, and the sureties were bound severally and not jointly. *City of Butte v. Cohen*, 9 M 435, 440, 24 P 206.

Where there is a general and a special statutory provision upon a given subject which cannot be harmonized, the special one is controlling, and if the latter is found to be inoperative, resort may be had to the general law with a view to harmonizing them and, if possible, making the later special act operative. *State v. Certain Intoxicating Liquors*, 71 M 79, 84, 227 P 472.

Where under the first clause of a contract a party bound himself generally as a surety, but under a subsequent one the conditions under which he would be liable were particularly set forth which in effect made him a guarantor, the two clauses were so inconsistent with each other as to warrant application of the doctrine

announced by this section, that where a general and particular provision of a contract are inconsistent, the latter must prevail, and therefore the promisor was a guarantor and not a surety and could not be joined as defendant with the lessee of property in an action to recover rentals, payment of which he had guaranteed. *Butte Mach. Co. v. Carbonate Hill Mill. Co.*, 75 M 167, 171, 242 P 956.

Where a statute deals generally with a given subject and a later one makes specific provision relating to a certain phase of that subject inconsistent with the former, the latter is controlling. *Kester v. Amon et al.*, 81 M 1, 14, 261 P 288.

In the construction of a statute, the intention of the legislature must be pursued, if possible; and when a general and a particular provision are inconsistent, the latter is paramount to the former. *London G. & A. Co., Ltd., v. Indus. Acc. Bd.*, 82 M 304, 310, 266 P 1103; *O'Connell v. State Bd. of Equalization*, 95 M 91, 110, 25 P 2d 114.

Where one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject in a more minute and definite way, the latter will prevail over the former to the extent of any necessary repugnancy between them. *Barth v. Ely*, 85 M 310, 323, 278 P 1002; *In re Stevenson*, 87 M 486, 498, 289 P 566.

Provisions to be Harmonized if Possible

Where one part of a statute deals with the subject in general and comprehensive

terms, while another part deals with it in a more minute and definite way, the two parts should be read together and, if possible, harmonized, with a view to giving effect to a consistent legislative policy. *Stadler v. City of Helena*, 46 M 128, 139, 127 P 454; *City of Butte v. Industrial Accident Board*, 52 M 75, 78, 156 P 130.

The language of a statute must be construed in accordance with its usual and ordinary acceptation, with a view to giving vitality to and making operative all provisions of the law and accomplishing the intention of the legislature when ascertainable. *County of Hill v. County of Liberty*, 62 M 15, 17, 203 P 500.

In the construction of a particular statute, all acts relating to the same subject or having the same general purpose should be read in connection with it, as together constituting one law, it being the duty of courts to reconcile them, if possible, and make them operative. *State v. Certain Intoxicating Liquors*, 71 M 79, 84, 227 P 472.

References

Cited or applied as section 3135, Code of Civil Procedure, in *Home B. & L. Assoc. v. Nolan*, 21 M 205, 210, 53 P 738; *State ex rel. Bray v. Settles*, 34 M 448, 452, 87 P 445; *Page v. New York Realty Co.*, 59 M 305, 316 et seq., 196 P 871; *State v. Stein*, 60 M 441, 446, 199 P 278; *Novak v. Industrial Accident Board*, 73 M 196, 203, 235 P 754; *Wall v. Duggan et al.*, 76 M 239, 245, 245 P 953; *Cove Irr. Dist. v. Yellowstone Ditch Co.*, 90 M 323, 334.

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10521. The circumstances to be considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

History: En. Sec. 614, p. 199, L. 1877; re-en. Sec. 614, 1st Div. Rev. Stat. 1879; re-en. Sec. 632, 1st Div. Comp. Stat. 1887; re-en. Sec. 3136, C. Civ. Proc. 1895; re-en. Sec. 7877, Rev. C. 1907; re-en. Sec. 10521, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1860.

Operation and Effect

The evidence of merchants and business men is admissible to explain the meaning of mercantile phrases endorsed upon a memorandum of sale. *Newell v. Nicholson*, 17 M 389, 43 P 180.

A bond given in connection with a building contract, and conditioned for the furnishing of all labor and material necessary to the completion of the building, as specified and shown on the plans furnished by the architect, need not be so reformed, before a recovery thereon, as to refer to

said contract, since the instruments, being contemporaneous and parts of the same transaction, may be construed together to explain each other under this section. *Watson v. O'Neill*, 14 M 197, 200, 35 P 1064. See also *Hogan v. Shields*, 20 M 438, 443, 52 P 55.

In arriving at the intent of parties to a stipulation, the circumstances under which the stipulation was made, its subject-matter, and the parties to it may be considered. The rules applicable to the construction of contracts generally control in interpreting stipulations. *Murphy v. Stone & Webster Eng. Corp.*, 44 M 146, 149, 119 P 717.

To aid the construction of a bill of sale, the circumstances under which it was made may be shown, and in doing this, conver-

sations prior to the sale about the subject-matter thereof, and not in conflict with the terms of the bill of sale, may be considered. *Sutherland v. Green*, 49 M 379, 384, 142 P 636.

Letters interchanged between the president of a corporation, signed by him personally, and plaintiff, considered in the light of the circumstances under which they were written, showed a contract of employment for a certain term, for the breach of which plaintiff was entitled to recover. *Edwards v. Plains Light & Water Co.*, 49 M 535, 544, 143 P 962.

Parol evidence is admissible to show the situation and relation of the parties to an oral contract of sale of personalty evidenced by a memorandum in writing, as well as the surrounding circumstances at the time of its execution; also for the purpose of applying the description in the memorandum and thus identifying the subject-matter of the contract, provided the subject-matter is so described by the memorandum as to be capable of certain identification, as well as to explain latent ambiguities. *Lewis v. Aronow*, 77 M 348, 356 et seq., 251 P 146.

Under this section and the preceding section, a contract the provisions of which are called in question years after its making, must be construed in the light of the

circumstances under which it was made, and the then intention of the parties must be pursued, if possible. *Cove Irr. Dist. v. Yellowstone Ditch Co.*, 90 M 323, 334, 3 P 2d 280.

References

Cited or applied as section 632, First Division Compiled Statutes 1887, in *Morris v. Edwards*, 10 M 298, 25 P 1030; *Riddell v. Peck-Williamson H. & V. Co.*, 27 M 44, 57, 69 P 241; *Hogan v. Kelly*, 29 M 485, 488, 75 P 81; as section 7877, Revised Codes, in *Western Loan & Savings Co. v. Smith*, 42 M 442, 450, 113 P 475; *Ford v. Drake*, 46 M 314, 319, 127 P 1019; *Rairden v. Hedrick*, 46 M 510, 516, 129 P 498; *Lehrkind v. McDonnell*, 51 M 343, 353, 153 P 1012; *Parham v. Chicago, Milwaukee & St. Paul Ry. Co.*, 57 M 492, 502, 189 P 227; *State Bank of Darby v. Pew et al.*, 59 M 144, 151, 195 P 852; *Cook et al. v. Northern Pac. Ry. Co.*, 61 M 573, 586, 203 P 512; *Baroch v. Greater Montana Oil Co.*, 70 M 93, 98, 225 P 800; *United States Nat. Bank v. Chappell*, 71 M 553, 566, 230 P 1084; *Anderson v. Border et al.*, 75 M 516, 529, 244 P 494; *Musselshell Valley F. & L. Co. v. Cooley*, 86 M 276, 293, 283 P 213; *Orem v. Hansen Packing Co.*, 91 M 222, 230, 7 P 2d 546; *Brown v. Homestake Exploration Co.*, 98 M 305, 39 P 2d 168.

10522. Terms to be construed in their general acceptance. The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

History: En. Sec. 615, p. 199, L. 1877; re-en. Sec. 615, 1st Div. Rev. Stat. 1879; re-en. Sec. 633, 1st Div. Comp. Stat. 1887; re-en. Sec. 3137, C. Civ. Proc. 1895; re-en. Sec. 7878, Rev. C. 1907; re-en. Sec. 10522, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1861.

Operation and Effect

For the purpose of enabling the court to interpret the abbreviations No. 1 D. N. S., used in a memorandum evidencing the

sale of wheat to a wheat buyer, where the oral contract of sale was attacked on the ground that it was void under the statute of frauds, parol evidence was admissible to show their customary meaning in the business of dealing in wheat. *Lewis v. Aronow*, 77 M 348, 358, 251 P 146.

References

Cited or applied as section 633, First Division Compiled Statutes 1887, in *Newell v. Nicholson*, 17 M 389, 43 P 180.

10523. Written words control those printed in blank form. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former control the latter.

History: En. Sec. 616, p. 199, L. 1877; re-en. Sec. 616, 1st Div. Rev. Stat. 1879; re-en. Sec. 634, 1st Div. Comp. Stat. 1887; re-en. Sec. 3138, C. Civ. Proc. 1895; re-en. Sec. 7879, Rev. C. 1907; re-en. Sec. 10523, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1862.

Operation and Effect

Under this section providing that where the terms of a contract are partly in

printing and partly in writing and the two are inconsistent, the written portion controls, where a contract of sale of an automobile provided in writing "Terms on balance—140.00 due on delivery" and in printing "Balance due upon delivery," the former supplanted the latter. *Backer v. Parker Morelli Barclay M. Co.*, 87 M 595, 599, 289 P 571; *New Home Sewing M. Co. v. Songer et al.*, 91 M 127, 7 P 2d 238.

10524. Persons skilled may testify to decipher characters. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.

History: En. Sec. 617, p. 199, L. 1877; re-en. Sec. 617, 1st Div. Rev. Stat. 1879; re-en. Sec. 635, 1st Div. Comp. Stat. 1887; re-en. Sec. 3139, C. Civ. Proc. 1895; re-en. Sec. 7880, Rev. C. 1907; re-en. Sec. 10524, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1863.

References

New Home Sewing M. Co. v. Songer, et al., 91 M 127, 135, 7 P 2d 238.

10525. Of two constructions, which preferred. When the terms of an agreement have been intended in a different sense by different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

History: En. Sec. 618, p. 200, L. 1877; re-en. Sec. 618, 1st Div. Rev. Stat. 1879; re-en. Sec. 636, 1st Div. Comp. Stat. 1887; re-en. Sec. 3140, C. Civ. Proc. 1895; re-en. Sec. 7881, Rev. C. 1907; re-en. Sec. 10525, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1864.

References

Cited or applied as section 636, First Division Compiled Statutes 1887, in Shreve v. Copper Bell Mining Co., 11 M 309, 28 P 315; Muth v. Goddard, 28 M 237, 245, 72 P 621.

10526. Writings—how construed. A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment to the person to whom the notice is given.

History: En. Sec. 619, p. 200, L. 1877; re-en. Sec. 619, 1st Div. Rev. Stat. 1879; re-en. Sec. 637, 1st Div. Comp. Stat. 1887;

re-en. Sec. 3141, C. Civ. Proc. 1895; re-en. Sec. 7882, Rev. C. 1907; re-en. Sec. 10526, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1865.

10527. Construction in favor of natural right preferred. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former is to be adopted.

History: En. Sec. 620, p. 200, L. 1877; re-en. Sec. 620, 1st Div. Rev. Stat. 1879; re-en. Sec. 638, 1st Div. Comp. Stat. 1887; re-en. Sec. 3142, C. Civ. Proc. 1895; re-en. Sec. 7883, Rev. C. 1907; re-en. Sec. 10527, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1866.

References

Cited or applied as section 638, First Division Compiled Statutes 1887, in Bielenberg v. Montana U. Ry. Co., 8 M 271, 278, 20 P 314.

10528. Material allegations only to be proved. None but a material allegation need be proved.

History: En. Sec. 621, p. 200, L. 1877; re-en. Sec. 621, 1st Div. Rev. Stat. 1879; re-en. Sec. 639, 1st Div. Comp. Stat. 1887;

re-en. Sec. 3143, C. Civ. Proc. 1895; re-en. Sec. 7884, Rev. C. 1907; re-en. Sec. 10528, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1867.

10529. Evidence confined to material allegations. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into

a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

History: En. Sec. 622, p. 201, L. 1877; re-en. Sec. 622, 1st Div. Rev. Stat. 1879; re-en. Sec. 640, 1st Div. Comp. Stat. 1887; re-en. Sec. 3144, C. Civ. Proc. 1895; re-en. Sec. 7885, Rev. C. 1907; re-en. Sec. 10529, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1868.

Operation and Effect

Where testimony on an issue (ownership of chattels) is conflicting, evidence of collateral facts tending to show which of

the statements of witnesses are the more credible is admissible. *Henderson v. Campbell*, 95 M 180, 184, 26 P 2d 351.

References

Cited or applied as section 3144, Code of Civil Procedure, in *Mahoney v. Dixon*, 34 M 454, 459, 87 P 452; *State ex rel. Bourquin v. Morris et al.*, 67 M 40, 44, 214 P 332.

10530. Affirmative only can be proved. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

History: En. Sec. 623, p. 201, L. 1877; re-en. Sec. 623, 1st Div. Rev. Stat. 1879; re-en. Sec. 641, 1st Div. Comp. Stat. 1887; re-en. Sec. 3145, C. Civ. Proc. 1895; re-en. Sec. 7886, Rev. C. 1907; re-en. Sec. 10530, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1869.

Operation and Effect

In an action by the state to recover a license tax from a telephone company, the burden was on the defendant to establish the number of telephones used exclusively in interstate business, and that they were the same instruments attempted to be taxed. *State v. Rocky Mountain Bell Tel. Co.*, 27 M 394, 400, 71 P 311.

If one asserts himself to be the owner of the right to use waters claimed by him,

the burden is on him to prove it. *Smith v. Duff*, 39 M 374, 378, 102 P 981.

Where the allegation of nonpayment in a counterclaim is necessary to state a cause of action, it is material, and, being deemed denied, it must be proved, the burden resting upon the defendant. *Yancey v. Northern Pacific Ry. Co.*, 42 M 342, 349, 112 P 533.

References

Cited or applied as section 3145, Code of Civil Procedure, in *Donovan-McCormick Co. v. Sparr*, 34 M 237, 248, 85 P 1029; *Norum v. Queen City Oil Co.*, 81 M 527, 539, 264 P 122; *Cuckovich v. Buckovich*, 82 M 1, 5, 264 P 930.

10531. Facts which may be proved on trial. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute.
2. The act, declaration, or omission of a party, as evidence against such party.
3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto.

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death.

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or

10531
89 P. (2d) 558

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103 P. (2d) 157

10531
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103 P. (2d) 154-156

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163 P. 2d 255

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subsec. 5
181 P. (2) 603, 604

declaration of a joint owner, joint debtor, or other person jointly interested with the party.

6. After proof of a conspiracy, the act or declaration of a conspirator against his coconspirator, and relating to the conspiracy.

7. The act, declaration, or omission forming part of a transaction, as explained in section 10511.

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter.

10531, subsec. 9
64 P (2d) 1075

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion of a question or science, art, or trade, when he is skilled therein.

10531
sub. 10
89 P. (2d) 1045

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given.

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary.

12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts, engravings on rings, family portraits and the like, as evidence of pedigree.

14. The contents of a writing, when oral evidence thereof is admissible.

15. Any other facts from which the facts in issue are presumed or are logically inferable.

16. Such facts as serve to show the credibility of a witness, as explained in section 10508.

History: En. Sec. 624, p. 201, L. 1877; re-en. Sec. 624, 1st Div. Rev. Stat. 1879; re-en. Sec. 642, 1st Div. Comp. Stat. 1887; re-en. Sec. 3146, C. Civ. Proc. 1895; re-en. Sec. 7887, Rev. C. 1907; re-en. Sec. 10531, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1870.

Subd. 2

Admissions in Verified Pleadings Admissible

A plaintiff may offer in evidence an admission made by the defendant in his verified answer without offering the entire answer, and, by so doing, he is not estopped from denying or disproving statements contained in the pleading. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 167, 108 P 1057.

Oral Admissions of a Party to be Viewed With Caution

Oral admissions of a party should be viewed with caution and subjected to careful scrutiny, no other class of testimony

affording such opportunities for unscrupulous witnesses to distort the facts or to commit open perjury. *Sylvain et al. v. Page*, 84 M 424, 438, 276 P 16.

When Admission Against Interest is Admissible

A stenographer who took the testimony at the coroner's inquest incident to an automobile accident could properly testify to a statement of defendant driver as to the high rate of speed at which he was driving at the time of the occurrence, such statement having been admissible as an admission against interest. *Marinkovich v. Tierney et al.*, 93 M 72, 89, 17 P 2d 93.

In an action of the nature of this case, the wife of plaintiff was properly permitted to testify to a conversation with defendant, who insisted on payment by her husband of amounts claimed to have been stolen from an apartment house for a period of five years, that another woman had stolen things, as an admission

by defendant against interest and as tending to establish malice in aid of the claim for exemplary damages. *Edquest v. Tripp & Dragstedt Co. et al.*, 93 M 446, 458, 19 P 2d 637.

Subd. 3

Failure of Accused to Deny Accusation of Guilt is Admissible

Under this subdivision of this section, providing that upon a trial evidence may be given of an act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto, held that where one who on being accused of crime remains silent, though he has full liberty to speak, his failure to reply or deny is relevant as showing his guilt, the accusatory statement being admissible, not as evidence of the truth of the statement, but as tending to show his admission by his silence; the rule applies though defendant was under arrest at the time, but does not extend to statements made in his presence at a judicial hearing or proceeding. *State v. Won*, 76 M 509, 518, 248 P 201.

Subd. 4

Admissibility Question for Court

The question whether a dying declaration is admissible is one for the court's decision after hearing preliminary proof concerning the condition of the declarant and the circumstances surrounding the making of the statement, whereupon, if admitted, the question of its sufficiency and the weight to be given it is for the jury's determination; hence refusal to submit instructions stating the rule governing the admission of such declarations was not error. *State v. Vetter*, 76 M 574, 587, 248 P 179.

Declaration of Deceased in Disparagement of His Title

In a suit to have the executor and heirs of plaintiff's alleged co-owner in a mining claim declared trustees for his benefit, declarations made by the decedent in his lifetime after issuance of patent, that plaintiff was still the owner of an interest in the claim, when in fact his name had been fraudulently omitted from the patent, and evidence of the fact that decedent had joined with plaintiff a year prior to his death in a lease of the claim with an agreement to sell upon certain conditions, were in effect declarations of the deceased in disparagement of his title, and competent under section 10510 and subdivision 4 of this section. *Delmoe v. Long*, 35 M 139, 154, 88 P 778.

Evidence that after the grantor referred to above had deeded to plaintiff the por-

tion of his lands on which she was living, stated to the witness who desired to purchase the forty-acre tract claimed by plaintiff as having been mistakenly omitted from her deed, that he had deeded all his property away and that the tract belonged to plaintiff, was admissible against defendant heirs, as decedent's declaration against interest under subdivision 4 of this section, and section 10514, as some evidence of the real intent of the grantor and of his mistake in making the deed to plaintiff. *Laundreville v. Mero et al.*, 86 M 43, 56, 281 P 749.

Declarations Touching Relationship

Testimony of a declaration claimed to have been made by the person whose estate was before the court in a proceeding to establish heirship, that he and a companion were cousins, was admissible under this section as one touching relationship. *In re Colbert's Estate*, 51 M 455, 467, 153 P 1022.

Under this section and section 10513, before testimony detailing declarations, acts, and attitude of persons deceased or out of the jurisdiction to show relationship can be admitted, the relationship of the declarant to the family whose history he refers to must be shown by evidence independent of his own statement. *In re Colbert's Estate*, 51 M 455, 469, 153 P 1022.

While declarations of decedent to his daughter, testified to by her husband after his death, in a proceeding to establish heirship, that she was his only legal heir, that he had never been divorced from his first wife, her mother, and that he had never been married to the woman with whom he had been living and by whom he had children, were admissible under this section, testimony of this character should be accepted with caution and scrutinized with great care. *Welch v. All Persons*, 78 M 370, 388, 254 P 179.

Declarations of a deceased member of a family on questions of pedigree, or in respect of relationship, birth, marriage or death of any person related by blood or marriage to the deceased, are made admissible in evidence under section 10513, and subdivision 4 of this section. As no limitations are placed upon the admissibility of such declarations, the question as to the weight to be accorded them is: Were they made under circumstances justifying the conclusion that there was no probable motive to falsify the facts declared? In determining this question all the surrounding facts and circumstances must be taken into consideration. *Welch v. All Persons*, 85 M 114, 130, 278 P 110.

Under subdivision 4 of this section, in effect making hearsay testimony admissible

in matters of genealogy and in questions of pedigree, declarations of deceased putative parents relating to the legitimacy or illegitimacy of their alleged children are admissible in a proceeding to determine heirship. In re Wray's Estate, 93 M 525, 537, 19 P 2d 1051.

Dying Declarations in General

The provision of subdivision 4 of this section, relative to the admissibility of dying declarations, is simply declaratory of the common law, and has generally been held to be sufficiently broad to comprise the facts and circumstances of the killing, and such other facts and circumstances, immediately surrounding and attending it, as properly form a part of the *res gestae*. State v. Crean, 43 M 47, 58, 114 P 603.

Dying Declarations May Encompass Matter Forming Part of the Res Gestae

Under this section, subdivision 4, one making a dying statement may make it sufficiently broad to comprise such facts and circumstances immediately surrounding or attending the act resulting in his injuries as form a part of the *res gestae*, as, for instance, the defendant struck another person present over the head with a weapon in the presence of declarant. State v. Le Duc, 89 M 545, 557 et seq., 300 P 919.

Under Sense of Pending Death

To meet the rule that a person making a dying declaration must have been under a sense of impending death, the state must show that the declarant at the time of making it had abandoned all hope of recovery from the injury inflicted by defendant and was under a firm conviction that his death was inevitable and near at hand, i. e., to render the declaration admissible it must prove the declarant's state of mind. State v. Martin, 76 M 565, 568, 248 P 176.

The fact that one making a dying statement to the county attorney, taken with the aid of a stenographer by question and answer, during its course said, "I am not going to give up," held not sufficient to show that he was not then under a sense of impending death (Subd. 4, this section), rendering the statement inadmissible, when taking into consideration the fatal nature of his wounds and his further statement when asked to rest a short time, "I think I will be done by then. Everything is getting pretty dark." (Mr. Chief Justice Callaway and Mr. Justice Galen dissenting as to admissibility of statement in evidence.) State v. Le Duc, 89 M 545, 557 et seq., 300 P 919.

When Dying Declaration is Admissible

To render an alleged dying declaration admissible in evidence, it is incumbent

upon the state to prove beyond a reasonable doubt that the declaration was made by a dying person, that it was made under a sense of impending death and that it related to the cause of his dying condition. State v. Martin, 76 M 565, 568, 248 P 176.

Id. A dying declaration made by one in delirium, or by one so nearly dead that he cannot appreciate his condition, is not admissible in evidence.

Id. Decedent, suffering from knife wounds who in addition had been struck on the head with a blunt instrument five times, shortly after an encounter with defendant, was asked who stabbed him, and in a whisper gave the name of defendant. He died two or three days later without making any other statement. Held, that in the absence of proof that declarant was conscious at the time he uttered the name of defendant, that the name was intended by him as an answer to the question and that he uttered it under a sense of his impending death, the admission of the declaration in evidence as a dying declaration was error.

Evidence held sufficient to show that when decedent whose abdomen had been torn open by a charge of heavy shot at close range, made the statement that defendant had fired the shot, he did so under a sense of impending death, and therefore it was admissible as his dying declaration. State v. Vetter, 76 M 574, 587, 248 P 179.

Subd. 5

Declarations of Agent of Elevator Purchasing Grain Admissible

Under this section and subdivision, the declarations of the person in charge of the elevator of defendant in an action for the conversion of wheat covered by mortgage, made relative to the transaction in an effort to protect defendant's interests, were admissible in evidence as a part of the *res gestae* and as made in the course of such person's employment as agent. Exchange State Bank v. Occident E. Co., 95 M 78, 87, 24 P 2d 126.

Operation in General

Subdivision 5 of this section, being a general statute, applicable to all cases, civil and criminal, must, if there be any conflict, yield to section 9062, applicable only to the subject of limitation of actions. Monidah Trust v. Kemper, 44 M 1, 6, 118 P 811.

Subd. 6

Declaration of Co-conspirator When Admissible

Evidence of the driver of an automobile in which defendant with three others

were riding that upon his inquiry where they wanted to go, one of them directed him to the place of the homicide, was properly admitted, since all acted together and the direction was given without protest from defendant. *State v. Byrne*, 60 M 317, 326, 199 P 262.

The rule that a defendant in a criminal case cannot be bound by conversations between third persons in his absence does not apply to acts and declarations of a co-conspirator done or made in furtherance of a common design during the life of the conspiracy in which case they are admissible after proof of the conspiracy; hence the admission of such conversations in the absence of sufficient evidence to establish a conspiracy was error. *State v. Hopkins*, 68 M 504, 509, 219 P 1106.

Subd. 8

Affidavit Which Sets Out What Absent Witness Would Say Not Evidence on Subsequent Trial

An affidavit filed in support of a motion for a continuance on account of the absence of a witness and setting forth what the witness would testify to if present, the motion being denied on opposing counsel's admission that the witness would so testify, is not admissible as evidence on a second trial of the cause as testimony given at a former trial between the same parties relating to the same matter. *Kelly v. Kipp et al.*, 77 M 110, 122, 250 P 819.

Jurisdiction of Former Action as Affecting the Right to Introduce Testimony

Under subdivision 8 of this section, the testimony of a witness deceased or out of the jurisdiction, in the form of depositions, given in a former action between the same parties relating to the same matter, may be received; but, to make testimony of this character admissible, the former action in which it was given must have been one within the power of the court to entertain. *In re Colbert's Estate*, 51 M 455, 463, 153 P 1022.

Precise Nominal Identity of All Parties Not Essential

Where plaintiff was one of two plaintiffs, and defendant was one of two defendants in a former action, and in a subsequent one the subject-matter in controversy was the same as that litigated in the first, testimony given in the former one by a witness absent from the state at the time of the second trial was competent, under this section, precise nominal identity of all parties not being essential. *O'Meara v. McDermott*, 40 M 38, 57, 104 P 1049.

To make the testimony given at a former trial by a witness since deceased admissible at a subsequent one between the same parties and relating to the same subject-matter, under this subdivision of this section, precise nominal identity of all the parties is not necessary. *Arnold et al. v. Genzberger et al.*, 96 M 358, 372, 31 P 2d 396.

Testimony of Deceased Witness From Stenographer's Notes Admissible

An official stenographer, who had reported the testimony of a witness on a former trial of the cause who died in the interim between the two trials, was properly permitted to read such testimony from a transcript made of his notes which had been lost, after swearing to the correctness of the original notes and the transcript. *O'Rourke v. Grand Opera House Co.*, 47 M 459, 470, 133 P 965.

Testimony of Witness Out of Jurisdiction Made at a Former Trial When Admissible

To warrant the introduction of the testimony of an absent witness, given upon a former trial, the party seeking to introduce such testimony must preliminarily prove the fact of departure or absence of such witness by positive testimony, or by the existence of circumstances from which departure or absence can be reasonably inferred. *Reynolds v. Fitzpatrick*, 28 M 170, 172, 72 P 510.

If, at the time of a second trial, it appears that a witness had been examined in a former controversy over the same subject-matter between the same parties, and is, at the time, out of the jurisdiction, notes of his testimony given on the former trial are competent evidence and should be admitted. *Mette & Kanne Distilling Co. v. Lowrey*, 39 M 124, 132, 101 P 966.

Evidence of plaintiff's witness given at a former trial between the same parties is admissible under subdivision 8 of this section, where at the time of the second trial he was without the state. *Great Northern Ry. Co. v. Ennis*, 236 F. 17, 26, 149 C. C. A. 227.

Subd. 9

Competency of Expert Witness Question for Court

The competency of a witness to testify as an expert is a question addressed to the discretion of the trial court, whose decision will not be reversed unless erroneous as a matter of law. *State v. Askin*, 90 M 394, 399, 3 P 2d 654.

Necessity That the Identity be Sufficient

Where the stenographer who took the testimony of a witness since deceased was dead at the time the testimony was sought to be used, and no one could be found who could read the stenographer's notes, or testify to the correctness either of the notes or the transcript, or to the fact that the transcript embodied the testimony of the witness as given at the former trial, it was not identified as required by this section, and therefore inadmissible. *Pew v. Johnson*, 35 M 173, 180, 88 P 770.

Opinion of Auto Mechanic When Admissible

In an action by a truck driver against his employer for injuries sustained, in which the negligence alleged consisted of the failure of the employer to remedy a defect in the truck after his attention had been called to it, with the result that a wheel collapsed while plaintiff was driving the machine, held that the opinion of an automobile mechanic of experience that the cause of the collapse was due to the spokes in the wheel being loose was properly admitted, but that, while it would have been proper for the witness to state by what methods the defect could have been discovered, his further answer to a hypothetical question that it could have been discovered by a reasonable inspection was incompetent, the jury having been as able to determine that from a recital of the facts as was the witness. *Demarais v. Johnson et al.*, 90 M 366, 371, 3 P 2d 283.

Opinion of One Skilled in Livestock Business Admissible When

The testimony of persons for many years engaged in the livestock business, that in their opinion the flesh of cattle found concealed on the range, and with the larceny of which defendants stood charged, was that of animals killed and properly bled, was properly admitted under this section. *State v. Keeland*, 39 M 506, 516, 104 P 513.

Persons familiar with cattle and their habits were properly permitted to testify as to the improbability of the animals, alleged to have been stolen, straying a certain distance from the place where they were seen a few days prior thereto. *State v. Foley*, 44 M 311, 316, 120 P 225.

What is Not Proper Opinion Evidence

Whether a rope, without a chain attachment, is an unsafe appliance for hoisting timbers in a mine is not a proper subject of opinion evidence. It is appropriate for the jury to draw its inferences

as to such question after hearing evidence of the facts. *Cummings v. Reins Copper Co.*, 40 M 599, 621, 107 P 904.

When Opinion Evidence is Admissible in General

While, as a general rule, a witness must state facts, not opinions or conclusions, where he possesses special skill or knowledge of the subject-matter under investigation and the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without the assistance of the opinion of such a witness, his opinion is admissible in evidence. *Demarais v. Johnson et al.*, 90 M 366, 371, 3 P 2d 283.

Who May Give Opinions as Skilled or Expert Witnesses

It is only a person skilled in the particular science, art, or trade concerning which the investigation is had who can be permitted to give an opinion founded upon facts learned from other sources than his own observation. *State v. Peel*, 23 M 358, 364, 59 P 169.

The last clause of subdivision 9 of this section means that an expert witness may give his opinion upon, or about, a question of science, art, or trade. *Copenhaver v. Northern Pacific Ry. Co.*, 42 M 453, 465, 113 P 467.

A witness who had not been shown to have any theoretical or practical knowledge of constructing or operating a ferryboat was not qualified to express an opinion respecting the subject. *State ex rel. Rankin v. Martin*, 68 M 392, 402, 219 P 632.

Id. In the absence of evidence that the person who had prepared a map of a ferryboat had any knowledge of the construction or operation of such a boat, admission of the map in evidence for the purpose of illustrating his testimony while pointing out serious structural weaknesses in the construction of the boat was prejudicial error.

To make the opinion evidence of a witness as to the effect of a blow on the head being the cause of a blood clot at the base of the brain admissible, he need not be a physician or surgeon if he possesses the necessary experiential qualifications; nor is it essential that, being a physician and surgeon, he qualify as a specialist in the particular subject. *State v. Askin*, 90 M 394, 399, 3 P 2d 654.

Id. Before one may testify as an expert it must first be shown that he is qualified to do so, either by experience or the requisite study to enable him to form an opinion regarding the subject-matter under inquiry.

Subd. 10Effect of Opinion of Witness Where
Reasons for the Opinion are Unsatisfactory

The opinion of a lay witness that a person is incompetent, where the reasons for the opinion are unsatisfactory, cannot be considered such substantial evidence as will warrant the submission of the question of his incompetency to a jury, in face of positive and affirmative acts and conduct on his part clearly indicating mental capacity. *Sommerville v. Greenhood*, 65 M 101, 120, 210 P 1048.

"Intimate Acquaintance"

The determination of who is an "intimate acquaintance" must be left in every case to the trial court, its discretion in the matter not being subject to review except in cases of clear abuse of it. *State v. Penna*, 35 M 535, 541, 90 P 787; *State v. Berberick*, 38 M 423, 449, 100 P 209; *State v. Leakey*, 44 M 354, 369, 120 P 234.

In a capital case, in which insanity was relied upon as a defense, the acquaintance-ship acquired with the defendant by newspaper reporters during an interview lasting a half hour, within a few hours after the killing, was not such as to qualify them to give an opinion as to his sanity, and their evidence, declaring the defendant sane, was inadmissible. *State v. Penna*, 35 M 535, 542, 90 P 787.

One who had known defendant but three weeks, had met him only at meals, and never conversed with him in person, was incompetent to express an opinion that defendant was sane, not having been an "intimate" acquaintance within the meaning of this section. *State v. Leakey*, 44 M 354, 369, 120 P 234.

A teacher who, before making a test of his intelligence, had seen defendant but once and knew nothing of him save what she had been told by others, was not, under this section, and this subdivision, competent to express an opinion as to his sanity. *State v. Schlaps*, 78 M 560, 578, 254 P 858.

A nurse who has been in constant attendance of a patient for a considerable period of time comes within the "intimate acquaintance" rule, which permits a layman intimately acquainted with a person whose mental condition is challenged, after giving his reasons therefor, to express his opinion on the subject. *In re Bright's Estate*, 89 M 394, 398, 300 P 229.

Subscribing Witness Need Not Qualify
as Intimate Acquaintance to Give an
Opinion as to Sanity

A witness subscribing to a will need not qualify as an intimate acquaintance of

the testator before giving his opinion of the testamentary capacity of the testator in aid of objections to the probate of the instrument; lack of acquaintance and opportunity for observation going to the weight, rather than to the admissibility, of the evidence. *In re Cummings' Estate*, 92 M 185, 200, 11 P 2d 968.

When Evidence on Question of Sanity
is Admissible

Evidence of nonexpert witnesses on the question of the sanity of the defendant in a prosecution for homicide, to be admissible, must, under this section, be based upon an intimate acquaintance with him, and the witnesses must state the facts upon which their opinions are founded. *State v. Penna*, 35 M 535, 541, 90 P 787.

The testimony of a witness who had known defendant about four months, and who had qualified as an intimate acquaintance, under this section, that in his opinion defendant was insane, was improperly stricken from the record, even though he admitted on cross-examination that he had told the county attorney the day before that he thought defendant was sane, and that he based this latter opinion upon conversations had with other persons on the night previous. *State v. Leakey*, 44 M 354, 368, 120 P 234.

When Opinion Evidence Improperly
Admitted is Harmless

Error in permitting a layman to give his opinion as to defendant's sanity without having qualified under this subdivision of this section as an intimate acquaintance, was harmless where the only evidence of defendant's insanity consisted of his behavior on the stand and of his incoherent and meaningless answers, all the witnesses testifying to his mental condition declaring him sane, without contradiction or conflict. *State v. Davis*, 60 M 426, 437, 438, 199 P 421.

Subd. 11Common Reputation

Where a blue-print made of a map of lands involved in a boundary dispute, which map had been made by order of the State Board of Land Commissioners, had become a part of the records and files of the board though it bore neither a certificate by the surveyor who made it nor a filing mark, the board having adopted it as a record and acted thereon as such for a long period of time, its admission in evidence as an exhibit was not error. In any event, it may fairly be said that this plat, when taken in conjunction with the minutes of the board and the testimony of the witnesses, constituted facts

as to the common reputation relative to the lines and boundaries of the lands involved. *Nemitz v. Reckards et al.*, 98 M 229, 240, 38 P 2d 980.

Subd. 12

Customs and Usages to be Pleaded

Where customs or usages relating to a particular locality or trade are relied upon, they must be pleaded by the party seeking to make them a basis for recovery or defense. *Lewis v. Aronow*, 77 M 348, 358, 251 P 146.

Operation in General

Evidence (of custom) is never competent when the contract is clear and explicit in its terms and the necessity for interpretation does not arise. Under these circumstances the intention of the parties is to be ascertained from the writing itself without resort to evidence. *Wheeler v. James*, 70 M 37, 45, 223 P 900.

Subd. 15

Collateral Facts Admissible, for What Purpose

Where testimony on an issue (ownership of chattels) is conflicting, evidence of collateral facts tending to show which of the statements of witnesses are the more credible is admissible (section 10529 and this section). *Henderson v. Campbell*, 95 M 180, 184, 26 P 2d 351.

Facts Which May be Proved Which Are Not Explicitly Set Out as Coming Within Any of the Above Subdivisions

Declarations Against Interest

In a daughter's action to revoke her father's will on the ground of his insane delusion that she had tried to poison him, a letter to plaintiff from defendant, her brother, the sole beneficiary under the will, explaining the reason the testator gave for disinheriting her, and her offered testimony that defendant stated to her in the presence of her attorney that testator had said that his reason was that she had

tried to poison him, were improperly excluded, they having been admissible as declarations against interest. *In re Estate of Redfern*, 64 M 49, 208 P 1072.

Evidence of Marital Relationship

In an action by a wife for the death of her husband, a prima facie marriage between them is established by evidence of persons who had known plaintiff and decedent from infancy, who were present when their marriage was announced, and who knew that they had always lived together as man and wife and acknowledged that relation. *Soyer v. Great Falls Water Co.*, 15 M 1, 5, 37 P 838.

In General

In a trial for murder there is no valid reason why a policeman may not testify as to his presence in the county attorney's office, and what he saw and heard there, when the accused persons were made to face a person who, immediately after hearing the shot that produced the killing, had met these persons running from the scene of the crime. *State v. Fisher*, 54 M 211, 215, 169 P 282.

Id. Where a man was shot and afterward, in a hospital, identified the accused as the man who did the shooting, his testimony is admissible as touching a matter in issue, though no foundation was laid for it as a dying declaration.

References

Cited or applied as section 3146, Code of Civil Procedure, in *State v. Dotson*, 26 M 305, 309, 67 P 938; *Riddell v. Peck-Williamson H. & V. Co.*, 27 M 44, 57, 69 P 241; *State v. Tighe*, 27 M 327, 337, 71 P 3; *Capell v. Fagan*, 30 M 507, 512, 77 P 55; as section 7887, Revised Codes, in *Conway v. Monidah Trust*, 47 M 269, 283, 132 P 26; *Parkham v. Chicago etc. Ry. Co.*, 57 M 492, 502, 189 P 227; *Cook et al. v. Northern Pac. Ry. Co.*, 61 M 573, 586, 203 P 512; *State v. Richardson*, 63 M 322, 336, 207 P 124; *Kurth et al. v. Le Jeune*, 83 M 100, 108, 269 P 408.

CHAPTER 156

JUDICIAL NOTICE OF FACTS

Section 10532. Certain facts of general notoriety assumed to be true—specification of such facts.

10532. Certain facts of general notoriety assumed to be true—specification of such facts. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States.

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all cases these courts may resort for their aid to appropriate books or documents of reference.

History: En. Sec. 625, p. 201, L. 1877; re-en. Sec. 625, 1st Div. Rev. Stat. 1879; re-en. Sec. 643, 1st Div. Comp. Stat. 1887; re-en. Sec. 3150, C. Civ. Proc. 1895; re-en. Sec. 7888, Rev. C. 1907; re-en. Sec. 10532, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1875.

Subd. 2

Whatever is Established by Law

This subdivision of this section provides that courts take judicial notice of "whatever is established by law." Section 4335 establishes and defines the boundaries of Missoula county and designates the city of Missoula as its county seat. The courts of this state will take judicial notice that Missoula is the county seat of Missoula county, and that it is located within its boundaries. There is no intimation contained in the record that the homicide occurred elsewhere than in Missoula county. Accordingly, venue was established beyond a reasonable doubt. *State v. Cates*, 97 M 173, 189, 33 P 2d 578.

Subd. 3

Acts of the Congress of the United States

Under this section, courts take judicial notice of the form and contents of the Third and Fourth Liberty bond issues and of Victory Loan bonds. *Grosfield v. First Nat. Bank*, 73 M 219, 231, 236 P 250.

Acts of the Executive Department

The rules and regulations as to the cutting of timber upon the public lands of the United States, as prescribed by the secretary of the interior under a law of congress, will be considered an act of the executive department of the government of which the courts will take judicial notice. *United States v. Williams*, 6 M 379, 387, 12 P 851.

Courts take judicial notice of executive orders of the federal government creating

the Fort Missoula military reservation. *State v. Tully*, 31 M 365, 383, 78 P 760.

Courts take judicial notice of the facts that the federal government did not take over and assume jurisdiction of the railroads until January 1, 1918, and that for injuries prior to that date it cannot be held responsible. *Stevens v. Hines et al*, 63 M 94, 107, 206 P 441.

Acts of the Governor of This State Calling an Election

The courts will take judicial notice of the contents of the proclamation of the governor calling an election, and of the political history of the state. *State ex rel. Breen v. Toole*, 32 M 4, 8, 79 P 403.

Acts of the Judicial Department of the U. S.

While the supreme court may take judicial notice of the action of a federal court in assuming jurisdiction over a case which originated in a state court, it does not follow that the supreme court must necessarily conclude that the federal court properly assumed jurisdiction. *Golden v. Northern Pacific Ry. Co.*, 39 M 435, 447, 104 P 549.

Acts of the Legislature of This State

Judicial notice will be taken of the fact that during a certain year a city was a municipal corporation existing under the laws of this state, and was the county seat of a certain county. *Drew v. City of Butte*, 44 M 124, 126, 119 P 279.

It is not necessary for the plaintiff, in an action to recover damages for injuries arising from a violation of the pure food and drug act, to refer to that act; under this section, the courts take judicial notice of the general and public domestic statutes, and they need not be specially pleaded. *Kelley v. John R. Daily Co.*, 56 M 63, 74, 181 P 326.

10532 subsec. 3
101 Mont. 312
53 P (2d) 1151

10532, subd. 3
202 P.(2d) 245

10532, subd. 8
202 P.(2d) 245

Subd. 8**Laws of Nature**

The court is authorized under this section to take judicial notice of the time of the moon's changes, and for the purpose of refreshing the memory of the court and jury, the almanac may be referred to. *State v. Slothower*, 56 M 230, 236, 182 P 270.

Facts Which the Court Will Not Take Judicial Notice of

The courts of this state will take judicial notice of such matters only as are enumerated in this section, and the statutes of sister states not being included, a complaint, brought under a statute of another state, which fails to plead such statute, is fatally defective. *McKnight v. Oregon Short Line R. R. Co.*, 33 M 40, 42, 82 P 661. See also *Ridpath v. Heller*, 46 M 586, 590, 129 P 1054.

The supreme court does not take judicial notice of the provisions of rules of district courts. *Bowen v. Webb*, 34 M 61, 65, 85 P 739.

A court will not take judicial notice of the holding of a local option election. *State v. O'Brien*, 35 M 482, 500, 90 P 514.

Judicial notice cannot be taken of the solvency of a litigant or the condition of his property. *State ex rel. Robinson v. Clements*, 37 M 96, 103, 94 P 837.

While courts may take judicial notice of the fact that destruction of the sight of one eye impairs the power of vision, they may not assume, without proof, that such destruction necessarily affects the sight of the other eye injuriously. *Gordon v. Northern Pacific Ry. Co.*, 39 M 571, 579, 104 P 679.

Judicial notice is not taken of the different classes of railroad tickets. *John v. Northern Pacific Ry. Co.*, 42 M 18, 56, 111 P 632.

The matters enumerated in this section of which courts take judicial notice cannot be enlarged or diminished by judicial construction. They cannot assume that an ore-crushing machine is dangerous. *Masich v. American Smelting & Refining Co.*, 44 M 36, 46, 118 P 764.

The natural attractiveness of metals for lightning is not one of the laws of nature of which courts may take judicial notice. *Wiggins v. Industrial Accident Board*, 54 M 335, 343, 170 P 9.

In passing upon the contention, unsupported by evidence, that the license fee exacted by Chapter 75, Laws of 1917, as amended, is in excess of the reasonable expense of regulation, the supreme court cannot take judicial notice of the number

of vehicles in the state, the amount payable for each one, the cost of administering the law, the net amount paid over to the counties or the cost of enforcing the Act. *State v. Pepper*, 70 M 596, 604, 226 P 1108.

Courts will not take judicial notice of the contents of pleadings in any action other than the one immediately before it. *State ex rel. Bacorn v. District Court*, 73 M 297, 304, 236 P 553.

In an action for the rescission of a land contract in which plaintiff claimed that defendant had included lands in his contract of sale which were owned by the Northern Pacific Railway Company as a right-of-way, held, that while the trial court could properly take judicial notice, under this section, that the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company, it could not take such notice that the federal grant to the company attached to any particular tract of land, or that a particular tract of land was public land at the time of the taking effect of the grant. *Lasby et al. v. Burgess*, 76 M 452, 455, 248 P 190.

Under this section, enumerating the matters of which courts may take judicial notice, which may not be enlarged upon (nor diminished) by judicial construction, judicial notice that at a certain time a political party had a national organization may not be taken, that not being one of the matters therein enumerated. *State ex rel. Foster et al. v. Mountjoy*, 83 M 162, 167, 271 P 446.

Courts may take judicial notice of only those matters enumerated in this section; hence, the supreme court, on appeal in an action calling in question the legality of the assessments of the property of a telegraph company, made under section 2143, Revised Codes, is without power to take such notice of the difference of the cost of construction of land and submarine cable lines, that matter not being one of those enumerated in the section. *Western Union T. Co. v. State Board, etc.*, 91 M 310, 325, 7 P 2d 551.

Operation and Effect in General

Courts cannot enlarge the provisions of this section, but are restricted by its terms. *McKnight v. Oregon Short Line R. R. Co.*, 33 M 40, 42, 82 P 662; *Bowen v. Webb*, 34 M 61, 65, 85 P 740; *John v. Northern Pacific Ry. Co.*, 42 M 18, 56, 111 P 632.

References

Cited or applied as section 643, First Division Compiled Statutes 1887, in *State v. Owsley*, 17 M 94, 42 P 105; as section 7888, Revised Codes, in *Parham v. Chi-*

cago, Milwaukee & St. Paul Ry. Co., 57 M 492, 502, 189 P 227; Fergus County v. Federal Reserve Bank, 75 M 582, 592, 244 P 883; Rohr v. Stanton Trust & Sav. Bk., 76 M 248, 251, 245 P 947; In re Kostohris' Estate, 96 M 226, 236, 29 P 2d 829; Commonwealth Public S. Co. v. Deer Lodge, 96 M 48, 68, 29 P 2d 667.

CHAPTER 157

WITNESSES

- Section 10533. Witness defined.
10534. All persons capable of perceptions and communication may be witnesses.
10535. Persons who cannot be witnesses.
10536. Persons in certain relations cannot be examined.
10537. Judge or juror may be witness.
10538. When an interpreter to be sworn.

10533. Witness defined. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

History: En. Sec. 3160, C. Civ. Proc. 1895; re-en. Sec. 7889, Rev. C. 1907; re-en. Sec. 10533, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1878.

10534. All persons capable of perceptions and communication may be witnesses. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section 10508.

History: En. Sec. 626, p. 202, L. 1877; re-en. Sec. 626, 1st Div. Rev. Stat. 1879; re-en. Sec. 647, 1st Div. Comp. Stat. 1887; re-en. Sec. 3161, C. Civ. Proc. 1895; re-en. Sec. 7890, Rev. C. 1907; re-en. Sec. 10534, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1879.

Operation and Effect

A Chinaman who, upon being tested as to his competency as a witness, stated that he could tell what he knew, and that what he would say would be the truth, but that he did not know the nature of an oath, was qualified to testify under this section. State v. Lu Sing, 34 M 31, 36, 85 P 521.

Where an oil and gas lease required the lessee to drill a well within a certain time to the depth of 2500 feet or until oil was discovered at a lesser depth, a tool dresser who had worked about the well for fifteen days until operations ceased was qualified to testify that then the depth reached was 2460 feet and that at that it was not producing oil, the establishment of such facts not requiring the testimony of an expert. Solberg v. Sunburst Oil & Gas Co. et al., 73 M 94, 107, 235 P 761.

References

Cited or applied as section 647, First Division Compiled Statutes 1887, in State v. Tipton, 15 M 74, 38 P 222; as section 3161, Code of Civil Procedure, in State v. Geddes, 22 M 68, 89, 55 P 919; as section 7890, Revised Codes, in State v. Berberick, 38 M 423, 444, 100 P 209; Wilcox v. Schissler, 55 M 246, 257, 175 P 889; State v. Pippi, 59 M 116, 124, 195 P 556; In re Wray's Estate, 93 M 525, 537, 19 P 2d 1051.

10535. Persons who cannot be witnesses. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.
2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

10535
Sub-sec. 3
71 P (2d) 891,
893
.....Mont.....

10535
Sub-sec. 4
71 P (2d) 891,
892
.....Mont.....

10535
Subsec. 3
87 P.(2d) 192

10535
113 P.(2d) 931

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Subs. 3
139 P.(2d) 236,
237

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to the facts of direct transactions or oral communications between the proposed witness and the deceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court that, without the testimony of the witness, injustice will be done.

4. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communications between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation, except when it appears to the court that without the testimony of the witness injustice will be done.

History: Ap. p. Secs. 319, 320, p. 110, Bannack Stat.; amd. Secs. 371, 372, p. 210, L. 1867; re-en. Secs. 445, 446, p. 125, Cod. Stat. 1871; amd. Secs. 627, 628, p. 202, L. 1877; amd. Secs. 627, 628, 1st Div. Rev. Stat. 1879; re-en. Secs. 648, 649, 1st Div. Comp. Stat. 1887; amd. Sec. 3162, C. Civ. Proc. 1895; amd. Sec. 1, p. 245, L. 1897; amd. Sec. 1, Ch. 46, L. 1937; Sec. 7891, Rev. C. 1907; amd. Sec. 1, Ch. 66, L. 1909; amd. Sec. 1, Ch. 41, L. 1913; amd. Sec. 1, Ch. 213, L. 1921; re-en. Sec. 10535, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1880.

Subd. 1

Defendant Who Has Confessed May Show That He Was of Unsound Mind

Before the confession of a defendant is admitted in evidence, he has a right to show what his mental condition was at the time the confession was made. He is entitled to show that he was of unsound mind, and, therefore, not a competent witness against himself, and that the confession should, consequently, be excluded. *State v. Berberick*, 38 M 423, 445, 100 P 209.

Subd. 2

When a Child is Competent

A boy fifteen years of age, called as a witness, who answers that he understood what he had done when he took the oath, that he knows the difference between truth and falsehood, that the truth was that which was so, and not that which was not so, and that he knew that if he did not tell the truth he would be punished, sufficiently qualifies himself to testify in a criminal case. *State v. Cadotte*, 17 M 315, 316, 42 P 857.

Subd. 3

"Claim and Demand"

The terms "claim" and "demand" are used in this section in their broad, com-

prehensive sense, and apply to all sorts of causes of action against the estates of dead men, whether for money claims or for property which, but for the establishment of the claim or demand, would belong to the estate. *Delmoe v. Long*, 35 M 139, 152, 88 P 778.

Operation in General

Where a note and mortgage were obtained by the fraud of the plaintiff in an action to foreclose the mortgage, and of such plaintiff's associate, since deceased, the defendant is competent, in an action to foreclose the mortgage, to testify under this section as to transactions had by him with such associate. *Wilcox v. Schissler*, 55 M 246, 256, 175 P 889.

Under this section as amended, an attorney is competent to testify in an action against an administrator to recover fees for services rendered the estate as to transactions between himself and the decedent. *Harwood v. Scott*, 57 M 83, 186 P 693.

Under subdivision 3 of this section, providing that parties, or assignors of parties, to an action against an executor or administrator upon a claim against the estate of a deceased person, cannot be witnesses "as to the facts of direct transactions or oral communications between the proposed witness and the deceased," unless it appears to the court that without the testimony of the witness, injustice will be done, held, that the discretion lodged in the trial court to admit or reject testimony of the character of the above, was not abused in admitting the testimony of claimant against an estate as to transactions and oral communications had between him and decedent with relation to the contract upon which his claim was based, it being apparent that without such testimony plaintiff could not have established his claim, testimony of other disinterested

witness—corroborative of that of plaintiff—lacking in sufficient definiteness to prove it. *Wunderlich v. Holt*, 86 M 260, 270, 283 P 423.

Under this section, subdivision 3, the district court should not permit a party to an action against an executor or administrator to testify to direct transactions or oral communications between him and the deceased until sufficient other testimony is admitted in support of plaintiff's claim to warrant the court in exercising its discretion in favor of the questionable testimony to avoid doing of injustice. *Langston et al. v. Currie et al.*, 95 M 57, 70, 26 P 2d 160.

Id. In an action against an administrator and the heirs of decedent to have them declared trustees in plaintiffs' favor under an alleged oral agreement entered into by decedent with plaintiffs to make them his heirs in consideration of certain services to be rendered by them, held that the trial court did not abuse its discretion in rejecting as inadmissible, under this section, testimony relating to plaintiffs' direct transactions or oral communications had with decedent.

Id. In an action against an estate to compel enforcement of an oral contract alleged to have been made by decedent with plaintiffs to make them his heirs, the administrator was a proper, if not a necessary, party defendant, and having been made so the action was governed by this section, which makes a party to an action against an administrator an incompetent witness as to evidence of direct transactions or oral communications had between him and decedent.

Under this section and subdivision, the testimony of a party to an action against the executor of an estate as to direct transactions or oral communications between himself and the deceased should not be admitted until a foundation has been laid therefor in the shape of sufficient other testimony to warrant the court, in the exercise of its discretion, to rule in favor of its admission to prevent injustice being done. *Pineus v. Davis*, 95 M 375, 382 et seq., 26 P 2d 986.

Id. In an action against the estate of a decedent to recover on claims arising out of partnership dealings between deceased and plaintiff and rejected by the executor, admission of testimony relative to direct transactions or oral communications between the parties held not abuse of discretion as in violation of the preceding rule.

In an action against an administrator to foreclose a real estate mortgage of his decedent, apparently barred by the stat-

ute of limitations, testimony of plaintiff as to the receipt of letters, relied upon as an acknowledgment of the mortgage indebtedness, from decedent during his lifetime, held not incompetent as falling within the prohibition of this section, making testimony as to direct transactions or oral communications with deceased inadmissible. *Leffek v. Luedeman*, 95 M 457, 462, 27 P 2d 511.

Id. The testimony of an administrator, defendant in an action to foreclose a mortgage executed by his decedent, that, in his opinion, based on his knowledge of decedent's handwriting, the latter's signature on letters introduced by plaintiff for the purpose of showing that the writer had acknowledged the indebtedness nine years after maturity of the mortgage notes was genuine, held properly admitted, as against the objection that under this section it was inadmissible.

Purpose

The evident purpose of subdivision 3 of this section was to declare the plaintiff in the action an incompetent witness, unless the defendant waives the incompetency, which he may do, as provided in the first exception, or unless, under the second exception, it appears to the court that if the witness is not allowed to testify, recovery cannot be had upon a cause of action which is obviously meritorious. *Roy v. King's Estate*, 55 M 567, 573, 179 P 821.

The two-fold purpose of this section, subdivision 3, prohibiting a party to an action against an executor or administrator from testifying as to direct transactions or oral communications between the witness and the deceased, is to prevent such party from gaining an undue advantage over the defendant, and to remove the temptation to commit perjury by testifying to matters which in all probability cannot be denied by a living person. *Leffek v. Luedeman*, 95 M 457, 462, 27 P 2d 511.

When Admissible to Avoid Injustice

In an action against an administrator brought under section 9076, for damages for the wrongful killing of plaintiff's husband by defendant's intestate, where plaintiff was the only surviving witness and her testimony was indispensable to recovery, the court, in its discretion properly permitted her to testify under the exception to the general rule (this section) making such testimony inadmissible, the exception providing that where by its exclusion injustice will be done the testimony may be admitted. *Anderson et al. v. Wirkman*, 67 M 176, 180, 215 P 224.

Subd. 4Admissibility of Declaration of Deceased Agent of a Corporation Discretionary With Court

Under this section, subdivision 4, determination of the question whether testimony with relation to acts or conversations had with a deceased agent of a corporation is admissible or not rests in the discretion of the trial court. *Mosback v. Smith Brothers Sheep Co.*, 65 M 42, 51, 210 P 910.

Held, under this section and subdivision, that evidence of threats made by the agent of a corporation (since deceased) for the purpose of procuring defendant to execute a promissory note and a mortgage securing it was properly admitted, its admissibility having been addressed to the discretion of the trial court where without such evidence defendant could not have proven or made out a prima facie case of menace. *Averill Machinery Co. v. Taylor et al.*, 70 M 70, 80, 223 P 918.

Purpose

The purpose of the legislature in enacting subdivision 4 of this section was to declare a party dealing with an agent incompetent to testify as to any transaction or conversation had with the agent, in any action or proceeding against the principal, the effect of which would be to render the principal liable by reason of the particular act or declaration of his agent. *Wilcox v. Schissler*, 55 M 246, 256, 175 P 889.

References

Cited or applied as Laws of 1897, p. 245, before amendment, in *Dorais v. Doll*, 33 M 314, 319, 83 P 884; as section 3162, Code of Civil Procedure, before amendment, in *Harrington v. Butte & Boston Min. Co.*, 33 M 330, 334, 83 P 467; *State v. Lu Sing*, 34 M 31, 36, 85 P 521; *Wilson v. Wilson et al.*, 64 M 533, 544, 210 P 896; *Arnold et al. v. Genzberger et al.*, 96 M 358, 382, 31 P 2d 396.

10536. Persons in certain relations cannot be examined. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

6. Any person engaged in teaching psychology in any school, or who acting as such is engaged in the study and observation of child mentality, shall not without the consent of the parent or guardian of such child being so taught or observed testify in any civil action as to any information so obtained.

10536
New matter
"Reporters
Confidence
Act"
S.L. '43 c. 195
p. 368

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178 P. (2) 863

10536
Sub. 1
187 P. (2d)
1020

History: Ap. p. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931.

Subd. 2

Extent of Privilege

The rule declared by subdivision 2 of this section applies where one seeks advice upon communications made to an attorney, as such, even though the advice sought is for the purpose of aiding the client to evade his creditors. *Davis v. Morgan*, 19 M 141, 145, 47 P 793; *Smith v. Caldwell*, 22 M 331, 338, 56 P 590.

Information incidentally obtained by one while acting merely as a scrivener in drawing up a deed, though he is also an attorney, where advice had not been asked of him and he gave none, is not privileged. *Smith v. Caldwell*, 22 M 331, 338, 56 P 590.

Information obtained by an attorney from the defendant, in an action brought by a trustee in bankruptcy to recover the amount of an alleged preference, who, while introducing to the attorney the person who made the preference, and who was then in search of legal advice, made certain statements in relation to the business affairs of the person so introduced, is not privileged under subdivision 2, and the supreme court, upon review, is not bound to accept the assertion of the attorney that "they called upon me for the purpose of obtaining my services as an attorney-at-law" as conclusive. *Mackel v. Bartlett*, 33 M 123, 129, 82 P 795.

Under the rule that communications made to an attorney while acting for both parties do not fall within the prohibition of subdivision 2 of this section, when a controversy arises as to the matter about which he has thus been the common adviser, a statement by an attorney as to what transpired between plaintiff and defendant touching a settlement of their partnership affairs while he was acting as attorney for the firm was properly admitted. *Lenahan v. Casey*, 46 M 367, 378, 128 P 601.

An attorney may not, under the provisions of this section, relating to privileged communications, testify to matters of which he could have gained knowledge only through conferences with his client, in a proceeding between that client and another arising out of such matters, in which

he was no longer his former client's attorney. *August v. Burns*, 79 M 198, 216, 255 P 737.

Id. An attorney is not prohibited by this section from disclosing a statement made by his client with the express intention that it be communicated to another; hence the former attorney of defendant in a proceeding looking to the annulment of letters of guardianship was properly permitted to produce in court his office copy of a letter to plaintiff to show the purpose for which plaintiff's consent to the appointment of the guardian was desired.

Where in an action by father against son to establish a resulting trust in real property, the parties after transfer of the property by the former to the latter, had occasion to consult an attorney whose services were paid for by plaintiff, relative to securing payment of rentals from the tenant, admission of testimony by the attorney that the trend of the conversation in his office was that the father was the owner and the son his agent, was not error as violative of the provisions of the statute relative to privileged communications. *McQuay v. McQuay*, 81 M 311, 321, 263 P 683.

Id. Upon the assumption that the attorney, referred to in the foregoing paragraph, was the attorney for both parties, communications made to him while acting as such do not come within the prohibition of the statute when a controversy arises as to a matter about which he was the common adviser.

For a communication from a client to his attorney to be privileged, within the meaning of subdivision 2, section 1, of this section, it must be of a confidential nature, at least regarded so by the client, and must relate to a matter which in its nature is private and properly the subject of confidential disclosure, as well as to the subject-matter of the employment, and be made to the attorney for the purpose of enabling him properly to understand the matter in which he is employed. *Piersky v. Hocking et al.*, 88 M 358, 374, 292 P 725.

Id. Under the preceding rule, held, that where the attorney for plaintiff in an action to set aside an alleged fraudulent deed had theretofore represented defendant in a matter relating to a right-of-way over the land in question, and one in no way connected with the suit in equity, and the attorney when interviewing defendant concerning plaintiff's unpaid claim against him advised defendant that he was plaintiff's attorney, statements made to him by defendant as to plaintiff's demand were not privileged.

Timely Objection Must be Made or
Elso Privilege Will be Waived

Appellant argues that in admitting and considering evidence of admissions made by S. B. W., and in permitting one W. B. L., an attorney, to testify to a conversation with him, the court disregarded the preceding section and this section. The point is without merit, and we dispose of it simply by saying that the rule is elementary that a court cannot be put in error where timely objection is not made either to the competency of the evidence or of the witness, as was the case here. *In re Valley Center Drain District*, 64 M 533, 544, 210 P 896.

Subd. 3

Extent of Privilege

This section provides that, neither husband nor wife, during marriage or after, can testify, without the consent of the other, to any communication by one to the other during the marriage. The marriage between defendant, charged with burglary, and his wife was annulled after commission of the offense and before trial. Before annulment defendant sent her some of the articles of jewelry stolen, as a Christmas gift, inclosing a card bearing the words "May from Bernard." The wife was permitted to testify for the state that she received the articles and card. Held, that her testimony as to the receipt of the articles was not a communication within the meaning of the statute, and that as to the card, considering it as a communication, its admission was non-prejudicial under the facts in the case. *State v. Dixon*, 80 M 181, 203, 260 P 138.

10537. Judge or juror may be witness. The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

History: En. Sec. 378, p. 211, L. 1867; re-en. Sec. 452, p. 126, Cod. Stat. 1871; re-en. Sec. 631, p. 204, L. 1877; re-en. Sec. 631, 1st Div. Rev. Stat. 1879; re-en. Sec.

Subd. 4

Extent of Privilege

Where plaintiff on cross-examination admitted that a certain physician had attended and treated her for the injuries complained of, without detailing any conversation with him or telling of the character or extent of his treatment, it was proper to refuse to permit defendant to examine the physician as to plaintiff's condition at the time he attended her. *May v. Northern Pacific Ry. Co.*, 32 M 522, 538, 81 P 328.

To render statements made to a physician by his patient privileged under this section, they must have related to the particular injury or disease and been necessary to enable the former to properly prescribe for the latter or act in his professional capacity. *Garrett v. City of Butte*, 69 M 214, 219, 221 P 537.

Id. Held, under the above rule, that a statement made to a staff physician at a hospital by plaintiff in an action for personal injuries sustained by a fall on an icy sidewalk immediately after the accident, that she fell at a place different from the one alleged in the complaint, was not privileged, and that rejection of an offer of proof to that effect was reversible error.

References

Cited or applied as section 3163, Code of Civil Procedure, in *State v. Sloan*, 22 M 293, 298, 56 P 364; *State v. Lu Sing*, 34 M 31, 36, 85 P 521; *Simonsen v. Barth et al.*, 64 M 95, 105, 208 P 938; *State v. Newman*, 66 M 180, 196, 213 P 805; *State v. Yegen*, 74 M 126, 130, 238 P 603.

652, 1st Div. Comp. Stat. 1887; re-en. Sec. 3164, C. Civ. Proc. 1895; re-en. Sec. 7893, Rev. C. 1907; re-en. Sec. 10537, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1883.

10538. When an interpreter to be sworn. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of contempt.

History: En. Sec. 379, p. 211, L. 1867; amd. Sec. 453, p. 126, Cod. Stat. 1871; re-en. Sec. 632, p. 204, L. 1877; re-en. Sec. 632, 1st Div. Rev. Stat. 1879; re-en. Sec.

653, 1st Div. Comp. Stat. 1887; amd. Sec. 3165, C. Civ. Proc. 1895; re-en. Sec. 7894, Rev. C. 1907; re-en. Sec. 10538, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1884.

Operation and Effect

Determination of the question whether an interpreter is necessary for a particular witness lies within the discretion of the trial court, and its conclusion is not subject to review except for a manifest and gross abuse of discretion. Abuse of discretion in appointing an interpreter in a criminal case will not justify setting aside a conviction, unless defendant ap-

parently was prejudiced thereby. *State v. Inich*, 55 M 1, 10, 173 P 230.

Id. Where a foreign-born witness understood and spoke with reasonable ease the English language of the street and that used in ordinary business, but encountered difficulty and embarrassment when subjected to examination on the witness stand, the appointment of an interpreter was not a manifest or gross abuse of discretion.

CHAPTER 158

WRITINGS—PUBLIC WRITINGS

- Section 10539. Writings, public and private.
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10539. Writings, public and private. Writings are of two kinds:

1. Public; and,
2. Private.

History: En. Sec. 3170, C. Civ. Proc. 1895; re-en. Sec. 7895, Rev. C. 1907; re-en. Sec. 10539, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1887.

10540. Public writings defined. Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial,

and executive, whether of this state, of the United States, of a sister state, or of a foreign country;

2. Public records, kept in this state, of private writings.

History: En. Sec. 3171, C. Civ. Proc. 1895; re-en. Sec. 7896, Rev. C. 1907; re-en. Sec. 10540, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1888.

Operation and Effect

Held in a prosecution against the owner of a private bank for receiving deposits at a time when the bank was insolvent, that reports made to the state bank examiner by his deputies as to its financial conditions, not verified or signed, were not admissible in evidence as public writings in the absence of proof of their contents. *State v. Yegen*, 74 M 126, 129, 238 P 603.

Id. A public officer cannot by incorporating in a report something the law does not require to be incorporated there-

in, make the writing admissible in evidence as a public writing.

A certified copy of portions of the minutes of the State Board of Land Commissioners relating to lands involved in a boundary action and reciting, in effect, that the federal government survey thereof had been incorrectly made, that the board had ordered a resurvey by the state engineer, that adjustments were made to correct acreage inaccuracies in outstanding land contracts, etc., held admissible as an exhibit, under this section and section 10543, as copies of public records. *Nemitz v. Reckards et al.*, 98 M 229, 239, 38 P 2d 980.

References

State v. Ray, 88 M 436, 442, 294 P 368.

10541. All others private. All other writings are private.

History: En. Sec. 3172, C. Civ. Proc. 1895; re-en. Sec. 7897, Rev. C. 1907; re-en. Sec. 10541, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1889.

References

State v. Yegen, 74 M 126, 129, 238 P 603.

10542. Every citizen entitled to inspect and copy public writings.

Every citizen has a right to inspect and take a copy of any public writings of this state, except as otherwise expressly provided by statute.

History: En. Sec. 3180, C. Civ. Proc. 1895; re-en. Sec. 7898, Rev. C. 1907; re-en. Sec. 10542, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1892.

References

In *re Wehr's Estate*, 96 M 245, 253, 29 P 2d 836.

10543. Public officer bound to give copies. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing.

History: En. Sec. 3181, C. Civ. Proc. 1895; re-en. Sec. 7899, Rev. C. 1907; re-en. Sec. 10543, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1893.

Operation and Effect

A certified copy of portions of the minutes of the State Board of Land Commissioners relating to lands involved in a boundary action and reciting, in effect, that the federal government survey thereof had been incorrectly made, that the

board had ordered a resurvey by the state engineer, that adjustments were made to correct acreage inaccuracies in outstanding land contracts, etc., held admissible as an exhibit, under section 10540 and this section, as copies of public records. *Nemitz v. Reckards et al.*, 98 M 229, 239, 38 P 2d 980.

References

State v. Rouleau et al., 68 M 529, 541, 219 P 1096.

10544. Four kinds of public writings. Public writings are divided into four classes:

1. Laws.
2. Judicial records.
3. Other official documents.
4. Public records, kept in this state, of private writings.

History: En. Sec. 3182, C. Civ. Proc. 1895; re-en. Sec. 7900, Rev. C. 1907; re-en. Sec. 10544, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1894.

References

State v. Yegen, 74 M 126, 129, 238 P 603; In re Wehr's Estate, 96 M 245, 253, 29 P 2d 836.

10545. Laws, written or unwritten. Laws, whether organic or ordinary, are either written or unwritten.

History: En. Sec. 3183, C. Civ. Proc. 1895; re-en. Sec. 7901, Rev. C. 1907; re-en. Sec. 10545, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1895.

References

State ex rel. La Point v. District Court, 69 M 29, 34, 220 P 88.

10546. Written law defined. A written law is that which is promulgated in writing, and of which a record is in existence.

History: En. Sec. 3184, C. Civ. Proc. 1895; re-en. Sec. 7902, Rev. C. 1907; re-en. Sec. 10546, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1896.

10547. Constitution and statutes. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this state is therefore contained in its constitution and statutes, and in the constitution and statutes of the United States.

History: En. Sec. 3185, C. Civ. Proc. 1895; re-en. Sec. 7903, Rev. C. 1907; re-en. Sec. 10547, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1897.

10548. Public and private statutes defined. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

History: En. Sec. 3186, C. Civ. Proc. 1895; re-en. Sec. 7904, Rev. C. 1907; re-en. Sec. 10548, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1898.

10549. Unwritten law defined. Unwritten law is the law not promulgated and recorded, as mentioned in section 10546, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and treatises of learned men.

10549
165 P. 2d 795

History: En. Sec. 3187, C. Civ. Proc. 1895; re-en. Sec. 7905, Rev. C. 1907; re-en. Sec. 10549, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1899.

References

State ex rel. La Point v. District Court, 69 M 29, 34, 220 P 88.

10550. Books containing laws presumed to be correct. Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, code, or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country as evidence of the written law thereof, are admissible in this state as evidence of such law.

History: En. Sec. 370, p. 120, Bannack Stat.; re-en. Sec. 428, p. 221, L. 1867; re-en. Sec. 502, p. 137, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 12, p. 12, L. 1881; re-en. Sec. 646, 1st Div. Comp. Stat. 1887; en. Sec. 3188, C. Civ. Proc. 1895; re-en. Sec. 7906, Rev. C. 1907; re-en. Sec. 10550, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1900.

Operation and Effect

Proof of the written law of another state must be made in compliance with the methods prescribed in this section and the next succeeding section. Ridpath v. Heller, 46 M 586, 590, 129 P 1054.

10551. Evidence of foreign law or public writings. A copy of the written law or other public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such law or writing.

History: En. Sec. 3189, C. Civ. Proc. 1895; re-en. Sec. 7907, Rev. C. 1907; re-en. Sec. 10551, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1901.

same as the law of this state on the subject. Harvey E. Mack Co. v. Ryan, 80 M 524, 532, 261 P 283.

References

Cited or applied as section 7907, Revised Codes, in Ridpath v. Heller, 46 M 586, 590, 129 P 1054.

Operation and Effect

Where a party relies upon a law of a foreign state he must plead and prove it; if not pleaded it is presumed to be the

10552. Other evidence of laws of other states. The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state or country, or proved to be commonly admitted in such courts.

History: En. Sec. 3190, C. Civ. Proc. 1895; re-en. Sec. 7908, Rev. C. 1907; re-en. Sec. 10552, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1902.

timony of witnesses skilled in the subject. Ridpath v. Heller, 46 M 586, 590, 129 P 1054.

References

Cited or applied as section 7908, Revised Codes, in Buhler v. Loftus, 53 M 546, 565, 165 P 601; Harvey E. Mack Co. v. Ryan, 80 M 524, 532, 261 P 283.

Operation and Effect

The unwritten law of a sister state may be proved by the published reports of the decisions of its courts, or by the oral tes-

10553. Recitals in statutes—how far evidence. The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

History: En. Sec. 3191, C. Civ. Proc. 1895; re-en. Sec. 7909, Rev. C. 1907; re-en. Sec. 10553, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1903.

10554. Judicial record defined. A judicial record is the record of official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

History: En. Sec. 3192, C. Civ. Proc. 1895; re-en. Sec. 7910, Rev. C. 1907; re-en. Sec. 10554, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1904.

10555. Record—how authenticated as evidence. A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

History: Ap. p. Sec. 366, p. 120, Ban-nack Stat.; re-en. Sec. 424, p. 221, L. 1887; re-en. Sec. 498, p. 136, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 12, p. 12, L. 1881; re-en. Sec. 645, 1st Div. Comp. Stat. 1887; en. Sec. 3193, C. Civ. Proc. 1895; re-en. Sec. 7911, Rev. C. 1907; re-en. Sec. 10555, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1905.

Effect of Record of Sister State

The effect of a judicial record of a sister state, when proven, is the same in Montana as in the state where it was made, and a certified copy thereof is admissible in evidence in the courts of this state. Quickenden v. Hulbert et al., 83 M 501, 509, 272 P 994.

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165 P. 2d 795

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51 P (2d) 648

10555
124 P. (2d) 576

"In Due Form"

The words "in due form," as used in this section, mean the form prescribed by the law or practice of the state from which the record comes. *Adams v. Stenehjelm*, 50 M 232, 236, 146 P 469.

Id. Whether the attestation by a clerk of court of another state to one of its judicial records is in due form must be determined from the certificate of the judge of such court, since the courts of this state do not take judicial notice of the statute laws or practice of a foreign state.

Id. It is for the judge of that state from which the record came to determine whether the attestation of the clerk is in due form, and to evidence his conclusion by his certificate, and it is to his certificate alone that the court of this state must look to ascertain whether what purports to be a certificate by the clerk is such under the laws of the state where it was made.

Id. A copy of a judgment-roll of a court of another state, the certificate of attestation to which was to the effect that "said certificate of said clerk is duly authorized by law to be issued by such clerk, and full faith and credit are due to all his official acts as such," instead of that "the attestation is in due form," as required by this section, was inadmissible in evidence.

What Must be Established to be Entitled to Full Faith and Credit

Before the courts of this state can give faith and credit to a judgment of a for-

foreign state, the evidence offered must disclose that it is valid and capable of enforcement by final process; and in an action to recover upon such a judgment, failure of plaintiff to show that it was entered in the court of its rendition was a failure to prove a judgment capable of enforcement. *Adams v. Stenehjelm*, 50 M 232, 238, 146 P 469.

Under article IV, section 1 of the federal constitution, a judicial record of another state, proven by a copy thereof certified as required by this section, is entitled to full faith and credit in the courts of this state. *State v. District Court*, 83 M 511, 522, 273 P 638.

Who Shall Determine Whether a Record is Entitled to Full Faith and Credit

Whether a record of another state is entitled to full faith and credit in this state is a question to be determined by the court in which it is offered in evidence, and not by the judge of the court from which it comes. *Adams v. Stenehjelm*, 50 M 232, 238, 146 P 469.

References

Cited or applied as section 7911, Revised Codes, in *Buhler v. Loftus*, 53 M 546, 560, 165 P 601.

NOTE.—See also federal statutes on authentication of records, p. 48, volume I, Political Code.

10556. Record of a foreign country—how authenticated. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate, that the person making the attestation is the clerk of the court or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country.

History: Ap. p. Sec. 368, p. 120, *Bannack Stat.*, re-en. Sec. 426, p. 221, L. 1867; re-en. Sec. 500, p. 137, *Cod. Stat.* 1871; rep. Sec. 674, p. 215, L. 1877; en. Sec. 3194, *C. Civ. Proc.* 1895; re-en. Sec. 7912, *Rev. C.* 1907; re-en. Sec. 10556, *R. C. M.* 1921. *Cal. C. Civ. Proc. Sec.* 1906.

Operation and Effect

A duly authenticated court record of another country is admissible in evidence as a public writing under this section and section 10557. In *re Wehr's Estate*, 96 M 245, 253, 29 P 2d 836.

10557. Copy of a foreign record—when evidence. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

History: En. Sec. 370, p. 120, Bannack Stat.; re-en. Sec. 427, p. 221, L. 1867; re-en. Sec. 501, p. 137, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 3195, C. Civ. Proc. 1895; re-en. Sec. 7913, Rev. C. 1907; re-en. Sec. 10557, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1907.

Operation and Effect

A duly authenticated court record of another country is admissible in evidence as a public writing under section 10556 and this section. In *re Wehr's Estate*, 96 M 245, 253, 29 P 2d 836.

10558. Effect of a judgment or final order upon rights in various cases. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title, and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

History: En. Sec. 3196, C. Civ. Proc. 1895; re-en. Sec. 7914, Rev. C. 1907; re-en. Sec. 10558, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1908.

Effect of Judgment or Order in General

A judgment in a prior action, which adjudicated the ultimate rights of the parties in the subject in controversy, meets the requirements of this section, and was erroneously rejected on the hearing of an order to show cause why an injunction should not issue to restrain defendant from operating a certain mine pending a suit for an interest therein. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 26 M 193, 207, 66 P 943.

When a final judgment has once been rendered, it cannot be set aside by the court which has rendered it, except upon motion for a new trial or some other method authorized by statute, and, unless void upon its face, it is conclusive as to the matter adjudged upon the parties and their successors. *State ex rel. Working v. District Court*, 50 M 435, 437, 147 P 614.

A judgment which recited that, as shown by the evidence, it was barred by sub-

division 3 of section 9031, being upon the merits, was conclusive on that point, and, in the absence of a timely appeal, became final, and constituted a bar to another action on the same cause. *Peterson v. City of Butte*, 52 M 13, 15, 155 P 265.

Id. Where a judgment is rendered on the merits, and not thereafter reversed, modified, or set aside, it is *res judicata* as to the cause of action, without regard to whether it was right or wrong.

Under this section, a person acquiring title to property during the pendency of an action affecting it, is concluded by the judgment if he has notice of the pendency of the action. (*See State ex rel. Thelen v. District Court*, 93 M 149, 17 P 2d 57.) *Griffiths v. Thrasher*, 95 M 238, 246, 26 P 2d 983.

Under this section, which provides that a judgment is conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, if they have notice, actual or constructive, held, in an action to quiet title secured through a decree of foreclosure in a federal court, that defendant's claim that when he acquired his interest he had

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100 Mont. 523
50 P (2d) 865

10558
89 P. (2d) 1033

10558
134 P. (2d) 736

no knowledge of the action, was not meritorious, where a *lis pendens* had been filed in due form on the day the foreclosure action was commenced, thus imparting constructive notice to him and other defendants claiming under him. *Thomson v. Nygaard*, 98 M 529, 539, 41 P 2d 1.

General Rule Applicable to a Decree of Adoption

The rule that a judgment valid on its face is not subject to collateral attack based upon considerations dehors the record is especially applicable to a decree of adoption. In *re Pepin's Estate*, 53 M 240, 247, 163 P 104.

Judgments Against Administrators and Executors

A judgment against an executor or administrator upon a claim against the estate establishes the claim to be paid in due course of administration. In *re Smith's Estate*, 60 M 276, 296, 199 P 696.

Id. A judgment against an executor or administrator of an estate is in effect a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees or creditors, as privies are foreclosed by it on the merits of the claim.

Must Be Party to Action

One not a party to a judgment is not bound thereby. *Conrow v. Huffine*, 48 M 437, 447, 138 P 1094.

Quaere: Has the broad holding in *Botkin v. Kleinschmidt*, 21 M 1, 52 P 563, that a surety on a guardian's bond is concluded by the settlement of the account of the guardian even though the surety was not a party to the proceeding and had no notice thereof, been abrogated by this section, declaring as to whom judgments or orders are conclusive?

10559. Effect of other judicial orders—when conclusive. Other judicial orders of a court or judge of this state, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title, and in the same capacity.

History: En. Sec. 3197, C. Civ. Proc. 1895; re-en. Sec. 7915, Rev. C. 1907; re-en. Sec. 10559, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1909.

10560. Where parties are to be deemed the same. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

When Judgment in Prior Action Not Res Judicata in Subsequent One

Under this section, a judgment in respect to the matters directly adjudicated is conclusive between the parties and their successors in interest by title subsequent to the commencement of the action in which rendered; held, that where defendant in an action to quiet title (one in *personam* or *quasi in rem*), was not a party to a prior action to set aside a mortgage on the same property on the ground of fraud, and acquired his interest therein long before the defendant in the former parted with title or interest in the land, contention that judgment in the former suit was *res judicata* and binding on defendant in the second suit has no merit. *Teisinger v. Hardy*, 86 M 180, 190, 282 P 1050.

References

Cited or applied as section 3196, Code of Civil Procedure, in *State ex rel. Boston & M. Co. v. District Court*, 30 M 96, 110, 75 P 956; *Spencer v. Spencer*, 31 M 631, 637, 79 P 320; *State ex rel. Pool v. District Court*, 34 M 258, 264, 86 P 798; *Glass v. Basin & Bay State Min. Co.*, 35 M 567, 573, 90 P 753; as section 7914, Revised Codes, in *Sloan v. Byers*, 37 M 503, 514, 97 P 855; *Dunne v. Yund*, 52 M 24, 34, 155 P 273; *Sweeney v. City of Butte*, 64 M 230, 208 P 943; *Independent M. & C. Co. v. Aetna L. I. Co.*, 68 M 114, 159, 216 P 1109; *Springhorn v. Dirks et al.*, 72 M 121, 129, 231 P 912; *Hoppin v. Long*, 74 M 558, 578, 241 P 636; *Quickenden v. Hulbert et al.*, 83 M 501, 509, 272 P 994; *Sunburst Oil & Refining Co. v. Callender*, 84 M 178, 187, 274 P 834; *Gans & Klein Invest. Co. v. Sanford et al.*, 91 M 512, 521, 2 P 2d 808; *State ex rel. Thelen v. District Court*, 93 M 149, 159, 17 P 2d 57; *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 401, 30 P 2d 815; In *re Murphy's Estate*, 99 M 114, 43 P 2d 233.

History: En. Sec. 3198, C. Civ. Proc. 1895; re-en. Sec. 7916, Rev. C. 1907; re-en. Sec. 10560, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1910.

References

Gans & Klein Invest. Co. v. Sanford et al., 91 M 512, 521, 2 P 2d 808.

10561. What deemed adjudged in a judgment. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

History: En. Sec. 3199, C. Civ. Proc. 1895; re-en. Sec. 7917, Rev. C. 1907; re-en. Sec. 10561, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1911.

Last Decree Controlling

While a decree in a water right suit is res judicata as to the parties to the action in which rendered, where subsequently the matter in issue is relitigated and re-adjudicated, the last decree controls, determines the rights of the parties and cannot be collaterally impeached by showing the first. Gans & Klein Invest. Co. v. Sanford et al., 91 M 512, 521, 2 P 2d 808.

Operation and Effect

A judgment in a prior action, which adjudicated the ultimate right of the parties in the subject in controversy, meets the requirements of this section, and was erroneously rejected on the hearing of an order to show cause why an injunction should not issue to restrain defendant from operating a certain mine pending a suit for an interest therein. Wetzstein v. Boston & M. C. C. & S. M. Co., 26 M 193, 207, 66 P 943.

As between the parties to an action, the judgment is an adjudication, not merely of the conclusions expressed, but of everything necessarily included in them. Lyon v. United States F. & G. Co., 48 M 591, 603, 140 P 86.

An adjudication is final and conclusive not only as to the matter actually determined, but as to every matter which the parties might have litigated and have decided as an incident to, or essentially connected with, the subject-matter of the litigation. State v. District Court et al., 75 M 122, 126, 242 P 421.

Id. Mandamus being an action at law, judgment therein is conclusive of all of

relator's rights properly involved therein; hence inclusion of a clause in the decree that it was given without prejudice to his right to recover the damages sustained by him on account of the proceeding was surplusage. See also Solberg v. Sunburst Oil & Gas Co., 76 M 254, 265, 246 P 168.

In the absence of any evidence in the record on appeal in a chattel mortgage foreclosure suit in which the defense was res adjudicata, the supreme court in determining what was adjudicated in the former action is limited to what appears on the face of the judgment relied upon; in such a case the burden of showing any contrary facts affecting the scope of the judgment resting upon defendant. Stock-growers' Finance Corp. v. Nett, 91 M 334, 340, 7 P 2d 540.

Rights of Parties Defendant in Water Rights Suit, When Not Adjudicated

Where the rights of the parties defendant in a water-right suit are not, as between themselves, presented to the court by the pleadings for determination, the decree will not estop them from having such rights determined in a subsequent case. Sloan v. Byers, 37 M 503, 514, 97 P 855.

References

Cited or applied as section 7917, Revised Codes, in Bennett v. Quinlan, 47 M 247, 252, 131 P 1067; Peterson v. City of Butte, 52 M 13, 15, 155 P 265; Dunne v. Yund, 52 M 24, 34, 155 P 273; In re Smith's Estate, 60 M 276, 297, 199 P 696; Wallace et al. v. Goldberg et al., 72 M 234, 241, 231 P 56; Solberg v. Sunburst Oil & Gas Co. et al., 73 M 94, 102, 235 P 761; Hoppin v. Long, 74 M 558, 584, 241 P 636; Galiger et al. v. McNulty et al., 80 M 339, 352, 260 P 401.

10562. Where sureties are bound, principal is also. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defense.

History: En. Sec. 3200, C. Civ. Proc. 1895; re-en. Sec. 7918, Rev. C. 1907; re-en. Sec. 10562, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1912.

10563. Record of another state—its effect. The effect of a judicial record of a sister state is the same in this state as in the state where it was

made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

History: En. Sec. 3201, C. Civ. Proc. 1895; re-en. Sec. 7919, Rev. C. 1907; re-en. Sec. 10563, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1913.

Operation and Effect

Held under this section providing that the authority of an executor or administrator does not extend beyond the territorial limits of the government under which he was appointed, that an administrator appointed in another state cannot maintain an action in the courts of this state in his representative capacity. *LeFebure et al. v. Baker et al.*, 69 M 193, 198, 220 P 1111.

The effect of a judicial record of a sister state, when proven is the same in Montana as in the state where it was made, and a certified copy thereof is admissible in evidence in the courts of this state. *Quickenden v. Hulbert et al.*, 83 M 501, 509, 272 P 994.

References

Cited or applied as section 3201, Code of Civil Procedure, in *State ex rel. Ruef v. District Court*, 34 M 96, 101, 85 P 866; as section 7919, Revised Codes, in *State ex rel. Nipp v. District Court*, 46 M 425, 437, 128 P 590; In re *Estate of Bruhns*, 58 M 526, 529, 193 P 1114; *Henderson et al. v. Daniels*, 62 M 363, 372, 205 P 964.

10564. Record of a court of admiralty. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

History: En. Sec. 3202, C. Civ. Proc. 1895; re-en. Sec. 7920, Rev. C. 1907; re-en. Sec. 10564, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1914.

10565. Effect of a foreign judgment. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

History: En. Sec. 3203, C. Civ. Proc. 1895; re-en. Sec. 7921, Rev. C. 1907; re-en. Sec. 10565, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1915.

10566. Manner of impeaching a record. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

History: En. Sec. 3204, C. Civ. Proc. 1895; re-en. Sec. 7922, Rev. C. 1907; re-en. Sec. 10566, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1916.

10567. The jurisdiction necessary in a judgment. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.

History: En. Sec. 3205, C. Civ. Proc. 1895; re-en. Sec. 7923, Rev. C. 1907; re-en. Sec. 10567, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1917.

References

Gans & Klein Invest. Co. v. Sanford et al., 91 M 512, 521, 2 P 2d 808.

10568. Manner of proving other official documents. Other official documents may be proved as follows:

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1. Acts of the executive of this state, by the records of the state department of the state, and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by the order of the legislative assembly or congress, or either house thereof.

2. The proceedings of the legislative assembly of this state or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies, certified by the clerk or printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation.

6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme court, district, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with the certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original.

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof.

History: En. Sec. 3206, C. Civ. Proc. 1895; re-en. Sec. 7924, Rev. C. 1907; re-en. Sec. 10568, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1918.

Subd. 5

Operation and Effect

Certified copies of the records of the county commissioners, showing the result of a local option election, together with a certified copy of the affidavit of the publisher of the newspaper giving notice of the election, made by the county clerk, were properly admitted in evidence on the trial of one charged with an unlawful sale of liquor. *State v. O'Brien*, 35 M 482, 499, 90 P 514.

Subd. 7

Operation and Effect

Admission in evidence of a certified copy of the articles of incorporation of a foreign company, though properly certified, was nevertheless erroneous in the absence of a certified copy of the laws of the state of its incorporation showing the mode of incorporation and the proper custodian of the original, where such company had never complied with the laws of nor was doing business in this state. *Harvey E. Mack Co. v. Ryan*, 80 M 524, 529, 261 P 283.

Subd. 9

Operation and Effect

Under the ninth subdivision of this section, a certified copy of a copy is not ad-

missible. The best evidence is a certified copy of the original by the officer having it in custody. *Stephens v. Nacey*, 49 M 230, 246, 141 P 649.

Id. It is error to admit in evidence, against objection, the copy of the plat of a townsite, it not being the best evidence; but where it appears that a certified copy of the original, by the officer having it in charge, could easily be supplied, and it does not appear that prejudice was wrought by the use of the copy admitted, the judgment will not be reversed because of such error.

The court was right in its ruling for the further reason that, even though the exhibits were public records, they were not identified as required by statute, to entitle them to be admitted in evidence. If they were public records at all, they were records of a department of the United States government and could be admissible only under the provisions of this section and subdivision. *Steiner v. McMillan*, 59 M 30, 37, 195 P 836.

Under sections 488, 490 and 491, Chapter 8, Title 5, U. S. C. A., photostatic copies of records on file in the United States Pension Bureau, duly authenticated by the signature of the Commissioner of

Pensions and attested by the use of the proper official seal, were entitled to be received in evidence by the express authority of this section. *Welch v. All Persons*, 85 M 114, 128, 278 P 110.

The term "document" as used in this section, in providing that documents in federal departments may be proved by the certificate of the legal custodian thereof, means any matter expressed or described upon any substance by means of letters, figures, etc., used for the purpose of recording that matter. In *re Kostohris' Estate*, 96 M 226, 238, 29 P 2d 829.

Id. A "copy" of a government document admissible in evidence on the certificate of its legal guardian must ordinarily be a transcription or exact duplicate of the original, at least as to the part thereof certified.

References

Cited or applied as section 3206, Code of Civil Procedure, in *Milwaukee Gold Extraction Co. v. Gordon*, 37 M 209, 218, 95 P 995; as section 7924, Revised Codes, in *State v. State Board of Equalization*, 56 M 450, 460, 186 P 697; *State v. Yegen*, 74 M 126, 130, 135, 238 P 603; *State v. Ray*, 88 M 436, 442, 294 P 368.

10569. Public record of private writing evidence. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

History: En. Sec. 3207, C. Civ. Proc. 1895; re-en. Sec. 7925, Rev. C. 1907; re-en. Sec. 10569, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1919.

Operation and Effect

The organization of a corporation under the state law was properly proved by a copy of its certificate of incorporation, certified by the secretary of state. *Western Iron Works v. Montana P. & P. Co.*, 30 M 550, 555, 77 P 413.

This section refers to a public record of a private writing within the state, and not to public records of other states. *Milwaukee Gold Extraction Co. v. Gordon*, 37 M 209, 218, 95 P 995.

References

Angell v. Lewistown State Bank et al., 72 M 345, 350, 232 P 90; *National Life Ins. Co. v. Baker*, 94 M 600, 605, 23 P 2d 1098.

10570. Entries in official books prima facie evidence. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or any other person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

History: En. Sec. 3208, C. Civ. Proc. 1895; re-en. Sec. 7926, Rev. C. 1907; re-en. Sec. 10570, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1920.

Operation and Effect

In a prosecution for statutory rape, the school census of the county in which the prosecutrix attended school, required by law to be kept, was a public record, and

as such admissible as prima facie evidence of the age of the prosecutrix. *State v. Vinn*, 50 M 27, 39, 144 P 773.

A report of a deputy state examiner as to the result of his investigation of a county office is not a public or official book or record within the meaning of this section making entries in public or other official books or records made by a public officer prima facie evidence of the facts

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therein stated, and inadmissible in a prosecution of the officer for larceny of public funds, especially so where it is based not only upon books and records but upon af-

fidavits. *State v. Ray*, 88 M 436, 443, 294 P 368.

References

State v. Yegen, 74 M 126, 129, 238 P 603.

10571. Justice's judgment in other states—how proved. A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

History: En. Sec. 3209, C. Civ. Proc. 1895; re-en. Sec. 7927, Rev. C. 1907; re-en. Sec. 10571, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1921.

10572. Same—certificate to transcript—contents. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

History: En. Sec. 3210, C. Civ. Proc. 1895; re-en. Sec. 7928, Rev. C. 1907; re-en. Sec. 10572, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1922.

10573. Contents of other official certificates. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court.

History: En. Sec. 3211, C. Civ. Proc. 1895; re-en. Sec. 7929, Rev. C. 1907; re-en. Sec. 10573, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1923.

References

State v. Rouleau et al., 68 M 529, 541, 219 P 1096.

10574. Provisions in relation to states apply to territories. The provisions of the preceding sections of this chapter, applicable to the public writings of a sister state, are equally applicable to the public writings of the United States, or a territory of the United States.

History: En. Sec. 3212, C. Civ. Proc. 1895; re-en. Sec. 7930, Rev. C. 1907; re-en. Sec. 10574, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1924.

10575. Certificates of purchase prima facie evidence of ownership. A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States, or of this state, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

History: En. Sec. 3213, C. Civ. Proc. 1895; re-en. Sec. 7931, Rev. C. 1907; re-en. Sec. 10575, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1925.

Operation and Effect

In an action of ejectment to recover possession of a mining claim, a receipt issued by the receiver of the United States land office, which failed to show

that plaintiff had made the purchase or was entitled to patent, was not such a certificate as is referred to in this section, and was valueless as evidence, but its admission in evidence was error without prejudice where plaintiff's title was amply sustained by other proof. Consolidated Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 575, 111 P 152.

10576. Entries made by officers or boards prima facie evidence. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

History: En. Sec. 3214, C. Civ. Proc. 1895; re-en. Sec. 7932, Rev. C. 1907; re-en. Sec. 10576, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1926.

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CHAPTER 159

WRITINGS--PRIVATE WRITINGS

- Section 10577. Private writings classified.
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10577. Private writings classified. Private writings are either:

1. Sealed; or,
2. Unsealed.

History: En. Sec. 3220, C. Civ. Proc. 1895; re-en. Sec. 7933, Rev. C. 1907; re-en. Sec. 10577, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1929.

10578. Seal defined. A seal is a particular sign, made to attest, in the most formal manner, the execution of an instrument.

History: En. Sec. 3221, C. Civ. Proc. 1895; re-en. Sec. 7934, Rev. C. 1907; re-en. Sec. 10578, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1930.

10579. Manner of making seal. A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or

by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this state.

History: En. Sec. 3222, C. Civ. Proc. 1895; re-en. Sec. 7935, Rev. C. 1907; re-en. Sec. 10579, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1931.

10580. Effect of seal. There must be no difference hereafter, in this state, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal.

History: En. Sec. 3223, C. Civ. Proc. 1895; re-en. Sec. 7936, Rev. C. 1907; re-en. Sec. 10580, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1932.

10581. Execution of an instrument defined. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

History: En. Sec. 3224, C. Civ. Proc. 1895; re-en. Sec. 7937, Rev. C. 1907; re-en. Sec. 10581, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1933.

References

Springhorn v. Springer et al, 75 M 294, 301, 243 P 803; Nelson v. Davenport et al, 86 M 1, 6, 281 P 537.

10582. Compromise of a debt without seal good. An agreement in writing without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

History: En. Sec. 3225, C. Civ. Proc. 1895; re-en. Sec. 7938, Rev. C. 1907; re-en. Sec. 10582, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1934.

References

Barbarich v. Chicago etc. Ry. Co. et al, 92 M 1, 11, 9 P 2d 797.

10583. Subscribing witness defined. A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

History: En. Sec. 3226, C. Civ. Proc. 1895; re-en. Sec. 7939, Rev. C. 1907; re-en. Sec. 10583, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1935.

10584. Books, maps, etc.—how far evidence. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

History: En. Sec. 3227, C. Civ. Proc. 1895; re-en. Sec. 7940, Rev. C. 1907; re-en. Sec. 10584, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1936.

Operation and Effect

Tables showing the effect of experiments made by the manufacturer of the air-brakes with which plaintiff locomotive

engineer's train was equipped, offered in evidence for the purpose of showing their available power to control the movements of trains of different tonnage under varying conditions, were admissible upon the same principle as are mortality tables, almanacs, market reports, etc. Lynes v. Northern Pacific Ry. Co., 43 M 317, 329, 117 P 81.

10585. Original writing to be proved or accounted for. The original writing must be produced and proved, except as provided in sections 10488 to 10701 of this code. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents, in some authentic document, or by the recollection of a witness, as hereinbefore provided.

History: En. Sec. 3228, C. Civ. Proc. 1895; re-en. Sec. 7941, Rev. C. 1907; re-en. Sec. 10585, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1937.

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46 P (2d) 696

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103 P. (2d) 153

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Operation and Effect

Where plaintiff relied on a telegram, the burden was on him to prove the loss of the original, to authorize the admission of a copy. *Bond v. Hurd*, 31 M 314, 319, 78 P 579.

Refusal to permit a carbon copy of a livestock shipping contract to be introduced in evidence because proper foundation had not been laid for the introduction of secondary evidence was proper where such copy was incomplete in that the signature of the shipper was missing therefrom because of the fact that at the

time the contract was made the carbon sheet had been so placed as not to cover the space left for his signature, which omission was later supplied by defendant's agent writing in the name of plaintiff, and where it appeared that the original was in defendant's possession. *Rogness v. Northern Pac. Ry. Co.*, 59 M 373, 383, 196 P 989.

References

Cited or applied as section 3228, Code of Civil Procedure, in *Capell v. Fagan*, 30 M 507, 512, 77 P 55; as section 7941, Revised Codes, in *Cohen v. Clark*, 44 M 151, 158, 119 P 775.

10586. When in possession of adverse party, notice to be given. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

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62 P (2d) 1291

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103 P. (2d) 153

History: En. Sec. 3229, C. Civ. Proc. 1895; re-en. Sec. 7942, Rev. C. 1907; re-en. Sec. 10586, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1938.

10587. Writings called for and inspected may be withheld. Though a writing called for by one party is produced by the other, and it is thereupon inspected by the party calling for it he is not obliged to produce it as evidence in the case.

History: En. Sec. 3230, C. Civ. Proc. 1895; re-en. Sec. 7943, Rev. C. 1907; re-en. Sec. 10587, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1939.

10588. Writings—how proved. Any writing may be proved either:

1. By any one who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness.

10588
193 P.(2d) 377

10588
202 P.(2d) 533

History: En. Sec. 3231, C. Civ. Proc. 1895; re-en. Sec. 7944, Rev. C. 1907; re-en. Sec. 10588, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1940.

Operation and Effect

The common-law rule that where the execution of a writing has been attested the party desiring to prove its execution must, before using other evidence, either produce the attester as a witness or show

that his testimony is not available, was not abrogated by this section and therefore where one of two witnesses who had attested a writing was available at the time of the trial and the absence of the other was not explained, the court properly denied permission to introduce the testimony of an expert in handwriting to show that the signature attached thereto was the signature of the person alleged to have executed it. *Angell v. Lewistown State Bank et al.*, 72 M 345, 353, 232 P 90.

10589. Repealed—Chapter 154, laws of 1925.

10590. When evidence of execution not necessary. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section 10593, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

History: En. Sec. 3233, C. Civ. Proc. 1895; re-en. Sec. 7946, Rev. C. 1907; re-en. Sec. 10590, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1942.

10591. Evidence of handwriting. The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

History: En. Sec. 3234, C. Civ. Proc. 1895; re-en. Sec. 7947, Rev. C. 1907; re-en. Sec. 10591, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1943.

Operation and Effect

Under this section and the following section, where the question at issue is the genuineness of the signature to a paper,

signatures clearly proven to be those of the person whose writing is under investigation may be used for the purpose of comparison. *Baxter v. Hamilton*, 20 M 327, 335, 51 P 265.

References

In re Miller's Estate, 71 M 330, 340, 229 P 851.

10592. Evidence of handwriting by comparison. Evidence respecting the handwriting may also be given by comparison, made by the witness or jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

History: En. Sec. 3235, C. Civ. Proc. 1895; re-en. Sec. 7948, Rev. C. 1907; re-en. Sec. 10592, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1944.

Operation and Effect

Held, that the provision of this section that a witness may give evidence respecting handwriting by comparison with writings admitted or treated as genuine by the party against whom the evidence is offered has reference to an expert witness only and that therefore it was error to

permit nonexperts to give their opinions as to the genuineness of the handwriting of a purported will, based upon comparison with other writings admitted to have been genuine. In re Miller's Estate, 71 M 330, 339, 229 P 851.

References

Cited or applied as section 3235, Code of Civil Procedure, in *Baxter v. Hamilton*, 20 M 327, 335, 51 P 265; *Grosfield v. First Nat. Bank*, 73 M 219, 238, 236 P 250.

10593. Same—where a writing is more than thirty years old. Where a writing is more than thirty years old, the comparisons may be made with writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

History: En. Sec. 3236, C. Civ. Proc. 1895; re-en. Sec. 7949, Rev. C. 1907; re-en. Sec. 10593, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1945.

10594. Entries of decedents evidence in specified cases. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it.
2. When it was made in a professional capacity, and in the ordinary course of professional conduct.
3. When it was made in the performance of a duty specially enjoined by law.

History: En. Sec. 3237, C. Civ. Proc. 1895; re-en. Sec. 7950, Rev. C. 1907; re-en. Sec. 10594, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1946.

10595. Copies of entries also allowed. When an entry is repeated in the regular course of business, one being copied from another or at or near the time of the transaction, all the entries are equally regarded as originals.

History: En. Sec. 3238, C. Civ. Proc. 1895; re-en. Sec. 7951, Rev. C. 1907; re-en. Sec. 10595, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1947.

Operation and Effect

Assuming that a ledger was a book of original entry, within the meaning of the statute, and that the necessary preliminary proof had been made, the ledger itself would have been the best evidence of its contents; hence, secondary evidence thereof, such as copies of its accounts, were

inadmissible in evidence, where the case did not fall within any one of the first four subdivisions of section 10516. *Silver v. Eakins*, 55 M 210, 218, 175 P 876.

A book of accounts constituting a loose-leaf ledger, made up by a bookkeeper from time-cards upon which charges were made by mechanics in a garage at the time of the service rendered and immediately transferred to such ledger, is a book of original entries. *Smith v. Sullivan*, 58 M 77, 87, 190 P 288.

10596. Private writings—how proved. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing in the same manner as if it were a conveyance of real property.

History: En. Sec. 3239, C. Civ. Proc. 1895; re-en. Sec. 7952, Rev. C. 1907; re-en. Sec. 10596, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1948.

Operation and Effect

Under this section and section 10598, any private writing (except a will) which is acknowledged or proved and certified as required by statute carries with it the evidence of its due execution and is ad-

missible without further proof thereof. *Angell v. Lewistown State Bank et al*, 72 M 345, 351, 232 P 90.

Under this section authorizing the acknowledgment of private writings, an assignment of a cause of action may be acknowledged, and when acknowledged and introduced in evidence it makes out a prima facie case of due execution of the assignment. *Gotzian & Co. v. Norris et al*, 89 M 307, 314, 297 P 489.

10597. Removal of public records. The record of a conveyance of real property, or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court or judge, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office.

History: En. Sec. 3240, C. Civ. Proc. 1895; re-en. Sec. 7953, Rev. C. 1907; re-en. Sec. 10597, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1950.

References

Angell v. Lewistown State Bank et al, 72 M 345, 350, 232 P 90.

10598. Certified copies of records as evidence. Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, and every instrument authorized by law to be filed or recorded in the county clerk's office, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

History: En. Sec. 3241, C. Civ. Proc. 1895; re-en. Sec. 7954, Rev. C. 1907; re-en. Sec. 10598, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1951.

Operation and Effect

Under this section and section 10596, any private writing (except a will) which is acknowledged or proved and certified

10597
100 Mont. 577
51 P (2d) 643

10598
100 Mont. 577
51 P (2d) 643
101 Mont. 311
53 P (2d) 1151

as required by statute carries with it the evidence of its due execution and is admissible without further proof thereof. *Angell v. Lewistown State Bank et al.*, 72 M 345, 350, 232 P 90.

References

Springhorn v. Springer et al., 76 M 294, 301, 243 P 803; *Gotzian & Co. v. Norris et al.*, 89 M 307, 314, 297 P 489; *National Life Ins. Co. v. Baker*, 94 M 600, 605, 23 P 2d 1098.

CHAPTER 160

MATERIAL OBJECTS OTHER THAN WRITINGS

Section 10599. Material objects.

10599. Material objects. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, or character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

History: En. Sec. 3250, C. Civ. Proc. 1895; re-en. Sec. 7955, Rev. C. 1907; re-en. Sec. 10599, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1954.

Operation and Effect

A plaintiff does not possess the right to exhibit his injuries to the jury. He

may offer to do so, but it is within the discretion of the court to permit or refuse the offer, subject, of course, to review for manifest abuse of that discretion. *May v. Northern Pacific Ry. Co.*, 32 M 522, 536, 81 P 328.

CHAPTER 161

INDIRECT EVIDENCE—INFERENCES AND PRESUMPTIONS

Section 10600. Indirect evidence classified.

10601. Inference defined.

10602. Presumption defined.

10603. When an inference arises.

10604. Presumptions may be controverted, when.

10605. Specification of conclusive presumptions.

10606. All other presumptions may be controverted.

10600. Indirect evidence classified. Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

History: En. Sec. 3260, C. Civ. Proc. 1895; re-en. Sec. 7956, Rev. C. 1907; re-en. Sec. 10600, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1957.

Operation and Effect

A presumption is a form of indirect evidence, and it is valid and effective only until controverted by other evidence, direct or indirect. *Cooper v. Romney*, 49 M 119, 128, 141 P 289.

While negligence may be established by indirect evidence, i. e., by inferences and presumptions deducible from facts, one inference cannot be drawn from another inference or presumption, and a pre-

sumption cannot rest upon an inference. *Fisher v. Butte Electric Ry. Co. et al.*, 72 M 594, 604, 235 P 330.

References

Cited or applied as section 7956, Revised Codes, in *Jenkins v. Northern Pacific Ry. Co.*, 44 M 295, 303, 119 P 794; *Anderson et al. v. Wirkman*, 67 M 176, 186, 215 P 224; *State ex rel. Brown v. District Court*, 72 M 213, 218, 232 P 201; *California Packing Corp. v. McClintock*, 75 M 72, 76, 241 P 1077; *Maki v. Murray Hospital*, 91 M 251, 265, 7 P 2d 228; *Vonault v. O'Rourke*, 97 M 92, 106, 33 P 2d 535; *In re Silver's Estate*, 98 M 141, 38 P 2d 277.

10601. Inference defined. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect.

History: En. Sec. 3261, C. Civ. Proc. 1895; re-en. Sec. 7957, Rev. C. 1907; re-en. Sec. 10601, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1958.

References

Cited or applied as section 7957, Revised Codes, in *Jenkins v. Northern Pacific Ry. Co.*, 44 M 295, 303, 119 P 794; *State v. Blaine*, 45 M 482, 485, 124 P 516; *First*

Nat. Bank v. Robke et al., 72 M 527, 532, 235 P 327; *Fisher v. Butte Electric Ry. Co. et al.*, 72 M 594, 604, 235 P 330; *California Packing Corp. v. McClintock*, 75 M 72, 76, 241 P 1077; *Harrington v. H. D. Lee Mercantile Co.*, 97 M 40, 62, 33 P 2d 553; *Vonault v. O'Rourke*, 97 M 92, 107, 33 P 2d 535; *Mellon v. Kelly et al.*, 99 M 10, 41 P 2d 49.

10602. Presumption defined. A presumption is a deduction which the law expressly directs to be made from particular facts.

History: En. Sec. 3262, C. Civ. Proc. 1895; re-en. Sec. 7958, Rev. C. 1907; re-en. Sec. 10602, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1959.

Operation and Effect

A presumption, being a deduction which the law expressly directs to be made from particular facts, cannot be based upon a further presumption. *First Nat. Bank of Glendive v. Sorenson*, 65 M 1, 13, 210 P 900.

References

Doorly v. Goodman, 71 M 529, 536, 230 P 779; *California Packing Corp. v. McClintock*, 75 M 72, 76, 241 P 1077; *State v. Daly*, 77 M 387, 390, 250 P 976; *Renland v. First Nat. Bank et al.*, 90 M 424, 437, 4 P 2d 488; *Maki v. Murray Hospital*, 91 M 251, 265, 7 P 2d 228; *State v. Sim*, 92 M 541, 547, 16 P 2d 411; *Vonault v. O'Rourke*, 97 M 92, 106, 33 P 2d 535; *Mellon v. Kelly et al.*, 99 M 10, 41 P 2d 49.

10602
101 Mont. 132
54 P (2d) 1178

10602
124 P. (2d) 577
124 P. (2d) 584,
587, 588, 589,
592

10602
175 P. (2d) 768

10603. When an inference arises. An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

History: En. Sec. 3263, C. Civ. Proc. 1895; re-en. Sec. 7959, Rev. C. 1907; re-en. Sec. 10603, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1960.

Operation and Effect

A verdict may be founded upon an inference; thus, if a passenger of one railroad company is injured at the depot platform of another company, the defendant railroad, by stepping into an uncovered water-hole in the platform, an inference that the employees omitted to recover the hole is justified, and authorizes a recovery against the latter company. *Jenkins v. Northern Pacific Ry. Co.*, 44 M 295, 303, 119 P 794.

After having correctly defined an inference, and stating that it must be founded upon a fact legally proved, it is not error for the court to refuse to instruct the jury that an "inference cannot be founded upon another inference, or upon facts inferred from other facts legally proved." *State v. Blaine*, 45 M 482, 485, 124 P 516.

References

First Nat. Bank v. Robke et al., 72 M 527, 532, 235 P 327; *California Packing Corp. v. McClintock*, 75 M 72, 76, 241 P 1077; *Harrington v. H. D. Lee Mercantile Co.*, 97 M 40, 62, 33 P 2d 553; *Mellon v. Kelly et al.*, 99 M 10, 41 P 2d 49.

10603
100 Mont. 323
47 P (2d) 58
101 Mont. 132
54 P (2d) 1178

10603
90 P. (2d) 979

10603
124 P. (2d) 587

10604. Presumptions may be controverted, when. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.

History: En. Sec. 3264, C. Civ. Proc. 1895; re-en. Sec. 7960, Rev. C. 1907; re-en. Sec. 10604, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1961.

Operation and Effect

Before a district court could set aside a default judgment on the ground of non-service of summons, the defendant was

obliged not only to overcome the presumption accorded to official acts but the testimony of the officer making service as well, failing in which the motion was properly denied. *Gilliland v. Palatine Ins. Co., Ltd.*, 59 M 267, 269, 196 P 151.

One presumption may be of greater dignity than another and overcome the

10604
124 P. (2d) 584,
587

10604
180 P. (2) 497

latter. *McMahon v. Cooney et al*, 95 M 138, 144, 25 P 2d 131.

References

Cited or applied as section 3264, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 483, 48 P 753; as section 7960, Revised Codes, in *Cooper v. Romney*,

49 M 119, 128, 141 P 289; *Doorly v. Goodman*, 71 M 529, 536, 230 P 779; *California Packing Corp. v. McClintock*, 75 M 72, 76, 241 P 1077; *Maki v. Murray Hospital*, 91 M 251, 265, 7 P 2d 228; *State v. Sim*, 92 M 541, 548, 16 P 2d 411; *Vonault v. O'Rourke*, 97 M 92, 106, 33 P 2d 535.

10605. Specification of conclusive presumptions. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive.

History: En. Sec. 3265, C. Civ. Proc. 1895; re-en. Sec. 7961, Rev. C. 1907; re-en. Sec. 10605, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1962.

Subd. 2

Operation and Effect

As between the parties, or their successors in interest by a subsequent title, the recitals in a written instrument are conclusively presumed to be true, except the recital of a consideration; and, under the following section, the recital of a consideration is deemed *prima facie* to be true. *Dubbels v. Thompson*, 49 M 550, 557, 143 P 986.

Under this section, and this subdivision, an acknowledgment of the receipt of a cash consideration of one dollar in an alleged oil and gas lease was subject to explanation. *Sunburst Oil & Gas Co. v. Neville et al*, 79 M 550, 564, 257 P 1016.

Subd. 3

Operation and Effect

Under subdivision 3 of this section, plaintiff was estopped to deny the validity of an oral agreement for the sale of

land, and that he held the legal title for the benefit of defendant. *Cobban v. Heckenlen*, 27 M 245, 260, 70 P 805.

Subdivision 3 of this section, which says that "whenever a party has by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it," is but a crystallization into statutory form of the rule above stated, and forms the basic principle of equitable estoppel. (*Waddell v. School District*, 74 M 91, 238 P 884.) *Lindblom v. Employers' etc. Assur. Corp.*, 88 M 488, 494 et seq., 295 P 1007.

Operation in General

While a public officer should not make a mistake as to the amount of salary the law allows him, there is no conclusive presumption that he has knowledge thereof, such presumption not being included in the enumeration of conclusive presumptions found in this section. *Hicks v. Stillwater County*, 84 M 38, 46, 274 P 296.

References

Cited or applied as section 7961, Revised Codes, in *Golden v. Northern Pacific Ry. Co.*, 39 M 435, 451, 104 P 549; In re *Pepin's Estate*, 53 M 240, 248, 163 P 104; *State v. Smith*, 57 M 563, 581, 190 P 107; *Wray v. Great Falls Paper Co.*, 72 M 461,

466, 234 P 486; *Waddell v. School Dist. No. 2*, 74 M 91, 96, 238 P 884; *Hoppin v. Long*, 74 M 558, 584, 241 P 636; *Angus v. Mariner et al.*, 85 M 365, 374, 278 P 996; *State v. Sim*, 92 M 541, 548, 16 P 2d 411; In re *Wray's Estate*, 93 M 525, 535, 19 P 2d 1051; *Vonault v. O'Rourke*, 97 M 92, 107, 33 P 2d 535.

10606. All other presumptions may be controverted. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.
2. That an unlawful act was done with an unlawful intent.
3. That a person intends the ordinary consequence of his voluntary act.
4. That a person takes ordinary care of his own concerns.
5. That evidence wilfully suppressed would be adverse, if produced.
6. That higher evidence would be adverse from inferior, being produced.
7. That money paid by one to another was due to the latter.
8. That a thing delivered by one to another belonged to the latter.
9. That an obligation delivered up to the debtor has been paid.
10. That former rent or instalments have been paid when a receipt for latter is produced.
11. That things which a person possesses are owned by him
12. That a person is the owner of property from exercise of ownership over it, or from common reputation of his ownership
13. That a person in possession of an order on himself for payment of money, on the delivery of a thing, has paid the money or delivered the thing accordingly.
14. That a person acting in a public office was regularly appointed
15. That official duty has been regularly performed.
16. That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction.
17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.
18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.
19. That private transactions have been fair and regular.
20. That the ordinary course of business has been followed.
21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.

10606
123 P.(2d) 977
124 P.(2d) 587

10606 subsec. 1
101 Mont. 123
53 P.(2d) 119
101 Mont. 181
53 P.(2d) 109

10606 subsec. 1
107 P.(2d) 875

10606
62 P.(2d) 684

10606, subsec. 1
65 P.(2d) 1184

10606, subd. 4
65 P.(2d) 1184

10606
subsec. 8
103 P.(2d) 143,
144
10606 subsec. 11
72 P.(2d) 464
..... Mont.

10606
subsec. 11
103 P.(2d) 143

10606 subsec. 11
101 Mont. 181
3 P.(2d) 109

10606
subsec. 12
103 P.(2d) 143,
144

10606 subsec. 12
101 Mont. 181
3 P.(2d) 109

10606 subsec. 15
101 Mont. 313
53 P.(2d) 1152

10606 (15)
88 P.(2d) 14

10606
subsec. 15
89 P.(2d) 1027

10606
Sub. Sec. 15
74 P.(2d) 457
..... Mont.

10606
Subsec. 17
77 P.(2d) 1047
..... Mont.

10606 subsec. 19
101 Mont. 123
53 P.(2d) 119

65 P.(2d) 1179.

10606 subsec. 20
101 Mont. 123
53 P.(2d) 119

10606
141 P.(2d) 832
(Oregon)

10606, subd. 19
65 P.(2d) 1184

10606, subd. 20
65 P.(2d) 1184

10606
106 F.(2d) 375

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

10606, subd. 23
66 P (2d) 798

23. That a writing is truly dated.

10606
sub sec. 23
89 P.(2d) 1027

10606 (24)
88 P.(2d) 270

24. That a letter duly directed and mailed was received in the regular course of the mail.

10606
Subsec. 24
97 P.(2d) 592

25. Identity of persons from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

10606
Subsec. 27
77 P (2d) 1047
.....Mont.....

28. That things have happened according to the ordinary course of nature and the ordinary habits of life.

10606
subsec. 27
103 P. (2d) 143
10606 (28)
106 F.(2d) 375

29. That persons acting as copartners have entered into contract of copartnership.

10606
Sub-sec. 30
71 P (2d) 905
.....Mont.....

30. That a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

10606 subsec. 30
101 Mont. 254
53 P (2d) 454

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

10606 subsec. 33
101 Mont. 313
53 P (2d) 1152

32. That a thing once proved to exist continues as long as is usual with things of that nature.

628 (2d) 565

33. That the law has been

10606
subsec. 33
180 P. (2) 497

10606
Sub. Sec. 33
71 P (2d) 457

10606
Subsec. 33
76 P (2d) 93

10606
sub sec. 33
89 P.(2d) 1027

10606
Subd. 33
174 P.(2d) 2
175 P.(2d) 7
to 771

34. That a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

10606, subd. 33
65 P (2d) 1184

10606, subd. 33
64 P (2d) 112

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published.

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases.

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

38. The uninterrupted use by the public of land for a burial-ground for five years, with the consent of the owner, and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

39. That there was a good and sufficient consideration for a written contract.

40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

First. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived.

Second. If both were above the age of sixty, the younger is presumed to have survived.

Third. If one be under fifteen and the other above sixty, the former is presumed to have survived.

Fourth. If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth. If one be under fifteen, or over sixty, and the other between those ages, the latter is presumed to have survived.

History: En. Sec. 3266, C. Civ. Proc. 1895; re-en. Sec. 7962, Rev. C. 1907; re-en. Sec. 10606, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1963.

Subd. 1

Operation and Effect

Where a railroad engine runs against a boy on the track, and the engineer, in an action brought for personal injuries, is practically charged with manslaughter, the presumption is that he is innocent of that crime. *Haddox v. Northern Pacific Ry. Co.*, 43 M 8, 17, 113 P 1119.

When the presumption of innocence in murder cases is overcome by evidence, its office is ended, and it ceases to aid the defendant further. *State v. Colbert*, 58 M 584, 590, 194 P 145.

In an action involving fraud, the presumptions declared by subdivisions 1 and 19 of this section, that a person is innocent of wrong, and that private transactions have been fair and regular, prevail until overcome by evidence satisfactory to the court. *Hansen et al. v. Johnson et al.*, 90 M 597, 609, 4 P 2d 1088.

Subd. 3

Operation and Effect

Where one makes a voluntary conveyance of his property without retaining sufficient to satisfy the legal demands of his creditors, plaintiff in his action to set it aside as fraudulent is not required to show the existence of an actual fraudulent intent, the law presuming that by her voluntary act she intended the natural and inevitable consequences to flow therefrom, to-wit, to hinder, delay or defraud the plaintiff in the collection of his judgment secured after the conveyance, the result being fraud in fact. *National Bank of Anaconda v. Yegen*, 83 M 265, 280, 271 P 612.

Subd. 4

Operation and Effect

Where a workman, while working on a wet scaffold, slipped and in throwing out his hands came in contact with an electric company's live wire and was injured, the

accidental slipping cannot be said to be negligence per se on his part, since the law presumes that plaintiff exercised ordinary care in the premises. *Birsch v. Citizens' Electric Co.*, 36 M 574, 581, 93 P 940.

In an action to recover for personal injuries to a child, the burden of alleging and proving contributory negligence is upon the defendant, in the first instance, since there is a presumption of law that the plaintiff exercised ordinary care. *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 37 M 169, 172, 95 P 8, 16.

Although, under subdivision 4 of this section, the law presumes that a person exercises ordinary care for his own safety, yet where plaintiff's own case presents evidence which, if unexplained, establishes prima facie contributory negligence, there must be evidence exculpating him, or he cannot recover. *Meehan v. Great Northern Ry. Co.*, 43 M 72, 80, 114 P 781.

An instruction that the law presumed that plaintiff's decedent at the time of the accident was exercising ordinary care for his safety was properly refused where the question of negligence on the part of defendant and that of contributory negligence on his part were issues of fact to be determined by the jury. *Osterholm v. Butte Electric Ry. Co. et al.*, 60 M 193, 199 P 252.

The presumption that a person takes ordinary care of his own concerns is a disputable one and does not apply where the surrounding facts and circumstances show the contrary. *Roberts v. Chicago M. & St. P. Ry. Co.*, 67 M 472, 478, 216 P 332.

References

Grant v. Nihill, 64 M 420, 436, 210 P 914; *Doorly v. Goodman*, 71 M 529, 536, 230 P 779; *Rau v. Northern Pacific Ry. Co. et al.*, 87 M 521, 544, 289 P 580.

Subd. 8

Operation and Effect

Evidence consisting of a note given by the apparent owner of cattle and a chattel mortgage to secure the debt evidenced by it, which latter remained of record uncanceled for more than a month at the time defendant claimed to have bought

certain live stock, was competent for the purpose of re-enforcing the presumptions relative to the possession and ownership of property contained in subdivisions 8, 11, and 12 of this section. *Cuerth v. Arbogast*, 48 M 209, 217, 136 P 383.

The presumption that a fee-simple title passes by grant of real property unless it appears that a lesser estate was intended, that a thing delivered by one to another belongs to the latter, and that a conveyance made to one toward whom the grantor stands in a confidential relation is a gift, are rebuttable and must give way to proved facts. *Hoppin v. Long*, 81 M 330, 339, 263 P 421.

Subd. 11

Operation and Effect

Evidence consisting of a note given by the apparent owner of cattle and a chattel mortgage to secure the debt evidenced by it, which latter remained of record uncanceled for more than a month at the time defendant claimed to have bought certain live stock, was competent for the purpose of re-enforcing the presumptions relative to the possession and ownership of property contained in subdivisions 8, 11, and 12 of this section. *Cuerth v. Arbogast*, 48 M 209, 217, 136 P 383.

A person's possession of cattle is *prima facie* evidence that he owns them. *Kerr v. Blaine*, 49 M 602, 607, 144 P 566.

Where the mortgagee is in possession of real property by consent of the mortgagor, he can maintain such possession against the mortgagor or any other person who cannot show title paramount to that of the mortgagor, and may by ejectment recover possession as against an intruder, his possession being a sufficient *prima facie* showing to support a recovery, the burden being then cast upon defendant to show a superior title or right. *Stack v. Coyle*, 59 M 444, 452, 197 P 747.

The presumption declared by this section, subdivision 11, to the effect that "things which a person possesses are owned by him" has reference to the present and not to the past; therefore an offered instruction in an action in conversion that if plaintiff's husband was in possession of the property in question prior to the time it was attached, the law presumes that he and not plaintiff was its owner, was properly refused. *Wray v. Great Falls Paper Co.*, 72 M 461, 472, 234 P 486.

Where one places a fence on the land of another without an agreement permitting him to do so, it belongs to the owner of the land unless he chooses to require him to remove it, the presumption, disputable in nature, being that one in possession of land is also the owner of the

fixtures thereon (section 6819, and this section). *Schmuck v. Beck*, 72 M 606, 616, 234 P 477.

References

Rodda v. Best et al., 68 M 205, 217, 217 P 669.

Subd. 12

Operation and Effect

Evidence consisting of a note given the apparent owner of cattle and a chattel mortgage to secure the debt evidenced by it, which latter remained of record uncanceled for more than a month at the time defendant claimed to have bought certain live stock, was competent for the purpose of re-enforcing the presumptions relative to the possession and ownership of property contained in subdivisions 8, 11, and 12 of this section. *Cuerth v. Arbogast*, 48 M 209, 217, 136 P 383.

Subd. 14

Operation and Effect

In an action on the official bond of a justice of the peace, the sureties are estopped to deny the legal presumptions of regularity of the election or appointment of their principal, created by this section, or to deny his title to the office. *Murphy v. Johns*, 56 M 134, 136, 182 P 115.

Subd. 15

Operation and Effect

Under subdivision 15 of this section, it will be presumed, in the absence of a showing to the contrary, that instructions found in the proper place in a record on appeal, with proper indorsements thereon, were put there by the trial court and its officers. *Wastl v. Montana Union Ry. Co.*, 24 M 159, 174, 61 P 9.

Under subdivision 15 of this section, it is presumed, in the absence of any showing to the contrary, that city officials did not certify an assessment prematurely to the county officials, but performed their duty regularly. *Beck v. Holland*, 29 M 234, 237, 74 P 410.

It must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known, or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels. *Burton v. Kipp*, 30 M 275, 288, 76 P 563. See also *Thomas v. Thomas*, 44 M 102, 113, 119 P 283.

The presumptions found in subdivisions 15 and 16 of this section do not relieve a party who alleges in his pleading that a judgment of a justice of the peace was "duly given or made" from establishing on

the trial the facts concerning jurisdiction, where such allegation is controverted. *Miller v. Miller*, 47 M 150, 153, 131 P 23.

The presumption that official duty was regularly performed attaches to the acts of the warden of the penitentiary under subdivision 15 of this section. *Stephens v. Conley*, 48 M 352, 364, 138 P 189.

Under subdivision 15 of this section, the presumption is, when the sheriff receives a venire for service, that every man whose name appears upon it is competent for jury service. The defendant in a criminal case who interposes a challenge to the panel, on the ground that the sheriff failed to summon all of the jurors, may, therefore, rely on such presumption to establish a prima facie case to that extent. *State v. Groom*, 49 M 354, 358, 141 P 858.

When the record required by law to be kept by the state board of medical examiners has been properly identified by an officer of the board, the presumption attaches that it has been correctly kept. *State v. Hopkins*, 54 M 52, 66, 166 P 304.

In an action for false imprisonment against a town marshal for unlawfully and wrongfully arresting the plaintiff, the latter has the burden of proving facts sufficient to overcome the presumption that the officer who made the arrest performed an official duty in a regular manner. *Grant v. Williams*, 54 M 426, 428, 171 P 276.

In an action on an official bond, an allegation that the official in question was by the board of county commissioners duly appointed, and thereafter qualified, and ever since has been and is now a duly appointed, qualified, and acting justice of the peace of a designated township, is sufficient, aided by the statutory presumptions of subdivisions 15 and 33 of this section. *Murphy v. Johns*, 56 M 134, 136, 182 P 115.

Before the district court could set aside a default judgment on the ground of non-service of summons, the defendant was obliged not only to overcome the presumption accorded to official acts but the testimony of the officer making service as well, failing in which the motion was properly denied. *Gilliland v. Palatine Ins. Co., Ltd.*, 59 M 267, 269, 196 P 151.

Since the presumption obtains that the railroad commission fixed and established reasonable rates in obedience to section 3794, and that the rate as established is in accordance with the approved and published tariff, a complaint which fails to allege that freight charges were not in accordance with such tariff is defective. *Doney v. Northern Pacific Ry. Co. et al.*, 60 M 209, 199 P 432.

Second, upon appeals to this court the presumption must always be indulged that

the action of the district court proceeded, not only according to law, but that it was done in the regular mode. If we are to ascribe any force at all to these statutory presumptions, we may assume that Judge Von Tobel knew, both personally and judicially, when he took office on the morning of January 3, 1921, that no entry denying the new trial was then in the minutes of Department No. 2 of the court, and that he had a right to base his ruling upon information so acquired. *Marcellus v. Wright et al.*, 61 M 274, 288, 202 P 381.

Where a board of county canvassers refused to canvass election returns from a precinct on the ground that it appeared upon the face of the returns that the election had not been held at the place designated by the board of county commissioners, and on application for writ of mandate to compel them to act nothing was shown affirmatively by pleadings or otherwise that the judges of election at the precinct had not pursued the statute (section 551), giving them authority to change the place of election upon two days' notice if for any reason it cannot be held at the place appointed, it will be presumed that official duty was regularly performed by them and that they did change it, and the writ will issue commanding action. *State ex rel. Moore v. Patch et al.*, 65 M 218, 225, 211 P 202.

In the absence of countervailing evidence, the presumption obtains that the state prison board in paroling a prisoner sentenced to life imprisonment for murder regularly performed its duty and before granting the parole commuted his sentence, since without commutation in such case parole is not authorized by law. *Anderson et al. v. Wirkman*, 67 M 176, 186, 215 P 224.

Evidence that the clerk of defendant school board notified plaintiff prior to the end of his term of employment that he was discharged, held sufficient to show his discharge as against the contention that in the absence of a showing that the board had acted and authorized the clerk to give the notice, it was insufficient, the presumption being that the clerk as an officer of the board in sending the notice regularly performed his official duties, the burden of showing that he acted in excess of his authority having been upon defendant. *O'Brien v. School District No. 1*, 68 M 432, 435, 219 P 1113.

Conceding (without deciding) that under section 11071, a district judge may not issue a search-warrant without the approval of the county attorney first obtained, held, that in the absence of a showing that such approval had not been given, it will be presumed that official

duty was regularly performed and approval had in the manner required by law. *State v. Tesla et al.*, 69 M 503, 508, 223 P 107.

The presumption that official duty has been regularly performed has the effect of evidence and is satisfactory if not controverted, and under that rule it will be presumed, in the absence of countervailing proof that an officer in making a search and seizure did not act illegally, the burden of showing that he did being upon him who makes the assertion. *State ex rel. Brown v. District Court*, 72 M 213, 218, 232 P 201.

The presumption that a police magistrate charged as such with false imprisonment regularly performed his official duties, and to make out a cause of action against him it was necessary for plaintiff to overcome that presumption and to disclose wherein that officer was without jurisdiction, failing in which a demurrer to the complaint was properly sustained. *Shampagne v. Keplinger*, 78 M 114, 119, 252 P 803.

In the absence of proof in support of the contention that the trustees of a joint school district had not established polling places nor defined the boundaries of election precincts for the holding of the election above referred to, as required by section 991, and that therefore the election was invalid, it will be presumed that official duty had been regularly performed. *Buckhouse v. Joint School Dist. No. 28*, 85 M 141, 145, 277 P 961.

The presumption attaching to the official act of a district judge in appointing a receiver that he did so in consideration of a proper motion for his appointment and that notice thereof had been given is of greater dignity than the presumption that if the motion and notice of hearing had been given, the clerk of the district court would have made proper entry thereof in his register of actions. *Burgess v. Lasby et al.*, 91 M 482, 491, 9 P 2d 164.

In the absence of evidence showing that a sheriff, in attempting to make a levy of execution, made no search for personal property, it may be presumed from the recital in his return that he was unable to find any that he made a search (subdivision 15, this section). *Stone-Ordean-Wells Co. v. Strong et al.*, 94 M 20, 31, 20 P 2d 639.

In an action for the conversion of household goods, etc., against one who had been placed in possession of plaintiff's property under writ of execution, it will be presumed, in the absence of a showing that defendant was wrongfully in possession,

that the sheriff regularly performed his official duty and that the goods and chattels in question were removed to the highway at his direction, where they were stolen or destroyed. *Beyerlein v. Whitcomb et al.*, 95 M 293.

References

State v. Reed, 65 M 51, 61, 210 P 756; *State ex rel. Redman v. Meyers*, 65 M 124, 126, 210 P 1064; *Jersey et al. v. Peacock et al.*, 70 M 46, 48, 223 P 903; *State Bank of Outlook v. Sheridan County*, 72 M 1, 5, 230 P 1097; *Gardiner v. Eclipse Grocery Co.*, 72 M 540, 550, 234 P 490; *Edwards et al. v. Muri*, 73 M 339, 353, 237 P 209; *In re Hyde*, 73 M 363, 370, 236 P 248; *State v. State Board of Examiners*, 74 M 1, 17, 238 P 316; *Reynolds v. Gladys Belle Oil Co.*, 75 M 332, 346, 243 P 576; *State v. American Bank & Trust Co.*, 75 M 369, 377, 243 P 1093; *State v. Asal*, 79 M 385, 398, 256 P 1071; *State ex rel. Rankin v. Benton State Bank*, 81 M 322, 329, 263 P 689; *Lumber Co. v. School Dist. No. 56*, 84 M 461, 467, 277 P 9; *Lehman & Co. v. Skadan et al.*, 86 M 553, 556, 284 P 769; *Great Northern U. Co. v. Public Ser. Com.*, 88 M 180, 202, 293 P 294; *Shubat v. Glacier County et al.*, 93 M 160, 167, 168, 18 P 2d 614; *State v. Phelps*, 93 M 277, 289, 19 P 2d 319; *Thompson et al. v. Flynn*, 95 M 484, 496, 27 P 2d 505.

Subd. 16

Operation and Effect

The presumptions found in subdivisions 15 and 16 of this section do not relieve a party who alleges in his pleading that a judgment of a justice of the peace was "duly given or made" from establishing on the trial the facts concerning jurisdiction, where such allegation is controverted. *Miller v. Miller*, 47 M 150, 153, 131 P 23.

Second, upon appeals to this court the presumption must always be indulged that the action of the district court proceeded, not only according to law, but that it was done in the regular mode. If we are to ascribe any force at all to these statutory presumptions, we may assume that Judge Von Tobel knew, both personally and judicially, when he took office on the morning of January 3, 1921, that no entry denying the new trial was then in the minutes of Department No. 2 of the court, and that he had a right to base his ruling upon information so acquired. *Marcellus v. Wright et al.*, 61 M 274, 288, 202 P 381.

The presumption obtains that in rendering a judgment the court was acting in the lawful exercise of jurisdiction, and the burden of showing the contrary is upon him who makes the assertion of lack of jurisdiction. *Bury v. Bury et al.*, 69 M 570, 576, 223 P 502.

On application for writ of habeas corpus, which presents the inquiry whether the trial court had jurisdiction of the subject-matter of the prosecution and of the defendant and to render such a judgment as the law authorizes in the particular case, the presumption of jurisdiction is conclusive unless want of it appears on the face of the record, and express recitals of jurisdictional facts cannot be rebutted by evidence dehors the record. In re Shaffer, 70 M 609, 613, 227 P 37.

That a bill of exceptions was presented, settled and signed, within the time provided by statute must be made to appear affirmatively in the record and may not be supplied by the presumption that the trial court in settling and signing it was acting in the lawful exercise of its jurisdiction. O'Donnell v. City of Butte, 72 M 449, 455 et seq., 235 P 707.

The presumption attaching to the official act of a district judge in appointing a receiver that he did so in consideration of a proper motion for his appointment and that notice thereof had been given is of greater dignity than the presumption that if the motion and notice of hearing had been given, the clerk of the district court would have made proper entry thereof in his register of actions. Burgess v. Lasby et al., 91 M 482, 491, 9 P 2d 164.

Subd. 19

Operation and Effect

The law presumes that private transactions have been fair and regular (this section, subdivision 19). As the record does not contain any evidence of fraud on plaintiff's part we will not assume that she acted with any fraudulent intent. (Floyd-Jones v. Anderson, 30 M 351, 76 P 751.) * Mayger v. St. Louis Min. etc. Co., 68 M 492, 502, 219 P 1102.

In an action involving fraud the presumptions declared by subdivisions 1 and 19, of this section, that a person is innocent of wrong, and that private transactions have been fair and regular, prevail until overcome by evidence satisfactory to the court. Hansen et al. v. Johnson et al., 90 M 597, 609, 4 P 2d 1088.

Subd. 20

Operation and Effect

Admissions by defendants, who were engaged in the pawnbroking business, that they had a ring which was the subject-matter of a suit in replevin, on the day before suit and on the day action was begun, but before it was actually brought, when such admissions are aided by the presumption that the ordinary course of business had been followed, were sufficient to make out a prima facie case of the

present actual possession by defendants at the time the action was commenced. Sullivan v. Girson, 39 M 274, 277, 102 P 320.

References

California Packing Corp. v. McClintock, 75 M 72, 76, 241 P 1077.

Subd. 22

References

Anderson v. Border et al., 75 M 516, 525, 244 P 494.

Subd. 23

Operation and Effect

The presumption that an instrument was executed on the date set forth therein is rebuttable under this subdivision, and it may be rebutted by evidence outside the instrument, including parol testimony. Harrison State Bk. v. U. S. Fidelity & G. Co., 94 M 100, 106, 22 P 2d 1061.

Subd. 24

Operation and Effect

Under subdivision 24 of this section, defendants, to each of whom copies of the summons and complaint were mailed at their known places of residence, are presumed to have had actual notice of the pendency of the action. Smith v. Collis, 42 M 350, 369, 112 P 1070.

Positive testimony by the addressee of nonreceipt of a letter properly mailed does not overcome the presumption, rebuttable in character, declared by subdivision 24 of this section, that a letter duly directed and mailed was received in the regular course of mail, but the question is one of fact for the jury's determination from all of the evidence. Renland v. First Nat. Bank et al., 90 M 424, 437, 4 P 2d 488.

References

Clark v. Clark, 64 M 386, 393, 210 P 93.

Subd. 25

Operation and Effect

Defendant was charged with the crime of grand larceny and with the prior conviction of a like offense. The only evidence introduced by the state for the purpose of identifying defendant as the person formerly convicted was the judgment-roll in the prior action. The court instructed the jury that the name of the defendant being the same in both cases, the presumption followed that he was the same person, and that unless such presumption was controverted, they were bound to find accordingly. Held, prejudicial error, in that the instruction took from the jury the question whether defendant was in fact the same person who had suffered prior conviction. State v. Livermore, 59 M 362, 364, 196 P 977.

Subd. 26

Operation and Effect

The law presumes the death of a person who is shown to have departed from her home more than fourteen years prior to application for letters of administration, and has never returned, and who has never been heard of by her mother and sisters for more than fourteen years, although they have made diligent search in the attempt to find her. In *re* Liter's Estate, 19 M 474, 481, 48 P 753.

The disputable presumption declared by this subdivision of this section, "that a person not heard from in seven years is dead," is one available for all legal purposes and presents a prima facie case sufficient to warrant a grant of letters of administration on the estate of the absentee, the proceedings being void only when knowledge of the fact that he is alive is ascertained, this being true whether the proceedings rest upon a misapprehension of the fact of death or upon the presumption. *Williams et al. v. Hefner*, 89 M 361, 376, 297 P 492.

While there is a presumption that a person not heard from for seven years is dead (this section), there is none that he did not leave issue. In *re* Baxter's Estate, 98 M 291, 301, 39 P 2d 186.

Subd. 30

Operation and Effect

Among the disputable presumptions specified by statute is that "a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage" (this section and subdivision). "Every intendment of the law is in favor of matrimony. * * * The presumption of matrimony is one of the strongest known to the law. The law presumes morality, not immorality, marriage, and not concubinage, legitimacy, and not bastardy." (*Hadley v. Rash*, 21 M 170, 53 P 312.) *State v. Newman*, 66 M 180, 194, 195, 213 P 805. (From Judge Galen's dissent.)

Marriage cannot arise from the mere cohabitation of two persons reputed to be husband and wife, such cohabitation and reputation being merely evidence of the existence and reality of their consent; the fact that children have been born to them is not enough, and while the law will imply consent from the conduct of the parties when the facts will permit, and will presume that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage, such presumption disappears in the face of contrary facts. *Welch v. All Persons*, 85 M 114, 135, 278 P 110.

References

Welch v. All Persons, 78 M 370, 387, 254 P 179.

Subd. 31

Operation and Effect

The disputable presumption that a child born in lawful wedlock is legitimate (this subdivision and section, and section 5830) is successfully "controverted by other evidence" when the preponderance of the evidence is contrary thereto. (*Mr. Justice Angstman dissenting.*) In *re* Wray's Estate, 93 M 525, 535, 19 P 2d 1051.

Subd. 32

Operation and Effect

Accounts which are shown to have once been good and collectible are presumed to so continue under subdivision 32 of this section. *Thornton-Thomas Co. v. Brether-ton*, 32 M 80, 100, 80 P 10.

If lateral ditches are run from a canal toward the head of a swamp, the question whether the increase of flow in the canal is permanent is conjectural, and the presumption "that a thing once proved to exist continues as long as is usual with things of that nature," embodied in subdivision 32 of this section, cannot be indulged. *Smith v. Duff*, 39 M 382, 392, 102 P 984.

The presumption mentioned in subdivision 32 of this section does not apply regardless of the nature of the thing or condition in question. It applies only to those conditions which, from their nature, must continue for some appreciable length of time. In *re* Murphy's Estate, 43 M 353, 373, 116 P 1004.

When lunacy or insanity, of a general, habitual, or permanent nature is once shown to exist, it is presumed to continue until the presumption is overturned by countervailing evidence, because it is known from experience that the condition usually continues; but such presumption does not apply to cases of intermittent or occasional insanity, as in the very nature of things the idea of continuity is excluded. In *re* Murphy's Estate, 43 M 353, 373, 116 P 1004.

The law presumes that a thing once proved to exist continues as long as is usual with things of that nature. *Collins v. Thode*, 54 M 405, 411, 170 P 940.

Where a litigant, at the time he asked for a transfer of his cause to another district, indicated that the judge of that district was free from the bias and prejudice imputed to the former, the condition thus set forth will be presumed to continue, under subdivision 32 of this section,

until the contrary is shown. *Stair v. Lunke*, 56 M 130, 132, 180 P 569.

Again, our statute provides that there is a presumption "that a thing once proved to exist continues as long as is usual with things of that nature" (this section and subdivision). So that, under this presumption, in view of the plaintiff's agents' transactions had with the defendants and their continued visitations to the vicinity of the property sold to the defendants and repair work done upon the Healy ditch, a disputable presumption to say the least existed as to the continuance of Muckler and Glascock in their activities as plaintiff's agents. Moreover, it is nowhere contended that the agency was at any time terminated nor was this made the basis of the court's exclusion of the offered exhibit. *Healy v. Ginoff et al.*, 69 M 116, 132, 220 P 539.

Where a bank had for some two years refused to credit checks and drafts to a remitting bank until after collection thereof, the presumption obtains, in the absence of a showing to the contrary, that the method adopted continued at the time it transmitted certain paper to it which was not received until the receiving bank had closed its doors, and therefore the relationship of debtor and creditor did not then exist between them, and title to the funds collected remained in the remitting bank. *State v. Banking Corp. of Montana*, 74 M 491, 506, 241 P 626.

In the absence of a showing by plaintiff corporation that it was no longer the owner of practically all of the capital stock of the company which distributed the natural gas conveyed into the state by the former, the presumption declared by this section and subdivision, that the proven conditions continue, obtains. *Gallatin N. G. Co. v. Public Service Com.*, 79 M 269, 283, 256 P 373.

Under the rule that once a fact is established, it is presumed to have remained as proven to exist until the contrary is shown, held, in a prosecution for robbery, in which defendant on appeal contended that the felonious taking of a sum of money from the person of the complaining witness had not been proven, that evidence that defendant knew that the witness nine days before had placed his wallet containing the money in his inside vest pocket where he kept his money, which pocket had been cut out after the witness had been knocked down, etc., was sufficient to establish the taking. *State v. Olson*, 87 M 389, 394, 287 P 938.

Proof by plaintiff that in a given year he acquired title to the land, possession of which he seeks to recover in an action in ejectment, supplemented by the legal presumption that a thing once proved to

exist continues so long as is usual with things of that nature, is sufficient, in the absence of proof to the contrary, to make out a prima facie case in his behalf. *Miner v. Cook et al.*, 87 M 500, 503, 288 P 1016.

In determining whether or not, in a given case, the presumption declared by this section and subdivision, that a thing once proved to exist continues as long as is usual with things of that nature, applies, the elements of intervening time and the permanent or temporary nature of the particular condition must be considered. *Doran v. United States Bldg. etc. Assn.*, 94 M 73, 76, 20 P 2d 835.

References

McKenzie v. Evans et al., 96 M 3, 8, 29 P 2d 657.

Subd. 33

Operation and Effect

Application of the presumption that the law has been obeyed, respecting the indorsement of a satisfaction of a chattel mortgage or the filing thereof. *Kerr v. Blaine*, 49 M 602, 607, 144 P 566.

In an action on an official bond, an allegation that the official in question was by the board of county commissioners duly appointed, and thereafter qualified, and ever since has been and is now a duly appointed, qualified, and acting justice of the peace of a designated township, is sufficient, aided by the statutory presumptions of subdivisions 15 and 33 of this section. *Murphy v. Johns*, 56 M 134, 136, 182 P 115.

Since the presumption obtains that the railroad commission fixed and established reasonable rates in obedience to section 3794, and that the rate as established is in accordance with the approved and published tariff, a complaint which fails to allege that freight charges were not in accordance with such tariff is defective. *Doney v. Northern Pacific Ry. Co. et al.*, 60 M 209, 199 P 432.

Where in the record on appeal from an order confirming a resolution of the board of commissioners of an irrigation district that a proposed contract be executed and an assessment levied on all irrigable lands in the district, it was stipulated that the judgment-roll in the latter of the formation of the district was admitted in evidence but was not incorporated in the record, it will be presumed on appeal that it contained and recited all the law required. *In re Fort Shaw Irr. Dist.*, 81 M 170, 180, 261 P 962.

A statutory disputable presumption, such as that the law has been obeyed (this section and subdivision) is satisfactory if uncontradicted; the sufficiency of

sworn testimony to overcome such a presumption is a question for the trier of facts, except where the facts proved are overwhelmingly against the presumed facts and permit of but one rational and reasonable conclusion. *McMahon v. Cooney et al.*, 95 M 138, 144, 25 P 2d 131.

References

Rohr v. Stanton Trust & Sav. Bk., 76 M 248, 251, 245 P 947; *Thompson et al. v. Flynn*, 95 M 484, 496, 27 P 2d 505.

Subd. 39

Operation and Effect

Under subdivision 39 of this section, a deed to land furnishes presumptive evidence of a consideration, and the burden of showing want of consideration sufficient to support it is upon him who seeks to invalidate it or avoid its effect. *Lee v. Laughery*, 55 M 238, 245, 175 P 873.

Where in an action by the vendor to compel the purchaser to specifically perform a land contract by payment of a balance due on the purchase price, the contract was attached to and made a part of the complaint, it was error to sustain an objection to the introduction of testimony on the ground that the complaint failed to allege an adequate consideration, the burden of showing a want of it having been upon defendant. *Saint et al. v. Beal*, 66 M 292, 297, 213 P 248.

The presumption is that promissory notes were supported by a sufficient consideration, and that the burden of proving want of consideration is upon the party alleging it. *Dilts v. Brooks et al.*, 66 M 346, 349, 213 P 600.

A written contract (promissory note) is presumed to be supported by a sufficient consideration; the burden of showing otherwise is on the party seeking to avoid it. *Bielenberg v. Higgins et al.*, 85 M 69, 71, 277 P 636.

References

McConnell v. Blackley, 66 M 510, 514, 214 P 64; *Hale et al. v. Belgrade Co., Ltd.*, et al., 75 M 99, 111, 242 P 425; *Miles Savings Bank v. Liquin & Swandal*, 90 M 513, 521, 4 P 2d 482; *State v. Lund*, 93 M 169, 185, 18 P 2d 603.

Disputable Presumption

A disputable presumption is satisfactorily overcome by a preponderance of the evidence—it then fades away in the face of the contrary facts. *Monaghan v. Standard Motor Co.*, 96 M 165, 173, 29 P 2d 278.

Id. Uncontradicted testimony is not sufficient to overcome a disputable presumption, where the inferences to be drawn from the facts and circumstances

are open to different conclusions by reasonable men; nor is a mere denial by an interested witness, uncorroborated by other evidence, sufficient to overcome it.

Not Error to Refuse to Instruct on Certain Presumptions

Error cannot be predicated upon the action of the court in refusing to include, in an instruction, the provisions of subdivisions 8, 11, and 12 of this section. It is not commendable practice to submit to jurors abstract rules of law, though they are correct. *Cuerth v. Arbogast*, 48 M 209, 221, 136 P 383.

Other Presumptions Not Specifically Cited Under Any One of the Above Subdivisions

Assuming that the supreme court should, in a proper case where a stay of proceedings has been ordered by the trial court, use the writ of mandamus to compel the requirement of security pending the motion for a new trial, the presumption must be indulged that the defendant regularly pursued his duty, and that the order complained of was the result of the exercise of a wise discretion. *State ex rel. Robinson v. Clements*, 37 M 96, 100, 94 P 837.

It is a prima facie presumption that a railway brakeman on a freight-train has authority, by virtue of his employment, to eject trespassers therefrom. In some states, however, the presumption is conclusive. *Golden v. Northern Pacific Ry. Co.*, 39 M 435, 451, 104 P 549.

On motion for nonsuit everything will be deemed proved which the evidence of plaintiff tends to prove, the defendant, by making the motion, admitting the truth of all of plaintiff's testimony. *Park v. Grady*, 62 M 246, 204 P 382.

A bank which, while acting in the capacity of a trustee in collecting a draft, mingles the money of the beneficiary thus collected with its own, in disregard of instructions to remit to him, and then uses the common fund, will be presumed to have used its own money first, and the sum remaining will be deemed to belong to the beneficiary as far as necessary to make up, if possible, the full amount due him. *Hawaiian Pineapple Co. v. Browne*, 69 M 140, 220 P 1114.

A promissory note in the possession of the payee bearing no indorsement showing payment is presumed to be unpaid; and where the maker pleads payment, he has the burden of proving it and must produce evidence sufficient to overcome such prima facie presumption, as well as any other evidence tending to show that the note was unpaid. *Vesel v. Polich Trading Co. et al.*, 96 M 118, 129, 28 P 2d 858.

Presumptions Do Not Operate Backward
Presumptions do not operate backwards; i. e., from the fact that a condition exists at a particular time it may not be presumed that it existed in the past. *Doran v. United States Bldg. etc. Assn.*, 94 M 73, 76, 20 P 2d 835.

Presumptions May Not be Made the Basis for Further Presumptions

While from one fact found another fact may be presumed if the presumption is a logical result, a fact presumed may not be made the basis for a further presumption. *Doran v. United States Bldg. etc. Assn.*, 94 M 73, 76, 20 P 2d 835.

What is Not Presumed

Where the record contains no evidence of fraud, it will not be presumed that a party acted with fraudulent intent. *Floyd-Jones v. Anderson*, 30 M 351, 363, 76 P 751.

References in General

Cited or applied as section 3266, Code of Civil Procedure, in *State v. Lagoni*, 30 M

472, 483, 76 P 1044; *State v. Tully*, 31 M 365, 384, 78 P 760; *State v. Schaefer*, 35 M 217, 221, 88 P 792; as section 7962, Revised Codes, in *In re Huston's Estate*, 48 M 524, 535, 139 P 458; *Cooper v. Romney*, 49 M 119, 128, 141 P 289; *Dubbels v. Thompson*, 49 M 550, 557, 143 P 986; *Fusselman v. Yellowstone Valley Land & Irrigation Co.*, 53 M 254, 263, 163 P 473; *Dover Lumber Co. v. Whitcomb*, 54 M 141, 151, 168 P 947; *Grant v. Williams*, 54 M 246, 252, 169 P 286; *State v. Smith*, 57 M 563, 581, 190 P 107; *Daly v. Kelly*, 57 M 306, 309, 187 P 1022; *State v. Rouleau et al.*, 68 M 529, 542, 219 P 1096; *State ex rel. Hansen v. District Court*, 72 M 245, 250, 233 P 126; *State v. Sedlacek*, 74 M 201, 209, 239 P 1002; *Quickenden v. Hulbert et al.*, 83 M 501, 509, 272 P 994; *State v. Sim*, 92 M 541, 548, 16 P 2d 411; *Arnold et al. v. Genzberger et al.*, 96 M 358, 383, 31 P 2d 396.

CHAPTER 162

INDISPENSABLE EVIDENCE—EVIDENCE OF AGREEMENTS NOT IN WRITING—CONCLUSIVE AND UNANSWERABLE EVIDENCE

- Section 10607. Indispensable evidence, what constitutes.
10608. To prove perjury and treason, more than one witness required.
10609. Will to be in writing.
10610. Will—how revoked.
10611. Transfer of real property to be in writing.
10612. Last section not to extend to certain cases.
10613. Agreement not in writing—when invalid.
10614. Representation of credit by writing.
10615. Conclusive or unanswerable evidence.

10607. Indispensable evidence, what constitutes. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.

History: En. Sec. 3270, C. Civ. Proc. 1895; re-en. Sec. 7963, Rev. C. 1907; re-en. Sec. 10607, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1967.

References

Cited or applied as section 3270, Code of Civil Procedure, in *Christiansen v. Aldrich*, 30 M 446, 453, 76 P 1007.

10608. To prove perjury and treason, more than one witness required. Perjury and treason must be proved by testimony of more than one witness; treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

History: En. Sec. 3271, C. Civ. Proc. 1895; re-en. Sec. 7964, Rev. C. 1907; re-en. Sec. 10608, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1968.

Operation and Effect

Whether or not a convict under sentence of imprisonment in the state prison, ap-

pearing as a witness for the state in a perjury trial, was entitled to full credit, under the rule that perjury may be proved by the testimony of two witnesses or one witness and corroborating circumstances, was, under the circumstances for the determination of the jury. *State v. Jackson*, 88 M 420, 430, 293 P 309.

10609. Will to be in writing. A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with

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such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given.

History: En. Sec. 3272, C. Civ. Proc. 1895; re-en. Sec. 7965, Rev. C. 1907; re-en. Sec. 10609, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1969.

10610. Will—how revoked. A written will cannot be revoked or altered otherwise than as provided in the Civil Code.

History: En. Sec. 3273, C. Civ. Proc. 1895; re-en. Sec. 7966, Rev. C. 1907; re-en. Sec. 10610, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1970.

10611. Transfer of real property to be in writing. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust over or power concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance, or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

History: En. Sec. 6, p. 393, Cod. Stat. 1871; re-en. Sec. 160, 5th Div. Rev. Stat. 1879; re-en. Sec. 217, 5th Div. Comp. Stat. 1887; re-en. Sec. 3274, C. Civ. Proc. 1895; re-en. Sec. 7967, Rev. C. 1907; re-en. Sec. 10611, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1971.

Operation and Effect

A copartnership for locating a quartz lode is such a contract as does not come within the statute of frauds, and can be enforced. *Hirbour v. Reeding*, 3 M 15, 19, 11 Mor. Min. Rep. 514.

An express verbal contract for the sale of real estate is void under the statute of frauds. *Ryan v. Dunphy*, 4 M 342, 354, 1 P 710.

A parol agreement for the sale of real estate is void unless there is part per-

formance. *Lamme v. Dodson*, 4 M 560, 593, 2 P 298.

Where a trust in land was declared on behalf of the members of a syndicate by the grantee of the land to secure the payment of the price to the grantor, such grantee, in signing the declaration, acted as agent of the parties to the syndicate, and they were bound by the declaration, although they did not sign it. *Goodell v. Sanford*, 31 M 163, 174, 77 P 522.

References

Cited or applied as section 217, Fifth Division Compiled Statutes 1887, in *Lewis v. Lindley*, 19 M 422, 438, 48 P 765; as section 3274, Code of Civil Procedure, in *Christiansen v. Aldrich*, 30 M 446, 453, 76 P 1007; *Wells v. Waddell*, 59 M 436, 441, 196 P 1000; *Eccles v. Kendrick*, 80 M 120, 126, 259 P 609.

10612. Last section not to extend to certain cases. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

History: En. Sec. 7, p. 393, Cod. Stat. 1871; re-en. Sec. 161, 5th Div. Rev. Stat. 1879; re-en. Sec. 218, 5th Div. Comp. Stat. 1887; re-en. Sec. 3275, C. Civ. Proc. 1895; re-en. Sec. 7968, Rev. C. 1907; re-en. Sec. 10612, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1972.

Operation and Effect

A principal may be estopped to deny an oral contract of sale, made by his agent,

after part performance, and specific performance may be decreed, though a mere ratification of such contract must be in writing. *Cobban v. Hecklen*, 27 M 245, 258, 70 P 805.

References

Cited or applied as section 218, Fifth Division Compiled Statutes 1887, in *Maul v. Schultz*, 19 M 335, 48 P 626.

10613. Agreement not in writing—when invalid. In the following cases the agreement is invalid, unless the same or some note or memorandum

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667, 669
190 P. (2d)
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102 Mont. 475
59 P (2d) 795

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157 P. 2d 789
158 P. 2d 492
159 P. 2d 887
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200 P. (2d) 243
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thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 8175 of the Civil Code.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase-money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

History: En. Sec. 3276, C. Civ. Proc. 1895; re-en. Sec. 7969, Rev. C. 1907; re-en. Sec. 10613, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1973.

NOTE.—The history of our statute of frauds is given under section 7519.

Subd. 1

Operation and Effect

An oral agreement which by its terms is not to be performed within one year from its making is invalid, i. e., void for any purpose, and part performance does not take it out of the statute; hence it was error to permit evidence of the terms of such an agreement to be introduced in an action to recover the reasonable value of services rendered in pursuance of the agreement. *Dreidlein v. Manger*, 69 M 155, 162, 220 P 1107.

Subd. 2

Operation and Effect

"Guaranty" is a collateral agreement or undertaking on the part of one person called the guarantor, to pay a debt or perform an obligation in the event of the failure of another person, called the principal, who is himself liable in the first instance for such payment or performance, to a third person called the guarantee; it must be in writing and based upon a consideration. *Doorly v. Goodman*, 71 M 529, 534, 230 P 779.

Subd. 4

Operation and Effect

Where the value of property involved in a sale is sufficient to bring the contract of sale within the provisions of this section, the burden is on plaintiff, in an action for breach of the contract, to establish by a preponderance of evidence that a valid contract under the statutes was entered into between the parties, together with a breach of such contract, and the consequent damages. *Brophy v. Idaho P. & P. Co.*, 31 M 279, 284, 78 P 493.

Part payment of the purchase price upon a contract for the sale of cattle brought the transaction within the exception provided for in this section. *Case v. Kramer*, 34 M 142, 149, 85 P 878.

Subd. 5

Operation and Effect

In an action for the cancellation of a promissory note and chattel mortgage securing it, alleged by plaintiff vendor to have been given by him to his vendee as security if plaintiff should be unable to perfect his title to a portion of the land sold (which title had been obtained, deed being tendered), and claimed by defendant vendee to have been given under an oral agreement to take back the land sold, the amount of the note representing payments made by defendant on the purchase price, held, that such oral agreement was in effect one for the retransfer of real property

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and therefore void under the statute of frauds, which requires such an agreement to be in writing subscribed by the party to be charged, the plaintiff. *Eccles v. Kendrick*, 80 M 120, 259 P 609.

Under an oral contract of lease of a tract of land for a term of two years the lessee remained in possession for the entire term. In an action to recover a balance of \$275 of the total rent of \$300 stipulated for the lessee's defense was that the contract was void under the statute of frauds because not in writing. Held, that the landlord having fully performed his part of the agreement and the tenant having occupied the premises for the full term, the contract was taken out of the statute and the tenant was not in position to invoke its invalidity to shield him from payment of the rent. *Besse v. McHenry*, 89 M 520, 527, 300 P 199.

Evidence of a Void Oral Agreement Not Admissible

Unless a contract void under the statute of frauds because not in writing is removed from the operation of the statute by an exception, it is not only unenforceable but evidence of it may not be received. *McIntyre et al. v. Dawes*, 71 M 367, 375, 229 P 846.

Full Performance Takes Case Out of the Statute

Where an oral agreement to adopt was fully performed by the mother upon surrender of the child, and thereafter by the child until the death of the adopting

parties, it was taken out of the statute of frauds by full performance. *Gravelin v. Porier et al.*, 77 M 260, 280, 250 P 823.

Complete performance of an oral contract by one of the parties to it takes the agreement out of the operation of the statute of frauds under which it otherwise would be invalid. *Besse v. McHenry*, 89 M 520, 527, 300 P 199.

Invalid Contracts, When Admissible as Evidence of Ratification

Though an oral contract be invalid under the statute of frauds and in an action thereon evidence seeking to establish it is incompetent, it may be received as evidence in support of a plea such as ratification. *Arnold et al. v. Genzberger et al.*, 96 M 358, 373, 31 P 2d 396.

What Constitutes Part Performance

Part performance which will avoid the statute of frauds may consist of an act done in the performance of the contract which puts the party performing it in such a situation that the nonenforcement of the agreement would be a fraud upon him. *McIntyre et al. v. Davis*, 71 M 367, 375, 229 P 846; *Eccles v. Kendrick*, 80 M 120, 259 P 609.

References

DeAtley et al. v. Streit et al., 81 M 382, 390, 263 P 967; *Walker v. Hill*, 90 M 111, 300 P 260; *Department of Agriculture etc. v. DeVore*, 91 M 47, 61, 6 P 2d 125; *First Nat. Bank v. Hergert et al.*, 94 M 197, 202, 22 P 2d 169.

10614. Representation of credit by writing. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

History: En. Sec. 3277, C. Civ. Proc. 1895; re-en. Sec. 7970, Rev. C. 1907; re-en. Sec. 10614, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1974.

10615. Conclusive or unanswerable evidence. No evidence is by law made conclusive or unanswerable, unless so declared by this code.

History: En. Sec. 3280, C. Civ. Proc. 1895; re-en. Sec. 7971, Rev. C. 1907; re-en. Sec. 10615, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1978.

CHAPTER 163

PRODUCTION OF EVIDENCE—BY WHOM PRODUCED

Section 10616. Evidence to be produced, by whom.

10617. Writing altered—who to explain.

10616. Evidence to be produced, by whom. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

History: En. Sec. 3290, C. Civ. Proc. 1895; re-en. Sec. 7972, Rev. C. 1907; re-en. Sec. 10616, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1981.

Operation and Effect

If one asserts himself to be the owner of the right to use waters claimed by him, the burden is on him to prove it. *Smith v. Duff*, 39 M 374, 378, 102 P 981.

Where a life insurance policy provided that the contract should not become effective unless the first premium had been paid and the policy issued during the "continuance in good health" of the insured, and, upon suit being brought by the widow of the insured, and it being admitted that the first premium was paid, the plaintiff was entitled to judgment, in the absence of evidence tending to establish fraud upon which alone the defendant relied to avoid the contract; and the burden to show such fraud was on the defendant. *Pelican v. Mutual Life Ins. Co.*, 44 M 277, 285, 119 P 778.

The burden throughout is on him who has the affirmative of an issue. *De Sandro v. Missoula Light & Water Co.*, 48 M 226, 237, 136 P 711.

Under this section, the party asserting a right in any case has the burden of prov-

ing each of the material allegations of his cause of action. *Tucker v. Missoula Light & Ry. Co. et al.*, 77 M 91, 100, 250 P 11.

While the right of dower is favored in the law, the burden of establishing the existence of a valid marriage as the basis of that right rests upon the person asserting it. *Shepherd & Pierson Co. v. Baker*, 81 M 185, 193, 262 P 887.

Plaintiffs, by alleging ratification and issue being joined thereon by the defendants, assumed the burden of proof of that fact. *Arnold et al. v. Genzberger et al.*, 96 M 358, 373, 31 P 2d 396.

References

Cited or applied as section 7972, Revised Codes, in *In re Murphy's Estate*, 43 M 353, 373, 116 P 1004, Ann. Cas. 1912C, 380; *Lyon v. Chicago, Milwaukee & St. Paul Ry. Co.*, 50 M 532, 537, 148 P 386; *Connelly Co. v. Schlueter Bros. et al.*, 69 M 65, 69, 220 P 103; *Doering v. Selby et al.*, 75 M 416, 421, 244 P 485; *Malano v. Bressan*, 76 M 366, 372, 245 P 871; *Putnam v. Putnam*, 86 M 135, 146, 282 P 855.

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10617. Writing altered—who to explain. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.

History: En. Sec. 365, p. 119, *Bannack Stat.*; re-en. Sec. 423, p. 221, L. 1867; re-en. Sec. 497, p. 136, *Cod. Stat.* 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 12, p. 12, L. 1881; re-en. Sec. 644, 1st Div. *Comp. Stat.* 1887; amd. Sec. 3291, C. Civ. Proc. 1895; re-en. Sec. 7973, *Rev. C.* 1907; re-en. Sec. 10617, R. C. M. 1921. *Cal. C. Civ. Proc. Sec.* 1982.

Operation and Effect

Where alterations appeared in an alleged written confession of defendant charged with crime, it was incumbent upon the state, under this section, relating to writings offered in evidence as exhibits in civil cases but made applicable to criminal cases by section 11977, to account for them before it is admissible in evidence; in the instant case defendant testified that the writing was inaccurate. *State v. Crighton*, 97 M 387, 400, 34 P 2d 511.

CHAPTER 164**PRODUCTION OF EVIDENCE—MEANS OF PRODUCTION—SUBPOENA**

- Section 10618. Subpoena for witness defined.
 10619. Subpoena—how issued.
 10620. Subpoena—how served.
 10621. How served, if witness be concealed.
 10622. When a witness is not compelled to attend.
 10623. Person present compelled to testify.
 10624. Disobedience—how punished.
 10625. Forfeiture therefor.
 10626. Warrant may issue to bring witness, when.
 10627. Contents of warrant.
 10628. If witness be a prisoner, how brought.
 10629. On whose motion.
 10630. How examined.

10618. Subpoena for witness defined. The process by which the attendance of a witness is required is by a subpoena. It is a writ or order directed to a person, and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

History: Ap. p. Sec. 380, p. 212, L. 1867; re-en. Sec. 454, p. 127, Cod. Stat. 1871; re-en. Sec. 633, p. 204, L. 1877; re-en. Sec. 633, 1st Div. Rev. Stat. 1879; re-en. Sec. 654, 1st Div. Comp. Stat. 1887; en. Sec. 3300, C. Civ. Proc. 1895; re-en. Sec. 7974, Rev. C. 1907; re-en. Sec. 10618, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1895.

References

Cited or applied as section 3300, Code of Civil Procedure, in *McGlaulin v. Wormser*, 28 M 177, 182, 72 P 428; *May v. Northern Pacific Ry. Co.*, 32 M 522, 537, 81 P 328; *Helena Adjustment Co. v. Claflin*, 75 M 317, 326, 243 P 1063.

10619. Subpoena—how issued. The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein; it is issued under the seal of the court before which the attendance is required, or in which the issue is pending.

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice, or any other officer before whom the attendance is required.

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdictions, with like power to enforce attendance; and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

History: Ap. p. Sec. 322, p. 111, Bannack Stat.; en. Sec. 381, p. 212, L. 1867; re-en. Sec. 455, p. 127, Cod. Stat. 1871; re-en. Sec. 634, p. 204, L. 1877; re-en. Sec. 634, 1st Div. Rev. Stat. 1879; re-en. Sec. 655, 1st Div. Comp. Stat. 1887; re-en. Sec.

3301, C. Civ. Proc. 1895; re-en. Sec. 7975, Rev. C. 1907; re-en. Sec. 10619, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1896.

References

State ex rel. Mangam v. District Court, 91 M 240, 243, 6 P 2d 873.

10620. Subpoena—how served. The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

History: En. Sec. 382, p. 212, L. 1867; re-en. Sec. 456, p. 127, L. 1871; re-en. Sec. 635, p. 205, L. 1877; re-en. Sec. 635, 1st Div. Rev. Stat. 1879; re-en. Sec. 656, 1st

Div. Comp. Stat. 1887; amd. Sec. 3302, C. Civ. Proc. 1895; re-en. Sec. 7976, Rev. C. 1907; re-en. Sec. 10620, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1897.

10621. How served, if witness be concealed. If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon

him, any court or judge, or any officer issuing a subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

History: En. Sec. 383, p. 212, L. 1867; 657, 1st Div. Comp. Stat. 1887; re-en. Sec. 457, p. 127, Cod. Stat. 1871; 3303, C. Civ. Proc. 1895; re-en. Sec. 7977, re-en. Sec. 636, p. 205, L. 1877; re-en. Sec. Rev. C. 1907; re-en. Sec. 10621, R. C. M. 636, 1st Div. Rev. Stat. 1879; re-en. Sec. 1921. Cal. C. Civ. Proc. Sec. 1988.

10622. When a witness is not compelled to attend. A witness is not obliged to attend as a witness before any court, judge, or justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

History: En. Sec. 325, p. 111, Bannack Stat.; amd. Sec. 380, p. 212, L. 1867; re-en. Sec. 454, p. 127, Cod. Stat. 1871; re-en. Sec. 633, p. 204, L. 1877; re-en. Sec. 633, 1st Div. Rev. Stat. 1879; re-en. Sec. 654, 1st Div. Comp. Stat. 1887; re-en. Sec. 3304, C. Civ. Proc. 1895; re-en. Sec. 7978, Rev. C. 1907; re-en. Sec. 10622, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1989.

* Operation and Effect

While witnesses residing in a county other than where the trial is had, and more than thirty miles from the place where it takes place, may not be compelled to attend under this section, where they attend and the court finds that their testimony was necessary, the successful party is entitled to include the amount paid

them for mileage in his cost bill. *McGlaulin v. Wormser*, 28 M 177, 182, 72 P 428; *Great Falls Meat Co. v. Jenkins*, 33 M 417, 422, 84 P 74.

The constitutionality of this section was doubted by the supreme court in *McGlaulin v. Wormser*, 28 M 177, 182, 72 P 428; but conceding that it is not open to this objection, it does not deal with the subject of mileage of witnesses, but clearly and explicitly and in terms extends to a witness coming within its provisions a privilege to attend or refuse at his option. *Great Falls Meat Co. v. Jenkins*, 33 M 417, 422, 84 P 74.

References

Helena Adjustment Co. v. Claflin, 75 M 317, 326, 243 P 1063.

10623. Person present compelled to testify. A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

History: En. Sec. 326, p. 112, Bannack Stat.; re-en. Sec. 384, p. 212, L. 1867; re-en. Sec. 458, p. 128, Cod. Stat. 1871; re-en. Sec. 637, p. 206, L. 1877; re-en. Sec. 637, 1st Div. Rev. Stat. 1879; re-en. Sec. 658, 1st Div. Comp. Stat. 1887; re-en. Sec.

3305, C. Civ. Proc. 1895; re-en. Sec. 7979, Rev. C. 1907; re-en. Sec. 10623, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1990.

References

Helena Adjustment Co. v. Claflin, 75 M 317, 326, 243 P 1063.

10624. Disobedience—how punished. Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out.

History: En. Sec. 329, p. 112, Bannack Stat.; amd. Sec. 387, p. 213, L. 1867; re-en. Sec. 461, p. 128, Cod. Stat. 1871; re-en. Sec. 640, p. 206, L. 1877; re-en. Sec. 640, 1st Div. Rev. Stat. 1879; re-en. Sec. 661, 1st Div. Comp. Stat. 1887; re-en. Sec. 3306, C. Civ. Proc. 1895; re-en. Sec. 7980, Rev. C. 1907; re-en. Sec. 10624, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1991.

Operation and Effect

The supreme court will not, by prohibition, restrain the district court from enter-

taining and determining a motion to strike an answer from the files and enter judgment by default under this section, on the ground that such section is unconstitutional, although the district court may have erroneously decided to uphold the constitutionality of the section, and may, in consequence, eventually make an order which will be in excess of its jurisdiction. *State ex rel. Heinze v. District Court*, 32 M 294, 396, 80 P 673.

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S.L. 49, C. 113
Sec. 1, P. 219

Id. Query, whether the district court, under this section, may lawfully find a person in contempt for refusing to obey an order of a notary public when cited to appear before such officer and give his deposition for use in a cause pending in the district court.

References

Cited or applied as section 3306, Code of Civil Procedure, in *State ex rel. Heinze v. District Court*, 32 M 579, 580, 81 P 345; as section 7980, Revised Codes, in *Hauser v. Newman*, 39 M 252, 254, 102 P 334; *State ex rel. Bacorn v. District Court*, 73 M 297, 302, 236 P 553.

10625. Forfeiture therefor. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

History: En. Sec. 330, p. 112, Bannack Stat.; re-en. Sec. 388, p. 213, L. 1867; re-en. Sec. 462, p. 128, Cod. Stat. 1871; re-en. Sec. 641, p. 206, L. 1877; re-en. Sec. 641, 1st Div. Rev. Stat. 1879; re-en. Sec.

662, 1st Div. Comp. Stat. 1887; re-en. Sec. 3307, C. Civ. Proc. 1895; re-en. Sec. 7981, Rev. C. 1907; re-en. Sec. 10625, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1992.

10626. Warrant may issue to bring witness, when. In case of a failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

History: En. Sec. 331, p. 112, Bannack Stat.; amd. Sec. 389, p. 213, L. 1867; re-en. Sec. 463, p. 128, Cod. Stat. 1871; re-en. Sec. 642, p. 207, L. 1877; re-en. Sec. 642, 1st Div. Rev. Stat. 1879; re-en. Sec. 663, 1st

Div. Comp. Stat. 1887; re-en. Sec. 3308, C. Civ. Proc. 1895; re-en. Sec. 7982, Rev. C. 1907; re-en. Sec. 10626, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1993.

10627. Contents of warrant. Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process by the district court.

History: En. Sec. 643, p. 207, L. 1877; re-en. Sec. 643, 1st Div. Rev. Stat. 1879; re-en. Sec. 664, 1st Div. Comp. Stat. 1887;

re-en. Sec. 3309, C. Civ. Proc. 1895; re-en. Sec. 7983, Rev. C. 1907; re-en. Sec. 10627, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1994.

10628. If witness be a prisoner, how brought. If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court.

2. By a justice of the supreme court, or a judge of the district court of the county where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court.

History: En. Sec. 332, p. 112, Bannack Stat.; re-en. Sec. 390, p. 213, L. 1867; re-en. Sec. 464, p. 128, Cod. Stat. 1871; re-en. Sec. 644, p. 207, L. 1877; re-en. Sec. 644, 1st Div. Rev. Stat. 1879; re-en. Sec. 665, 1st

Div. Comp. Stat. 1887; amd. Sec. 3310, C. Civ. Proc. 1895; re-en. Sec. 7984, Rev. C. 1907; re-en. Sec. 10628, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1995.

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10629. On whose motion. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

History: En. Sec. 333, p. 113, Bannack Stat.; re-en. Sec. 391, p. 213, L. 1867; re-en. Sec. 465, p. 128, Cod. Stat. 1871; re-en. Sec. 645, p. 207, L. 1877; re-en. Sec. 645, 1st Div. Rev. Stat. 1879; re-en. Sec. 666, 1st Div. Comp. Stat. 1887; re-en. Sec. 3311, C. Civ. Proc. 1895; re-en. Sec. 7985, Rev. C. 1907; re-en. Sec. 10629, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1996.

10630. How examined. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

History: En. Sec. 334, p. 113, Bannack Stat.; re-en. Sec. 392, p. 213, L. 1867; re-en. Sec. 466, p. 129, Cod. Stat. 1871; re-en. Sec. 646, p. 207, L. 1877; re-en. Sec. 646, 1st Div. Rev. Stat. 1879; re-en. Sec. 667, 1st Div. Comp. Stat. 1887; re-en. Sec. 3312, C. Civ. Proc. 1895; re-en. Sec. 7986, Rev. C. 1907; re-en. Sec. 10630, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1997.

References

Cited or applied as section 3312, Code of Civil Procedure, in *May v. Northern Pacific Ry. Co.*, 32 M 522, 537, 81 P 328.

CHAPTER 165

PRODUCTION OF EVIDENCE—MANNER OF PRODUCTION—BY AFFIDAVIT, DEPOSITION, AND EXAMINATION

- Section 10631. Testimony—in what mode taken.
- 10632. Affidavit defined.
- 10633. A deposition defined.
- 10634. Oral examination defined.
- 10635. Deposition—how taken.

10631. Testimony—in what mode taken. The testimony of a witness is taken in three modes:

1. By affidavit.
2. By deposition.
3. By oral examination.

History: En. Sec. 3320, C. Civ. Proc. 1895; re-en. Sec. 7987, Rev. C. 1907; re-en. Sec. 10631, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2002.

Operation and Effect

In application for letters of administration where there is no contest, affidavits of nonresident witnesses, taken before a notary public, may be used to prove death, although no commission was issued and no notice given that the testimony of such witnesses would be taken. The dis-

trict judge, if he is not satisfied with the proof thus offered, has the power to order further testimony. In *re Liter's Estate*, 19 M 474, 480, 48 P 753.

References

Cited or applied as section 3320, Code of Civil Procedure, in *Benepe-Owenhouse Co. v. Scheidegger*, 32 M 424, 429, 80 P 1024; as section 7987, Revised Codes, in *Morehouse v. Bynum*, 51 M 289, 292, 152 P 477; *Fisk Tire Co. v. Lanstrum et al.*, 96 M 279, 282, 30 P 2d 84.

10632. Affidavit defined. An affidavit is a written declaration under oath, made without notice to the adverse party.

History: En. Sec. 3321, C. Civ. Proc. 1895; re-en. Sec. 7988, Rev. C. 1907; re-en. Sec. 10632, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2003.

Operation and Effect

A paper intended as an affidavit for an attachment is insufficient upon its face where the declarations therein contained

do not purport to have been made under oath, or before an officer authorized to administer an oath. *Continental Oil Co. v. Jameson*, 53 M 466, 468, 164 P 727.

In the absence of a statute requiring an affidavit to be signed by the affiant, the affidavit will be held sufficient though not signed, if it appears by the certificate of a competent attesting officer that

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affiant made oath thereto. *International Harvester Co. v. Embody*, 89 M 402, 404, 298 P 348.

References

Cited or applied as section 3321, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 479, 48 P 753; *Reynolds v. Fitz-*

patrick, 23 M 52, 59, 57 P 452; as section 7988, Revised Codes, in *Wertz v. Lamb*, 43 M 477, 482, 117 P 89; *Crane & Ordway Co. v. Baatz*, 53 M 438, 444, 164 P 533; *Thedin et al. v. First National Bank*, 67 M 65, 71, 214 P 956; *State v. English*, 71 M 343, 346, 229 P 727; *Fisk Tire Co. v. Lanstrum et al.*, 96 M 279, 281, 30 P 2d 84.

10633. A deposition defined. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

History: En. Sec. 3322, C. Civ. Proc. 1895; re-en. Sec. 7989, Rev. C. 1907; re-en. Sec. 10633, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2004.

References

Cited or applied as section 3322, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 479, 48 P 753; *State v. English*, 71 M 343, 346, 229 P 727; *State v. Crighton*, 97 M 387, 403, 34 P 2d 511.

10634. Oral examination defined. An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

History: En. Sec. 3323, C. Civ. Proc. 1895; re-en. Sec. 7990, Rev. C. 1907; re-en. Sec. 10634, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2005.

10635. Deposition—how taken. Depositions must be taken in the form of questions and answers, and the words of the witness must be written down, unless the parties agree to a different mode.

History: En. Sec. 3324, C. Civ. Proc. 1895; re-en. Sec. 7991, Rev. C. 1907; re-en. Sec. 10635, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2006.

CHAPTER 166

AFFIDAVITS

Section 10636. Affidavits—for what purposes may be used.

10637. Evidence of publication—what constitutes.

10638. Filing evidence of publication.

10639. Affidavits to be used in this state—before whom may be taken in this state.

10640. If made in another state of the United States, before whom taken.

10641. If made in a foreign country, before whom taken.

10642. Certificate of the clerk, if taken before a judge of a court out of this state.

10636. Affidavits—for what purposes may be used. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other cases expressly permitted by some other provision of this code.

History: En. Sec. 3330, C. Civ. Proc. 1895; re-en. Sec. 7992, Rev. C. 1907; re-en. Sec. 10636, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2009.

Operation and Effect

An affidavit may be used to verify a pleading or paper required to be verified, but it gives no evidentiary value to a

paper not required to be verified. *State ex rel. Wood v. Board of Commrs.*, 49 M 165, 171, 140 P 728.

An affidavit filed in support of a motion to modify a decree of divorce is merely a tender of evidence in support of the motion, and hence an order overruling a motion to strike such affidavit is nothing more than an interlocutory ruling upon

the admissibility of evidence, and is not appealable as a special order made after final judgment. *Weed v. Weed*, 55 M 599, 601, 179 P 827.

Under the rule that where an affidavit is used by one party a counter affidavit may be used by his adversary, where a motion to suppress evidence was made upon affidavit the state could properly oppose it by counter affidavit. *State*

ex rel. Merrell v. District Court, 72 M 77, 81, 231 P 1107.

References

Cited or applied as section 3330, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 479, 48 P 753; as section 7992, Revised Codes, in *Morehouse v. Bynum*, 51 M 289, 292, 152 P 477; *State ex rel. Hansen v. District Court*, 72 M 245, 249, 233 P 126.

10637. Evidence of publication—what constitutes. Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer or publisher of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

History: En. Sec. 13, p. 12, L. 1881; re-en. Sec. 677, 1st Div. Comp. Stat. 1887; re-en. Sec. 3331, C. Civ. Proc. 1895; re-en. Sec. 7993, Rev. C. 1907; re-en. Sec. 10637, R. C. M. 1921; amd. Sec. 1, Ch. 80, L. 1935. Cal. C. Civ. Proc. Sec. 2010.

References

Cited or applied as section 7993, Revised Codes, in *Harvey v. Town of Townsend et al.*, 57 M 407, 188 P 897.

10638. Filing evidence of publication. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case the original affidavit, or a copy thereof, certified by the judge of the court or clerk having it in custody, is prima facie evidence of the facts stated therein.

History: En. Sec. 655, p. 209, L. 1877; re-en. Sec. 655, 1st Div. Rev. Stat. 1879; re-en. Sec. 676, 1st Div. Comp. Stat. 1887; re-en. Sec. 3332, C. Civ. Proc. 1895; re-en. Sec. 7994, Rev. C. 1907; re-en. Sec. 10638, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2011.

10639. Affidavits to be used in this state—before whom may be taken in this state. An affidavit to be used before any court, judge, or officer of this state may be taken before any judge or clerk of any court, or any justice of the peace, county clerk, or notary public in this state.

History: En. Sec. 336, p. 113, Bannack Stat.; re-en. Sec. 399, p. 215, L. 1867; re-en. Sec. 473, p. 130, Cod. Stat. 1871; re-en. Sec. 651, p. 208, L. 1877; re-en. Sec. 651, 1st Div. Rev. Stat. 1879; re-en. Sec. 672, 1st Div. Comp. Stat. 1887; re-en. Sec. 3333, C. Civ. Proc. 1895; re-en. Sec. 7995, Rev. C. 1907; re-en. Sec. 10639, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2012.

10640. If made in another state of the United States, before whom taken. An affidavit taken in another state of the United States, to be used in this state, may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any notary public in another state, or before any judge or clerk of a court of record having a seal.

History: En. Sec. 337, p. 113, Bannack Stat.; amd. Sec. 400, p. 215, L. 1867; amd. Sec. 474, p. 130, Cod. Stat. 1871; re-en. Sec. 652, p. 208, L. 1877; re-en. Sec. 652, 1st Div. Rev. Stat. 1879; re-en. Sec. 673, 1st Div. Comp. Stat. 1887; amd. Sec. 3334, C. Civ. Proc. 1895; re-en. Sec. 7996, Rev. C. 1907; re-en. Sec. 10640, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2013.

References

Cited or applied as section 3334, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 479, 48 P 753; as section 673, First Division Compiled Statutes 1887, in *Power v. Lenoir*, 22 M 169, 176.

10641. If made in a foreign country, before whom taken. An affidavit taken in a foreign country, to be used in this state, may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal in such foreign country.

History: En. Sec. 338, p. 113, Bannack Stat.; re-en. Sec. 401, p. 215, L. 1867; re-en. Sec. 475, p. 130, Cod. Stat. 1871; re-en. Sec. 653, p. 208, L. 1877; re-en. Sec. 653, 1st Div. Rev. Stat. 1879; re-en. Sec. 674, 1st Div. Comp. Stat. 1887; amd. Sec. 3335, C. Civ. Proc. 1895; re-en. Sec. 7997, Rev. C. 1907;

re-en. Sec. 10641, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2014.

References

Cited or applied as section 7997, Revised Codes, in *In re Koller's Estate*, 40 M 137, 143, 105 P 549.

10642. Certificate of the clerk, if taken before a judge of a court out of this state. When an affidavit is taken before a judge of a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

History: En. Sec. 339, p. 113, Bannack Stat.; amd. Sec. 402, p. 215, L. 1867; re-en. Sec. 476, p. 130, Cod. Stat. 1871; re-en. Sec. 654, p. 208, L. 1877; re-en. Sec. 654, 1st Div. Rev. Stat. 1879; re-en. Sec. 675, 1st Div. Comp. Stat. 1887; re-en. Sec. 3336, C. Civ. Proc. 1895; re-en. Sec. 7998, Rev. C.

1907; re-en. Sec. 10642, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2015.

References

Cited or applied as section 476, p. 130, Codified Statutes 1871, in *Fredericks v. Davis*, 3 M 251, 256.

CHAPTER 167

DEPOSITIONS—HOW TAKEN WITHOUT AND WITHIN THE STATE

- Section 10643. Deposition—when used.
 10644. Testimony of a witness out of the state—when taken.
 10645. In the state—when taken.
 10646. Testimony of witness out of the state taken upon commission issued under seal, upon notice—to whom to issue.
 10647. Proper interrogatories may be prepared, or may be waived by the parties.
 10648. Authorities and duties of commissioner.
 10649. Trial—when postponed for reason of nonreturn of commission.
 10650. Depositions—by whom used.
 10651. Deposition for use within state—notice—physical examination to be submitted to by party.
 10652. Manner of taking depositions—may be used by either party on the trial.
 10653. When deposition excluded.
 10654. A deposition once taken may be read at any time.
 10655. Deposition in this state to be used in other states.
 10656. How to procure witness upon commission.
 10657. How, if no commission.
 10658. Deposition—how taken.

10643. Deposition—when used. In all cases other than those mentioned in section 10636, where a written declaration under oath is used, it must be a deposition as prescribed by this code.

History: En. Sec. 3340, C. Civ. Proc. 1895; re-en. Sec. 7999, Rev. C. 1907; re-en. Sec. 10643, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2019.

References

Cited or applied as section 3340, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 479, 48 P 753.

10644. Testimony of a witness out of the state—when taken. The testimony of a witness out of the state may be taken by deposition in an

action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen therein.

History: Ap. p. Sec. 345, p. 115, Bannack Stat.; en. Sec. 407, p. 217, L. 1867; en. Sec. 9, p. 76, L. 1870; re-en. Sec. 481, p. 132, Cod. Stat. 1871; re-en. Sec. 660, p. 211, L. 1877; re-en. Sec. 660, 1st Div. Rev. Stat. 1879; re-en. Sec. 682, 1st Div. Comp. Stat. 1887; re-en. Sec. 3341, C. Civ. Proc. 1895; re-en. Sec. 8000, Rev. C. 1907; re-en. Sec. 10644, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2020.

Operation and Effect

Disbarment proceedings being in the nature of a special proceeding, a deposition may be taken therein under the authority of this section. In re Wellcome, 23 M 259, 260, 58 P 711.

References

Cited or applied as section 3341, Code of Civil Procedure, in In re Liter's Estate, 19 M 474, 479, 48 P 753.

10645. In the state—when taken. The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

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1. When the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness resides out of the county in which his testimony is to be used.

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89 P. (2d) 558

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause.

History: Ap. p. Sec. 340, p. 114, Bannack Stat.; amd. Sec. 403, p. 216, L. 1867; re-en. Sec. 477, p. 131, Cod. Stat. 1871; re-en. Sec. 656, p. 209, L. 1877; re-en. Sec. 656, 1st Div. Rev. Stat. 1879; re-en. Sec. 678, 1st Div. Comp. Stat. 1887; en. Sec. 3342, C. Civ. Proc. 1895; re-en. Sec. 8001, Rev. C. 1907; re-en. Sec. 10645, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2021.

References

Cited or applied as section 3342, Code of Civil Procedure, in State ex rel. White-side v. District Court, 24 M 539, 540, 63 P 395; McGlaufflin v. Wormser, 28 M 177, 182, 72 P 428; Great Falls Meat Co. v. Jenkins, 33 M 417, 422, 84 P 74; as section 8001, Revised Codes, in Hauser v. Newman, 39 M 252, 254, 102 P 334; State ex rel. Bacorn v. District Court, 73 M 297, 301, 236 P 553.

10646. Testimony of witness out of the state taken upon commission issued under seal, upon notice—to whom to issue. The deposition of a witness out of this state may be taken upon the commission issued from the court, under the seal of the court, upon an order of the court, or a judge thereof, on the application of either party, upon five days' previous notice to the other. If issued to any place within the United States, it may be directed to any person agreed upon by the parties, or if they do

not agree, to any judge or justice of the peace, or commissioner, selected by the court or judge issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties.

History: Ap. p. Sec. 346, p. 115, Bannack Stat.; amd. Sec. 408, p. 217, L. 1867; amd. Sec. 482, p. 132, Cod. Stat. 1871; amd. Sec. 1, p. 49, L. 1874; amd. Sec. 661, p. 211, L. 1877; re-en. Sec. 661, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 49, L. 1883; re-en. Sec. 683, 1st Div. Comp. Stat. 1887; en. Sec. 3350, C. Civ. Proc. 1895; re-en. Sec. 8002, Rev. C. 1907; re-en. Sec. 10646, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2024.

Operation and Effect

In application for letters of administration where there is no contest, affidavits of

nonresident witnesses, taken before a notary public, may be used to prove death, although no commission was issued and no notice given that the testimony of such witnesses would be taken. The district judge, if he is not satisfied with the proof thus offered, has the power to order further testimony. In *re Liter's Estate*, 19 M 474, 480, 48 P 753.

References

Cited or applied as section 8002, Revised Codes, in *In re Colbert's Estate*, 51 M 455, 463, 153 P 1022.

10647. Proper interrogatories may be prepared, or may be waived by the parties. Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

History: En. Sec. 409, p. 217, L. 1867; re-en. Sec. 483, p. 133, Cod. Stat. 1871; rep. Sec. 4, p. 50, L. 1874; re-en. Sec. 3351, C. Civ. Proc. 1895; re-en. Sec. 8003, Rev. C. 1907; re-en. Sec. 10647, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2025.

References

Cited or applied as section 3351, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 478, 48 P 753.

10648. Authorities and duties of commissioner. The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk of the court or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

History: En. Sec. 410, p. 217, L. 1867; re-en. Sec. 484, p. 133, Cod. Stat. 1871; rep. Sec. 4, p. 50, L. 1874; re-en. Sec. 3352, C. Civ. Proc. 1895; re-en. Sec. 8004, Rev. C. 1907; re-en. Sec. 10648, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2026.

10649. Trial—when postponed for reason of nonreturn of commission. A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

History: En. Sec. 353, p. 116, Bannack Stat.; re-en. Sec. 411, p. 217, L. 1867; re-en. Sec. 485, p. 133, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 3353, C. Civ. Proc. 1895; re-en. Sec. 8005, Rev. C. 1907; re-en. Sec. 10649, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2027.

Operation and Effect

A court of record has authority, of its own motion, and in the absence of a statute, to adjourn the hearing of a matter pending before it; but this power may be restricted as provided in this section. *Curry v. McCaffery*, 47 M 191, 201, 131 P 673.

10650. Depositions—by whom used. The deposition mentioned in this chapter may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice, subject to all just exceptions.

History: En. Sec. 3354, C. Civ. Proc. 1895; re-en. Sec. 8006, Rev. C. 1907; re-en. Sec. 10650, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2028.

References

Cited or applied as section 8006, Revised Codes, in *In re Colbert's Estate*, 51 M 455, 463, 153 P 1022.

10651. Deposition for use within state—notice—physical examination to be submitted to by party. Either party may have the deposition taken of a witness in this state, in either of the cases mentioned in section 10645, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit showing that the case is within that section. Such notice must be at least five (5) days, adding also one day for every twenty-five (25) miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice. At the time of taking the deposition of a party as a witness in any action or proceeding wherein the physical condition of such party is material, the party taking such deposition shall have the right to require the party whose deposition is being taken to submit to a physical examination by a physician selected by the party taking, or for whose benefit said deposition is being taken, but no party shall be required to submit to such physical examination until the same is duly authorized by the court in which said action or proceeding is pending, or a judge thereof.

History: En. Sec. 341, p. 114, Bannack Stat.; amd. Sec. 404, p. 216, L. 1867; re-en. Sec. 478, p. 131, Cod. Stat. 1871; re-en. Sec. 657, p. 209, L. 1877; re-en. Sec. 657, 1st Div. Rev. Stat. 1879; re-en. Sec. 679, 1st Div. Comp. Stat. 1887; amd. Sec. 3360, C. Civ. Proc. 1895; re-en. Sec. 8007, Rev. C. 1907; re-en. Sec. 10651, R. C. M. 1921; amd. Sec. 1, Ch. 34, L. 1933. Cal. C. Civ. Proc. Sec. 2031.

Operation and Effect

Under this section, a notary public is without authority to issue a subpoena to a witness, in an action pending for the purpose of taking his deposition, until the notice and a copy of the affidavit prescribed by the section, have been served upon the adverse party by the party

desiring the deposition; hence a subpoena issued prior thereto is void. *State ex rel. Mangam v. District Court*, 91 M 240, 243, 6 P 2d 873.

Id. Disobedience of a void court order does not constitute contempt; hence, held on application for a writ of prohibition to review an order of the district court requiring relator to show cause why he should not be adjudged guilty of contempt for refusing to appear before a notary public for the purpose of taking his deposition in a cause pending in the district court, that the subpoena issued by the notary having been void for failure to serve the notice and affidavit required by this section, upon the adverse party in the action, there was no jurisdictional basis for the contempt proceeding.

10652. Manner of taking depositions—may be used by either party on the trial. Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed, and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon,

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and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private means of conveyance; and thereupon such deposition may be used by either party upon the trial or proceeding against any party giving or receiving the notice, subject to all legal exceptions; but, if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions 2, 3, and 4, of section 10645, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

History: En. Sec. 342, p. 114, Bannack Stat.; amd. Sec. 405, p. 216, L. 1867; re-en. Sec. 479, p. 131, Cod. Stat. 1871; re-en. Sec. 658, p. 210, L. 1877; re-en. Sec. 658, 1st Div. Rev. Stat. 1879; re-en. Sec. 680, 1st Div. Comp. Stat. 1887; amd. Sec. 3361, C. Civ. Proc. 1895; re-en. Sec. 8008, Rev. C.

1907; re-en. Sec. 10652, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2032.

Operation and Effect

This section regulates the manner of taking and use of such depositions only as are taken within the state. In re Colbert's Estate, 51 M 455, 465, 153 P 1022.

10653. When deposition excluded. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

History: En. Sec. 3362, C. Civ. Proc. 1895; re-en. Sec. 8009, Rev. C. 1907; re-en. Sec. 10653, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2033.

10654. A deposition once taken may be read at any time. When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it.

History: En. Sec. 344, p. 115, Bannack Stat.; amd. Sec. 406, p. 217, L. 1867; re-en. Sec. 480, p. 132, Cod. Stat. 1871; re-en. Sec. 659, p. 211, L. 1877; re-en. Sec. 659, 1st Div. Rev. Stat. 1879; re-en. Sec. 681, 1st Div. Comp. Stat. 1887; amd. Sec. 3363, C. Civ. Proc. 1895; re-en. Sec. 8010, Rev. C. 1907; re-en. Sec. 10654, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2034.

Operation and Effect

A deposition taken to be used in a guardianship proceeding was improperly admitted in evidence in a contest involving the question whether the incompetent

for whom a guardian was appointed, and who subsequently died of dementia, was sane or insane at the time he executed the will sought to be probated; neither the parties nor the subject-matter were the same, and the evidence was inadmissible under this section. In re Murphy's Estate, 43 M 353, 375, 116 P 1004.

References

Cited or applied as section 8010, Revised Codes, in In re Colbert's Estate, 51 M 455, 463, 153 P 1022; Damm v. Damm, 82 M 239, 241, 266 P 410.

10655. Deposition in this state to be used in other states. Any party to an action or special proceeding in a court, or before a judge, of a sister state, may obtain the testimony of a witness residing in this state, to be used in such action or proceedings, in the cases mentioned in the next two sections.

History: En. Sec. 3364, C. Civ. Proc. 1895; re-en. Sec. 8011, Rev. C. 1907; re-en. Sec. 10655, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2035.

10656. How to procure witness upon commission. If a commission to take such testimony has been issued from the court, or a judge thereof,

before which such action or proceeding is pending, on producing the commission to a judge of the district court, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place.

History: En. Sec. 3365, C. Civ. Proc. 1895; re-en. Sec. 8012, Rev. C. 1907; re-en. Sec. 10656, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2036.

10657. How, if no commission. If a commission has not been issued, and it appear to a judge of the district court, or to a justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;
2. That a commission to take the testimony of such witness has not been issued;
3. That, according to the law of the state where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding; he must issue his subpoena requiring the witness to appear and testify before him at a specified time and place.

History: En. Sec. 3366, C. Civ. Proc. 1895; re-en. Sec. 8013, Rev. C. 1907; re-en. Sec. 10657, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2037.

10658. Deposition—how taken. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state requires.

History: En. Sec. 3367, C. Civ. Proc. 1895; re-en. Sec. 8014, Rev. C. 1907; re-en. Sec. 10658, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2038.

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GENERAL RULES OF EXAMINATION

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 10671. Writing shown to witness may be inspected by adverse party.

10659. Order of proof—how regulated. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

History: En. Sec. 3370, C. Civ. Proc. 1895; re-en. Sec. 8015, Rev. C. 1907; re-en. Sec. 10659, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2042.

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10660. Witness not under examination may be excluded. If either party requires it, the judge may exclude from the court-room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

History: En. Mar. 8, 1883; re-en. Sec. 273, 1st Div. Comp. Stat. 1887; amd. Sec. 3371, C. Civ. Proc. 1895; re-en. Sec. 8016, Rev. C. 1907; re-en. Sec. 10660, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2043.

Operation and Effect

The meaning of this provision is that the application is addressed to the sound legal discretion of the trial court, and that no review will be had, except for a manifest abuse of such discretion. In the absence of any showing of prejudice, the action of the trial court will not be disturbed. *Finlen v. Heinze*, 32 M 354, 383, 80 P 918.

One who had not been subpoenaed and did not know that he would be called as a witness was properly permitted to testify, though he remained in the courtroom after an order of execution of witnesses had been made by the court under this section. *State v. McDonald*, 51 M 1, 7, 149 P 279.

Refusal to permit a witness for defendant in a criminal prosecution to testify

on a matter material to his defense, on the ground that the witness had violated an order of court excluding witnesses during the taking of testimony, is reversible error where the witness was ignorant of the rule and neither defendant nor his counsel was responsible for or knew of his presence in the courtroom. *State v. Johnson*, 62 M 503, 510, 205 P 661.

Id. For a willful violation of an order of court excluding witnesses from the courtroom during the course of a trial, the proper remedy is punishment of the witness for contempt.

The matter of excluding witnesses from the courtroom is one addressed to the sound legal discretion of the trial court and where no prejudice is shown its refusal to exclude will not be disturbed on appeal; and generally, officers such as members of the sheriff's force are exempted from the rule permitting exclusion on the trial of a criminal case. *State v. Walsh*, 72 M 110, 117, 232 P 194.

10661. Court may control mode of interrogation. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; but, subject to this rule, the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon a particular point when the evidence upon it is already so full as to preclude reasonable doubt.

History: En. Sec. 3372, C. Civ. Proc. 1895; re-en. Sec. 8017, Rev. C. 1907; re-en. Sec. 10661, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2044.

Operation and Effect

While in a prosecution for rape the widest latitude compatible with well-settled principles of the law of evidence should be allowed on the cross-examination of witnesses, yet where the prosecutrix had on her cross-examination sev-

eral times answered questions as to her age, etc., exclusion of further questions on the same subjects was not reversible error. *State v. McConville*, 64 M 302, 306, 209 P 987.

Where on cross-examination of a witness every material and proper question was answered and the ground upon every point covered fully, the district court, may, under this section, stop the production of further evidence upon the subject. *State v. Cassill et al.*, 70 M 433, 452, 227 P 49.

10662. Direct and cross-examination defined. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

History: En. Sec. 3373, C. Civ. Proc. 1895; re-en. Sec. 8018, Rev. C. 1907; re-en. Sec. 10662, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2045.

10663. Leading question defined. A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

History: En. Sec. 3374, C. Civ. Proc. 1895; re-en. Sec. 8019, Rev. C. 1907; re-en. Sec. 10663, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2046.

Operation and Effect

It appears to be within the sound discretion of the court to allow leading questions on the part of the county attorney, especially when the witnesses are illiterate and unable to speak English; but, having done this, it is but fair to extend the same

privilege to the defendant. *State v. Spotted Hawk*, 22 M 33, 65, 55 P 1026.

The asking of numerous leading questions by the prosecution, over objection of defendant, may justly be cause for complaint that by the course adopted he was denied the fair and impartial trial guaranteed by the constitution. *State v. Kanakaris*, 54 M 180, 183, 169 P 42.

References

State v. Karri, 84 M 130, 137, 276 P 427.

10664. When witness may refresh memory from notes. A witness is allowed to refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

History: En. Sec. 3375, C. Civ. Proc. 1895; re-en. Sec. 8020, Rev. C. 1907; re-en. Sec. 10664, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2047.

Common Law Not Applicable

The courts are not authorized to enlarge the provisions of this section. It establishes the law relative to the subject-matter, and, in such a case, the common law is not applicable. *Marron v. Great Northern Ry. Co.*, 46 M 593, 603, 129 P 1055.

Effect of Failure of Witness to Qualify Under This Section on Admissibility of Memorandum

If a witness does not recollect, and must resort to a memorandum, but cannot qualify, by testifying to the necessary preliminary facts, and cannot, therefore, testify by its aid, or directly from it, the memorandum itself is inadmissible. *Marron v. Great Northern Ry. Co.*, 46 M 593, 602, 129 P 1055.

Entries Made by Witness

A witness may, to refresh his memory, properly have recourse to a memorandum-book containing entries written by himself. *Cohen v. Clark*, 44 M 151, 157, 119 P 775.

How Witness Must Qualify Before Being Heard

This section comprehends two classes of witnesses. The first class includes the witness whose memory can be refreshed by reference to the memoranda. The second class includes the witness who does not retain any recollection of the particular facts recorded in the memoranda, even after he examines the entries which he made himself. The witness of the first class may refresh his memory, and, having done so, may then testify independently of the memoranda. The witness of the second class may testify directly from the memoranda. But before either one will be heard at all, these preliminary facts must be made to appear: (a) The entries must have been written by the witness himself, or under his direction; (b) they must have been written at the time the facts occurred, or at a time when the facts were fresh in the witness' memory; and (c) the witness must have known at the time the entries were made that they correctly stated the facts. *Marron v. Great Northern Ry. Co.*, 46 M 593, 601, 129 P 1055.

The use of a memorandum by a witness in testifying is permissible only after the necessary preliminary proof qualifying the witness has been made. *Silver v. Eakins*, 55 M 210, 218, 175 P 876.

Before a witness may be permitted to refresh his memory by recourse to memoranda, it must be made to appear that the writing was made by himself or under his direction; that it was written at the time the facts occurred or when they were fresh in his memory, and that he knew at the time that the paper correctly stated the facts; in the absence of such a showing refusal to permit him to consult the writing is proper. *Spurgeon v. Imperial Elevator Co.*, 99 M 432, 436, 43 P 2d 891.

Not Essential That Memorandum be Admissible

A memorandum, fugitive in character, kept by a witness, but not intended as a record of his business transactions from day to day, is hearsay and not admissible in evidence, though he may use it to refresh his memory or to aid him in giving his testimony. *Columbus State Bank v. Erb*, 50 M 442, 451, 147 P 617.

Operation and Effect

A witness was properly allowed to refer to a memorandum of articles as shown in evidence by the sheriff's return, on which the witness, before the trial, had extended the unit and gross cost price obtained by taking the prices from his cost-book and price-lists kept by himself, and adding the freight and insurance apportioned by percentage. Memoranda used by a witness for this purpose are not evidence of the value of the goods. *Kipp v. Silverman*, 25 M 296, 303, 64 P 884.

Where bank officials in an action on a lost promissory note testified in part from memory as to its execution by defendant, motion to strike it on the ground that they were testifying from bank records and that the testimony was admissible

only under the conditions prescribed by this section, held properly denied. *St. Martin State Bank v. Steffes*, 88 M 85, 90, 290 P 259.

When Not Permissible to Refresh Memory From Book of Accounts

Refusal to permit a witness to refresh his memory from a book of accounts was proper, under this section where it appeared that the entries had been copied from other memorandum-books, that he did not know when nor by whom some of them were made, but knew that a portion of them was copied after the dates of the original entries and that some of them might not be exact as to dates. *McLean v. Rice*, 63 M 556, 559, 208 P 252.

Id. Where a witness was properly denied permission to refresh his memory from books of account (above), the court as properly refused to permit him to answer questions put to him by his counsel, who was reading from the same book in framing them, since a party cannot do indirectly what he cannot do directly.

When Refusal to Instruct Jury to Receive Testimony With Caution is Error

Where a witness testified to seditious language used by defendant, from a memorandum extended by the former from notes made by him when the statements were said to have been made, refusal to instruct the jury to receive such testimony with caution was error. *State v. Diedtman*, 58 M 13, 23, 190 P 117.

References

State v. Bennett, 60 M 355, 360, 199 P 276.

10665. Cross-examination, as to what. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.

History: En. Sec. 3376, C. Civ. Proc. 1895; re-en. Sec. 8021, Rev. C. 1907; re-en. Sec. 10665, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2048.

Applicable to Parties as Well as to Other Witnesses

The rule that the cross-examination of a witness should be confined to matters deposed to in chief applies to parties as well as to other witnesses. *Borden v. Lynch*, 34 M 503, 509, 87 P 609.

Common Law Changed

This section radically changes the common-law rule in respect to cross-examination. This right must be freely exercised, and doubt regarding the limits to which

cross-examination may go ought usually, if not always, to be resolved against the objection. *Cobban v. Hecklen*, 27 M 245, 263, 70 P 805.

Cross-Examination Limited to Material Matters

The provision of this section that a party may cross-examine a witness or his opponent on any facts stated in his direct examination or connected therewith, has reference to material matters; hence where plaintiff, though relieved by admissions in the answer from offering any evidence, did testify to immaterial matters, refusal to permit defendant to cross-examine him was not an abuse of discre-

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tion. *Courtney v. Gordon*, 74 M 408, 414, 241 P 233.

While the statute with relation to cross-examination of witnesses should be liberally construed and the extent to which the witness may be cross-examined with respect to collateral matters is largely within the discretion of the trial court, where the evidence sought to be elicited is clearly immaterial for any purpose, the court may properly exclude it. *State v. McClain et al.*, 76 M 351, 246 P 956.

Examination as to Matters Not Raised in Direct Subject to the Rules of Direct

Where the prosecuting witness in a case of rape had not been asked on her direct examination as to acts of sexual intercourse with persons other than defendant, his counsel by propounding to her a question of that nature on cross-examination made her his own witness and was bound by her negative answer and therefore was properly denied permission to introduce testimony of witnesses to whom she was said to have stated that she had been intimate with others. *State v. Richardson*, 63 M 322, 329 et seq., 207 P 124.

Extent of Cross-Examination

Where, on a prosecution for robbery, a witness on direct examination testified that he had been confined in the penitentiary, and that he had known the defendant for about fifteen months, and had observed his demeanor at the penitentiary, and that he thought defendant insane, questions put to him on cross-examination for the purpose of showing that he was a member of the conspiracy which resulted in the robbery were not improper, as exceeding the proper limits of cross-examination. *State v. Howard*, 30 M 518, 527, 77 P 50.

The general rule is that a witness may be cross-examined as to anything testified to by him in chief or connected therewith, but not as to other matters, but this rule may not be extended to include matters clearly not connected with the subject-matter upon which examination in chief was had. Where, therefore, plaintiff, in an action for the conversion of certain personal property by a constable, testified that she was the owner of a mortgage on the property in question and a note secured thereby, and on cross-examination she was asked what consideration she had given for the instruments, the cross-examination as to consideration or other circumstances which resulted in the execution of the note and mortgage was properly excluded. *Borden v. Lynch*, 34 M 503, 509, 87 P 609.

Inquiry well within the bounds of legitimate cross-examination. *State v. Hanlon*, 38 M 557, 575, 100 P 1035.

Where a witness for the state, on a trial for larceny of livestock, testified that

he was in the employment of a cattle company as stock inspector at the time of the arrest of accused, but there was nothing to show that he was engaged in a criminal conspiracy to convict accused, a question on cross-examination, as to whether he had not been employed to "put up a job" on accused, was properly excluded as intended to degrade the witness. *State v. Biggs*, 45 M 400, 404, 123 P 410.

Where, in an action for damages arising out of the death of a boy, by drowning, in the defendant's natatorium, the plaintiff calls as a witness an attendant at the institution and questions him as to instructions given him by the management, the witness may testify on cross-examination that the boy demonstrated that he could swim. *Henroid v. Gregson Hot Springs Co.*, 52 M 447, 455, 158 P 824.

Plaintiff having stated, among other things, that in his opinion an automobile was driven at the rate of forty miles an hour at the time it struck him, it was error to refuse permission to cross-examine him whether at that time he was intoxicated, testimony as to his condition in this respect shedding light upon his capacity for accurate observation, correct memory, and unbiased judgment. *Herzig v. Sandberg*, 54 M 538, 540, 172 P 132.

Where, after defendant, charged with sedition, had testified in his own behalf simply denying that he made the utterances testified to by the state's witnesses, the county attorney cross-examined him, in the manner of laying the foundation for impeachment, as to other seditious language not charged in the information nor inquired into in the state's case in chief, he made him his own witness and was bound by his answers. *State v. Smith*, 57 M 349, 188 P 644.

Where matters inquired into on cross-examination are relevant to the subject-matter of the examination in chief and of informative value to the jury upon the question under consideration, the cross-examination is proper. *McCarthy v. Anaconda Copper Min. Co.*, 70 M 309, 320, 225 P 391.

A wide range of cross-examination is permissible and the trial court should incline to extend rather than restrict the right, but matters which have no connection with any statement made by the witness on his direct examination should not be permitted to be inquired into. *Downey et al. v. Northern Pacific Ry. Co.*, 72 M 166, 180, 232 P 531; *Spurgeon v. Imperial Elevator Co.*, 99 M 432, 43 P 2d 891.

In a prosecution for permitting gambling to be conducted on the premises of defendant, where his wife had testified that while certain games were permitted to be played, there never had been any gambling

permitted, cross-examination as to the manner in which the games were conducted and as to her knowledge of what took place was proper. *State v. Mott*, 72 M 306, 309, 233 P 602.

Where plaintiff in her case in chief in an action on a promissory note did not go into the matter of consideration, defendant was improperly permitted on cross-examination to propound questions with relation thereto, under this section, making cross-examination proper only as to facts stated in the witness' direct examination or connected therewith. *Alley v. Butte & Western Min. Co.*, 77 M 477, 487, 251 P 517.

Where plaintiff in an action to recover money paid under duress, as well as exemplary damages, under threats of placing his wife under arrest for alleged theft, on his direct examination as to her physical condition had been limited as to time to a showing comprising a certain number of weeks after her arrest, the court did not err in confining defendants in their cross-examination to the same limit. *Edquest v. Tripp & Dragstedt Co. et al.*, 93 M 446, 459, 19 P 2d 637.

Id. Where a police officer on his direct examination had testified to the leaving of certain articles in a certain place in an apartment house, in an endeavor to detect the person who had been stealing things therein, to his partial concealment awaiting developments, etc., a question on cross-examination whether he was trying to "set traps" was not improper.

While this section permits a wide range of cross-examination, it does not sanction examination of a witness on matters not touched upon in his direct examination or connected therewith; nor may a party under the pretense of cross-examination make out his case by witnesses for his opponent. *Vonault v. O'Rourke*, 97 M 92, 110, 116, 33 P 2d 535.

Matters Stricken From Record Not Subject to Cross-Examination

Where testimony elicited by plaintiff was ordered stricken from the record, cross-examination of the witness there-

after as to matters so stricken was improper. *Alley v. Butte & Western Min. Co.*, 77 M 477, 487, 251 P 517.

Must be Liberally Construed

This section must be liberally construed. *Cuerth v. Arbogast*, 48 M 209, 215, 136 P 383.

Operation in General

This section permits a wide range for cross-examination, and the courts should incline to extend, rather than to restrict, the right. Properly understood, the right extends not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury upon the question in controversy. *Kipp v. Silverman*, 25 M 296, 306, 64 P 884; *Cobban v. Hecklen*, 27 M 245, 263, 70 P 805; *State v. Howard*, 30 M 518, 527, 77 P 50; *Shandy v. McDonald*, 38 M 393, 398, 100 P 203; *State v. Rhys*, 40 M 131, 136, 105 P 494; *State v. Rodgers*, 40 M 248, 253, 106 P 3; *State v. Biggs*, 45 M 400, 404, 123 P 410; *State v. Whitworth*, 47 M 424, 431, 133 P 364; *Herzig v. Sandberg*, 54 M 538, 540, 172 P 132.

The right of cross-examination may not be unduly restricted and may extend not only to facts stated by the witness in his original examination, but to all other facts connected with them which tend to enlighten the jury upon the question in controversy. The rule necessarily includes questions, the purpose of which is to bring out facts illustrative of the motives, bias, and interest of the witness, or as reflecting upon his capacity and memory. *State v. Biggs*, 45 M 400, 404, 123 P 410; *Moss v. Goodhart*, 47 M 257, 268, 131 P 1071; *Cuerth v. Arbogast*, 48 M 209, 216, 136 P 383.

References

Cited or applied as section 3376, Code of Civil Procedure, in *Gallick v. Bordeaux*, 22 M 470, 481, 56 P 961; *Mahoney v. Dixon*, 34 M 454, 459, 87 P 452; as section 8021, Revised Codes, in *Owens v. Davenport*, 39 M 555, 558, 104 P 682; *State v. Paddock*, 86 M 569, 284 P 549.

10666. Party producing witness, how far may impeach his credit. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 10669.

History: En. Sec. 3377, C. Civ. Proc. 1895; re-en. Sec. 8022, Rev. C. 1907; re-en. Sec. 10666, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2049.

Effect of Refusal to Exclude Impeaching Testimony

Mere error in admitting evidence in a criminal case is not reversible error; to

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be such the error must have been prejudicial to defendant; nor will a reversal of the judgment be ordered where the error resulted in his favor; therefore, where the state was erroneously permitted to introduce evidence contradicting the testimony of one of its witnesses, without first making the showing required by this section, but the evidence was beneficial to defendant, the error was harmless. *State v. Arnold*, 84 M 348, 359, 275 P 757.

Operation and Effect

The state, in a criminal prosecution, may cross-examine its witness, where his testimony varies from what the county attorney had reason to believe it would be. *State v. Bloor*, 20 M 574, 585, 52 P 611.

Id. This section and section 10669, are not repugnant to the due process of law clause of the state and federal constitutions.

The state may, where circumstances arising in the course of a trial of a criminal cause require it in order to protect its right, as where one of its witnesses and the defendant are shown to have been on terms of friendly intimacy, etc., propound to such witnesses questions of an impeaching character. *State v. Willette*, 46 M 326, 330, 127 P 1013.

Before a party may contradict his own witness by showing inconsistent statements, he must, under this section, make a showing that he was misled or taken by surprise. *State v. Richardson*, 63 M 322, 330 et seq., 207 P 124; *Dick v. King*, 73 M 456, 459, 236 P 1093.

While a party producing a witness may not impeach his credit by evidence of his bad character, he may contradict him by

other evidence, and where he does so, such contradictory evidence should be taken into consideration in determining whether his opponent's motion for nonsuit should be granted or not. *Hardie v. Peterson et al.*, 86 M 150, 156, 282 P 494.

Where a witness for the state proved unfriendly, was attempting to protect defendant charged with the unlawful giving of intoxicating liquor to a minor, and was making statements different from prior ones when the case was under investigation by the officers, the court did not abuse its discretion in permitting the county attorney to cross-examine him; if the element of surprise be deemed material, it need not be confined to what develops after the witness takes the stand. *State v. Clark*, 87 M 416, 420, 288 P 186.

What Does Not Constitute Impeaching One's Own Witness

A letter written by the president of a corporation to its manager urging the latter to borrow money for the use of the company, on the strength of which he obtained funds from his wife on a corporation note, was admissible as tending to show that such officer, called by plaintiff as a witness and who on cross-examination had testified that the company was in good financial condition and needed no money, had made statements inconsistent with such testimony, and was, therefore, not open to the objection that plaintiff attempted to impeach her own witness. *Alley v. Butte & Western Min. Co.*, 77 M 477, 489, 251 P 517.

References

Cited or applied as section 8022, Revised Codes, in *Great Northern Ry. Co. v. Ennis*, 236 Fed. 17, 28, 149 C. C. A. 227.

10667. Witness, how examined—when re-examined. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

History: En. Sec. 3378, C. Civ. Proc. 1895; re-en. Sec. 8023, Rev. C. 1907; re-en. Sec. 10667, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2050.

Operation and Effect

Permission to recall a witness for the state for further cross-examination rests in the sound discretion of the court. *State v. Mumford*, 69 M 424, 433, 222 P 447.

Id. Where defendant, charged with murder, was convicted of manslaughter, refusal of the court to permit a witness for the state to be recalled for further cross-examination for the purpose of impeaching

another witness who had testified to the finding of a bullet in the ground where the head of the deceased was lying, presumably offered for the purpose of showing that the shot was fired by the defendant while standing over the prone body of his victim and thus showing malice, whereas defendant claimed to have fired the shot from a distance, held not abuse of discretion, but if error held harmless as was also the admission of the bullet itself, in view of the verdict of manslaughter, showing that the jury disregarded the element of premeditation or malice.

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10668. How impeached. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

History: En. Sec. 3379, C. Civ. Proc. 1895; re-en. Sec. 8024, Rev. C. 1907; re-en. Sec. 10668, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2051.

Competent Testimony to Impeach

Testimony of a witness that he had heard another witness state in a conversation that he had made a contract with plaintiff's brother for certain lumber was competent to impeach such witness' testimony that he had contracted with plaintiff for such lumber. *Michener v. Fransham*, 29 M 240, 245, 74 P 448.

Defendant May be Impeached as Any Other Witness

When a defendant is sworn, and testifies in his own behalf, he is subject to the same rules of cross-examination and impeachment as any other witness, and it is competent for the state to impeach his testimony by evidence that his general reputation for truth, honesty, and integrity is bad. *State v. Schnepel*, 23 M 523, 526, 59 P 927. See also *State v. Crowe*, 39 M 174, 178, 102 P 579; *State v. Inich*, 55 M 1, 13, 173 P 230.

Defendant May Not be Impeached Unless He Testifies

Where the defendant, at a criminal trial, does not offer himself as a witness, he is not subject to impeachment. *State v. Jones*, 51 M 390, 394, 153 P 282.

Impeachment in Any Other Manner Than That Prescribed is Substantial Error

Within the meaning of the rule declared by section 12125, that the supreme court on appeal must disregard technical errors or defects which do not go to the substantial rights of the parties, the right of one on trial for crime forbidding his impeachment in any other manner than that pre-

scribed by this section, is a substantial one. *State v. Shannon*, 95 M 280, 288, 26 P 2d 360.

Particular Wrongful Acts Not Admissible

Where a defendant on trial for crime calls witnesses to testify to his good character in the community in which he resides, cross-examination as to their knowledge of disparaging rumors affecting his reputation is proper, but evidence showing particular acts of lawlessness committed by the defendant is inadmissible for the purpose of rebutting testimony tending to show his good character. *State v. Jones*, 48 M 505, 516, 139 P 441.

This section and section 10675 forbid a county attorney from asking, on the cross-examination of a defendant in a criminal case, questions the purpose of which is to show that he has been guilty of numerous minor offenses, independent of the crime for which he is being tried, and the object of which questions is to impeach the defendant or to degrade him in the estimation of the jury. *State v. Kanakaris*, 54 M 180, 184, 169 P 42.

References

Cited or applied as section 3379, Code of Civil Procedure, in *Farleigh v. Kelley*, 28 M 421, 431, 72 P 756, 63 L. R. A. 319; *State v. Wells*, 33 M 291, 298, 83 P 476; *State v. Allen*, 34 M 403, 413, 87 P 177; as section 8024, Revised Codes, in *State v. Smith*, 57 M 349, 361, 188 P 644; *State v. Stein*, 60 M 441, 446, 447, 199 P 278; *State v. Jackson*, 71 M 421, 433, 230 P 370; *State v. Kacar*, 74 M 269, 282, 240 P 365; *State v. Hamilton*, 87 M 353, 364, 287 P 933; *Sawyear v. United States*, 27 F. 2d 569.

10669. Same—by evidence of declarations. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

History: En. Sec. 3380, C. Civ. Proc. 1895; re-en. Sec. 8025, Rev. C. 1907; re-en. Sec. 10669, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2052.

Dying Declarations May be Impeached

A dying declaration is open to impeachment in any of the modes by which the testimony of the declarant could have been impeached had he been alive and testifying under oath, and the witness who testifies to such a declaration as having been made to him may be impeached in like manner; hence defendant charged with the murder of declarant was improperly precluded from showing that the deposing witness was not at the hospital where decedent died at the time at which the alleged declaration was said to have been made. *State v. Kacar*, 74 M 269, 240 P 365.

Explanation of Impeaching Testimony Allowed

Where the thief, who had stolen the horse (with the receiving of which, knowing it to have been stolen, defendant was charged), had made a written statement while in jail that defendant had no knowledge of its having been stolen, he, as a witness for the state, was properly permitted to answer the prosecuting attorney's question as to what he thought the statement meant; he, as a witness, having been impeached by the writing, could explain the circumstances under which it was made. *State v. Keays*, 97 M 404, 418, 34 P 2d 855.

Failure to Lay Foundation Before Impeaching is Error

It is error to allow the prosecuting attorney, for the purpose of impeachment, to testify as to what a witness to a homicide stated at the coroner's inquest, by repeating her statements as taken down in writing by him at the time and stating that she had so stated, where the statements concerning which she was to be impeached had not been first related to her with an opportunity to answer as to their truth or to explain them, nor the written evidence shown to her before putting the question as required by this section. *State v. O'Brien*, 18 M 1, 9, 43 P 1091, 44 P 399.

Necessity for Laying a Foundation is Only Applicable to Impeachment Cases

In a prosecution for grand larceny, it is not necessary that a witness testifying to declarations of co-conspirators should be required to fix the time and place of their occurrence, and give the names of those present, before his statements can be admitted in evidence, such rule applying only to cases where it is sought to impeach a witness when under examination. *State v. Allen*, 34 M 403, 410, 87 P 177.

In an action on promissory notes given for the purchase of real property in which defendant, among other things, relied upon fraudulent representations on the part of the vendor, declarations against in-

terest made by defendant were properly admitted in rebuttal as against the objection that they tended to impeach defendant without a proper foundation having first been laid; they were admissible as original evidence although they may have had a tendency to discredit the declarant, not intended for purpose of impeachment, and it, therefore, was not necessary to lay a foundation as required by this section. *Howe v. Messimer*, 84 M 304, 311, 275 P 281.

Operation in General

Where a witness, on a trial for homicide, testified that he and accused had had trouble, but denied that he had ever tried to frighten him, it was error to exclude a question on cross-examination as to whether he had not told any of the witnesses that he had done so, though the question did not call the witness' attention to the time and place of the alleged statements so as to lay a foundation for impeaching evidence under this section. *State v. Beesskov*, 34 M 41, 53, 85 P 376.

Where the testimony of a witness on the trial of a case is at variance with his testimony previously given at a coroner's inquest, such portions of his testimony given at the inquest as contradict his testimony on the trial are admissible to show statements made by the witness inconsistent with his present testimony, if he denies having made such statements, or if recollection of them is disclaimed. *Westlake v. Keating Gold Min. Co.*, 48 M 120, 136, 136 P 38.

Where evidence of inconsistent statements made by a witness out of court was mere hearsay, any error in the refusal of the court to permit defendant, the transcript of the witness' testimony at a former trial being read on account of his absence from the state, to withdraw a statement that questions as to the witness' inconsistent statements were not for impeachment, was harmless. *Great Northern Ry. Co. v. Ennis*, 236 Fed. 17, 28, 149 C. C. A. 227.

Quaere as to Other Inconsistent Statements Permissible

Where, on cross-examination of a witness, he is asked whether he had not, at other times, made statements inconsistent with his present testimony, it is not necessary that the times, places, and persons present be related to him; such facts being required only when a foundation is sought for impeachment. *State v. Burrell*, 27 M 282, 285, 70 P 982.

Statement in Writing Must be Shown to Party

Cross-examination of a witness concerning the substance of his deposition, taken some time before the trial, was error

where the document was not produced or its absence accounted for. *Melzner v. Chicago, Milwaukee & St. Paul Ry. Co.*, 51 M 487, 493, 153 P 1019.

Sufficiency of Foundation

A sufficient foundation is laid for the impeachment of a witness by asking him whether he did not, in a certain conversation, at a certain place, make statements to which his attention is then called. *State v. Spotted Hawk*, 22 M 33, 64, 55 P 1026.

The exclusion of impeaching evidence was not error, where the offer of proof did not fix the time when the alleged conversation occurred, or designate the persons present, and no foundation was laid therefor in the examination of the witness sought to be impeached, as required by this section. *Tague v. John Caplice Co.*, 28 M 51, 61, 72 P 297.

In order that a witness may be impeached by a prior statement made by him, the statement claimed to be inconsistent with his testimony must be related to him, with the circumstances of time, place, and persons present; and he must be asked if he made such statement, and be given an opportunity to explain it, if he did. *Doichinoff v. Chicago, Milwaukee & St. Paul Ry. Co.*, 51 M 582, 587, 154 P 924.

Before a witness can be impeached, the circumstances of time, place, persons present, and language used must, under this section, be called to his attention. *State v. Gaimos*, 53 M 118, 127, 162 P 596;

Spurgeon v. Imperial Elevator Co., 99 M 432, 43 P 2d 891.

When Party May Call Witness to Impeach or Rebut

A witness having denied making statements at a coroner's inquest, the state was properly allowed to call another witness in rebuttal, who was present when such statement was claimed to have been made, and ask him whether the former witness made a certain statement just after he finished his testimony before the coroner. *State v. Hurst*, 23 M 484, 495, 59 P 911.

Where a witness who had been asked on cross-examination whether at a previous trial he had not given certain testimony replied that he did not remember, exclusion of an offer to prove on rebuttal by a witness who had heard him testify on that occasion that he did so testify was error under this section. *Wingate v. Davis et al.*, 77 M 572, 579, 252 P 307.

References

Cited or applied as section 3380, Code of Civil Procedure, in *Michener v. Franks*, 29 M 240, 246, 74 P 488; *Mahoney v. Dixon*, 34 M 454, 461, 87 P 452; as section 8025, Revised Codes, in *State v. Crowe*, 39 M 174, 177, 102 P 579; *State v. Jones*, 51 M 390, 394, 153 P 282; *State v. Smith*, 57 M 349, 361, 188 P 644; *State v. Richardson*, 63 M 322, 330, 207 P 124; *State v. Clark*, 87 M 416, 420, 288 P 186; *Wise v. Stagg*, 94 M 321, 330, 22 P 2d 308.

10670. Evidence of good character—when allowed. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

History: En. Sec. 3381, C. Civ. Proc. 1895; re-en. Sec. 8026, Rev. C. 1907; re-en. Sec. 10670, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2053.

Operation and Effect

Where the character of a witness whose deposition had been introduced was attacked by a deposition showing that at the time of the trial he was confined in a penitentiary, evidence of his previous good character was admissible in rebuttal. In *re Williams' Estate*, 52 M 192, 203, 156 P 1087.

The plaintiff, in libel and slander, is presumed to have a good character and reputation; hence, evidence of good character is inadmissible, under this section, until character is questioned. *Fowlie v. Cruse*, 52 M 222, 237, 157 P 958.

Testimony introduced in a prosecution for sedition to support the good character of the state's chief witness before his character had been impeached is inadmissible. *State v. Diedtman*, 58 M 13, 19, 190 P 117.

A witness for defendant gave evidence tending to establish an alibi. The state in rebuttal called witnesses who testified that the reputation of the alibi witness was bad. On surrebuttal defendant sought to introduce testimony that the general reputation of his witness was good; the court declined to hear it. Held, reversible error, the law not permitting a witness to be impeached without giving the party who produced him an opportunity to rebut the impeaching testimony. *State v. Jackson*, 71 M 421, 433, 230 P 370.

10671. Writing shown to witness may be inspected by adverse party. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury

before his testimony is closed, or it cannot be read except on recalling the witness.

History: En. Sec. 3382, C. Civ. Proc. 1895; re-en. Sec. 8027, Rev. C. 1907; re-en. Sec. 10671, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2054.

Operation and Effect

Where it appears that a written instrument was testified to and was admitted in evidence, the presumption is, in the absence of evidence to the contrary, that the contents of the paper were read to the jury. *State v. Patch*, 21 M 534, 538, 55 P 108.

Where defendant's wife, after having testified in his behalf, was asked on cross-examination to identify certain letters written by her as his agent, which letters disclosed the fact that defendant knew that his land had been sold by his agent prior to the date of his agreement to convey to plaintiff, the letters were properly admitted on cross-examination. *Ross v. Saylor*, 39 M 559, 568, 104 P 864.

CHAPTER 169

EFFECT OF EVIDENCE

Section 10672. Jury judges of effect of evidence, but to be instructed on certain points.

10672. Jury judges of effect of evidence, but to be instructed on certain points. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

2. They are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their mind;

3. That a witness false in one part of his testimony is to be distrusted in others;

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution;

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence; that in criminal cases guilt must be established beyond reasonable doubt;

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

History: En. Sec. 3390, C. Civ. Proc. 1895; re-en. Sec. 8028, Rev. C. 1907; re-en. Sec. 10672, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2061.

Subd. 1

Operation in General

Under subdivision 1 of this section, juries may not arbitrarily and capriciously disregard the testimony of witnesses, not

only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case. *Haddox v. Northern Pacific Ry. Co.*, 43 M 8, 16, 113 P 1119.

Subd. 2

Operation in General

Under subdivision 2 of this section, the fact that prosecutrix was contradicted, or

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49 P (2d) 447
102 Mont. 498
59 P (2d) 63

10672
76 P (2d) 632

10672
79 P.(2d) 665
Mont.....

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Sub. Sec. 3
74 P (2d) 3
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10672, subd. 6
63 P (2d) 127

10672, subd. 7
63 P (2d) 127

10672 subd. 7
108 P.(2d) 214

10672
156 P.2d 638

10672
177 P.(2d) 862

that conflicting impeaching evidence was given against her, would not overthrow a conviction of statutory rape. *State v. Peres*, 27 M 358, 364, 71 P 162.

Where the presumption of negligence on the part of a railroad company in the killing of livestock by one of its trains, arising by virtue of the statute making the fact of the killing *prima facie* evidence of such negligence, is confronted with testimony of its train operatives that there was not any negligence on their part, the result is a conflict of evidence resolvable by the jury under subdivision 2 of this section. *Johnson v. Chicago, Milwaukee & St. Paul Ry. Co.*, 52 M 73, 74, 155 P 971.

Since the burden of proof is not to be determined by the number of witnesses introduced, and the direct evidence of one witness entitled to full credit is sufficient to prove any fact (this section and 10505), the direct evidence of the plaintiff, upon whom was the burden of showing non-payment of the certificate of deposit in suit, was sufficient to establish that fact. *O'Langan v. First State Bank of Hilger*, 59 M 190, 194, 196 P 149.

A preponderance of the evidence may be established by the testimony of a single witness against a greater number of witnesses who testify to the contrary, the jurors being the exclusive judges of their credibility. *Doane v. Marquisee*, 63 M 166, 171, 206 P 420.

Preponderance of the evidence is not to be determined by the number of persons who testify; it may be established by the testimony of a single witness against a greater number of witnesses who testify to the contrary. *State ex rel. Bourquin v. Morris et al.*, 67 M 40, 46, 214 P 332; *In re Silver's Estate*, 98 M 141, 38 P 2d 277.

The party seeking reformation of a contract on the ground of mistake has the burden of establishing his claim by a preponderance of the evidence, and such preponderance may be established by the plaintiff's own testimony as against that of a greater number of witnesses to the contrary. *Ayers v. Buswell*, 73 M 518, 526, 238 P 591.

The rule that preponderance of the evidence may be established by the testimony of a single witness against a greater number of witnesses who testify to the contrary applies with equal force in criminal cases in which the state must prove the facts beyond a reasonable doubt. *State v. Park*, 88 M 21, 31, 32, 289 P 1037.

Whether sworn testimony to the contrary is sufficient to rebut such a statutory presumption is a question for the triers of fact to determine, except where the facts proved are overwhelmingly

against the presumed facts and permit of but one rational and reasonable conclusion. *McMahon v. Cooney et al.*, 95 M 138, 145, 25 P 2d 131.

Subd. 3

Instructions Based on This Subdivision

A charge in a prosecution for grand larceny, which tells the jury that they have the right to disregard any or all of the testimony of a witness who has wilfully and intentionally testified falsely as to any material matter in the case, is erroneous by reason of the omission of the words "except in so far as it is corroborated by other credible evidence." *State v. De Wolfe*, 29 M 415, 424, 74 P 1084. See also *State v. Fuller*, 34 M 12, 28, 85 P 369; *State v. Lee*, 34 M 584, 588, 87 P 977.

An instruction charging the jury on a trial for murder, that if they were satisfied that any witness had knowingly and wilfully testified falsely in any material matter, they had the right to reject the whole of his testimony, "unless on any point such testimony is corroborated by the facts and circumstances of the case or other credible evidence," is an unauthorized restriction upon the discretionary power of the jury to reject testimony, and should not be given in any case. *State v. Penna*, 35 M 535, 545, 90 P 787.

On appeal from the judgment in a criminal case, it will be presumed, in the absence of the evidence, that the giving of an instruction in the language of this section, "that a witness false in one part of his testimony is to be distrusted in others," was warranted by the case as submitted. Such instruction is not erroneous for failure to insert the word "wilfully" before the word "false," and the words "as to a material matter" after the word "testimony." *State v. Connors*, 37 M 15, 16, 94 P 199. See also *Shea v. United States*, 260 Fed. 807, 810.

An instruction that the jury could disregard the entire testimony of any witness whom they believed to have deliberately testified falsely to any fact material to the issue, etc., was erroneous under subdivision 3 of this section. *State v. Kanakaris*, 54 M 180, 185, 169 P 42.

An instruction making an exception to the statutory rule that a witness false in one part of his testimony is to be distrusted in others, in favor of one who has been corroborated by other credible evidence was error. *State v. Belland*, 59 M 540, 549, 197 P 841.

An instruction that where a witness has wilfully testified falsely as to a material matter in the case, the jury may disregard

any and all of his testimony, except in so far as it was corroborated by other credible evidence, held erroneous, the statute (this section) going no further than to provide that the jury may look with distrust upon the testimony of any witness found to have so testified, making no exception in favor of one who has been corroborated. *Vande Veegaete v. Vande Veegaete*, 75 M 52, 59, 60, 243 P 1082.

Held, that an instruction that "a witness who testifies falsely in one part of his testimony is to be distrusted in others," required to be given by this section on all proper occasions, is proper where it is apparent that false testimony has been given, and the court is not required to modify it by confining the rule to testimony wilfully false as to a material matter. *Hageman v. Arnold*, 79 M 91, 95, 254 P 1070.

Whether an instruction "that a witness false in one part of his testimony is to be distrusted in others" (this section, subdivision 3) shall be given lies largely in the discretion of the trial court, not to be interfered with on appeal unless abuse thereof is shown. *Russell v. Sunburst Refining Co.*, 83 M 452, 467, 272 P 998.

Where in a homicide case a general instruction in the language of this subdivision and section, that a witness found false in one part of his testimony is to be distrusted in others, was given, an offered instruction relative to a dying declaration that if the jury found the declaration false in any material part they could reject it in its entirety was erroneous and properly refused. *State v. Le Due*, 89 M 545, 568, 300 P 919.

Court's instruction relative to the credibility of a witness who has sworn falsely, framed in strict compliance with this subdivision of this section, to-wit, that he is to be distrusted in other statements, may not be held error for failure to include the qualifying phrase "except in so far as corroborated by other testimony." *State v. Keays*, 97 M 404, 419, 34 P 2d 855.

Not Applicable to Unintentional or Immaterial Matters

Subdivision 3 of this section is not applicable to unintentional errors, or evidence given upon immaterial matters, and without intent to deceive. Its sense is to require the jury to distrust only a witness who wilfully swears falsely as to material matters, and it ought always to be given with the words "wilfully" and "material" expressed as qualifications of the rule it declares. *Cameron v. Wentworth*, 23 M 70, 77, 57 P 648.

Subdivision 3 of this section does not authorize an instruction that a witness false in one part of his testimony is to be

distrusted in others without limiting it to wilfully false statements as to material matters. *Ashley v. Rocky Mountain Bell Tel. Co.*, 25 M 286, 293, 64 P 765.

Operation in General

As a statute affecting the province of the jury in weighing evidence, subdivision 3 of this section requires them to view with distrust the testimony of a witness who wilfully swears falsely as to a material matter. They must distrust such a witness, and, under their general power of passing upon the credibility to be attached to each witness, they may discard such testimony entirely, except in so far as it is corroborated by other credible evidence. *Cameron v. Wentworth*, 23 M 70, 78, 57 P 648; *State v. De Wolfe*, 29 M 415, 424, 74 P 1084. See also *State v. Fuller*, 34 M 12, 28, 85 P 369; *State v. Lee*, 34 M 584, 587, 87 P 977.

If the trial court believed the witnesses who testified disputing the performance by the appellants, then it found the testimony of the appellants with reference thereto was false; and a witness who is false in one part is to be distrusted in others (this section). The only testimony from which it would have been possible for the trial court to have found the existence of the contracts, or either of them, was the testimony of the respective appellants as to their verbal contracts with the deceased. Therefore, if the trial court determined on the conflicting testimony that the appellants' testimony was not worthy of credit and was to be distrusted, there was no credible evidence in the record to warrant a finding in favor of the appellants or either of them. *Langston et al. v. Currie et al.*, 95 M 57, 75, 26 P 2d 160.

Subd. 4

Instructions Based on This Subdivision

Though the propriety of giving an instruction in the words of paragraph 4 of this section, that "the oral admissions of a party are to be viewed with caution," is a matter of discretion in the trial court, refusal to give it in this case was error. *McCrimmon v. Murray*, 43 M 457, 471, 117 P 73.

Operation in General

Statements as to declarations or admissions made by another are the weakest and least satisfactory character of evidence in persuasive value, and should be received with great caution. *Excellier v. Great Northern Ry. Co.*, 46 M 238, 248, 127 P 458. See also *Gauss v. Trump*, 48 M 92, 99, 135 P 910.

Evidence of oral admissions must be viewed with caution, especially so where

the party alleged to have made the admission is dead. *Humble v. St. John et al.*, 72 M 519, 525, 234 P 475.

Oral admissions of a party should be viewed with caution and subjected to careful scrutiny, no other class of testimony affording such opportunities for unscrupulous witnesses to distort the facts or to commit open perjury. *Sylvain et al. v. Page*, 84 M 424, 438, 276 P 16.

Refusal of an offered instruction that the uncorroborated testimony of an accomplice should be received with great caution was not error, where the court had advised the jury, pursuant to subdivision 4 of this section, that the testimony of an accomplice ought to be viewed with distrust. *State v. Lyford*, 87 M 325, 329, 287 P 214.

Oral admissions of a party are to be viewed with caution, and declarations against interest are deemed to be the weakest and least satisfactory of any evidence in persuasive value. *Linn v. French et al.*, 97 M 292, 298, 33 P 2d 1002.

Subd. 5

Beyond a Reasonable Doubt

In a prosecution against a telegraph company for furnishing information for bets on horse-races, there must be evidence that the defendant communicated the information or guilt cannot be established beyond a reasonable doubt. *State v. Postal Telegraph Co.*, 53 M 104, 108, 161 P 953.

In a criminal case, the state must prove the defendant's guilt beyond a reasonable doubt; evidence that does no more than to cast suspicion upon the defendant is not enough; mere suspicions or probabilities, however strong, are not a sufficient basis for a conviction. *State v. Sieff*, 54 M 165, 171, 168 P 524.

Suspicion, however well founded, that defendant is guilty of the crime for the commission of which he is being tried, is not sufficient to meet the requirements of this section, and does not justify a conviction. To justify a conclusion of guilt, the criminatory circumstances proved must be consistent with each other, and so clearly justify that conclusion that they exclude any other rational hypothesis. *State v. Brower*, 55 M 349, 353, 177 P 241.

That degree of proof in a criminal case which produces conviction in an unprejudiced mind is denominated "moral certainty" (section 10491), and "moral certainty" and the phrase "beyond a reasonable doubt" as employed in this section providing that conviction can be secured only upon evidence which establishes that guilt beyond a reasonable doubt, are synonymous. *State v. Mun*, 76 M 278, 283, 246 P 257.

Defendant charged with crime may not be convicted on conjectures, however shrewd, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes guilt beyond a reasonable doubt, i. e., upon proof such as logically to compel the conviction that the charge is true. *State v. Konon*, 84 M 255, 261, 274 P 1060.

Operation in General

Under subdivision 5 of this section, it was error to charge that, in actions against a firm by a third person, less strictness of proof was required to show partnership than is required in an action brought by one partner against another, preponderance of the evidence being required in both cases. *Lawrence v. Westlake*, 28 M 503, 506, 73 P 119. See also *Gallick v. Bordeaux*, 31 M 328, 335, 78 P 583.

Preponderance of Evidence

An instruction charging that fraud is never presumed, "but must be clearly and distinctly proven," was erroneous, in that it advised the jury that something more than a bare preponderance of the evidence was necessary to prove fraud, and imposed too great a burden upon the party alleging it. *Gehlert v. Quinn*, 35 M 451, 457, 90 P 168; *Fleming v. Lockwood*, 36 M 384, 394, 92 P 962.

In civil actions, where the evidence is conflicting, a preponderance of the evidence is the least that will support a verdict. *Flaherty v. Butte Electric Ry. Co.*, 42 M 89, 93, 111 P 348.

Id. In civil actions, where the evidence is not conflicting, the verdict must be in favor of the party who has the affirmative of the issue, and who has produced the uncontradicted evidence in support of it.

To warrant reformation of an instrument for mistake, it is not necessary that the mistake be made to appear beyond a reasonable doubt, or by any quantum of proof beyond a bare preponderance, as provided in subdivision 5 of this section. *Parchen v. Chessman*, 53 M 430, 434, 164 P 531.

Id. A preponderance of the evidence may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary.

Under subdivision 5 of this section, fraud or lack of mental capacity to enter into a contract may be established by a bare preponderance of the evidence. *Koerner v. Northern Pacific Ry. Co.*, 56 M 511, 186 P 337.

The denial in an answer of an allegation in a complaint for divorce that the plaintiff and defendant are husband and wife, imposes upon the plaintiff the burden of proving that fact by a preponderance of the evidence. *Sell v. Sell*, 58 M 329, 333, 193 P 561.

Subd. 6

Operation in General

Where the state had a witness present in the courtroom in a criminal case who, if otherwise unimpeached testimony of defendant's witnesses was untrue, might have contradicted it, but failed to put him on the stand, the jury, in weighing the evidence, should under this section, have taken into consideration its failure in that behalf. *State v. Neely*, 90 M 199, 208, 300 P 561.

Subd. 7

Operation in General

Where a party has it within his power to introduce stronger and more satisfactory evidence than that offered by him, the evidence produced should be viewed with distrust (this section). *State v. Farmers' etc. State Bank*, 85 M 256, 262, 278 P 828.

General Operation of This Section

An instruction, requested by defendant to the effect that, in weighing the testimony given by police officers and detectives, the jury should exercise greater care than in the case of other witnesses, because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused, and disregard all matters which did not tend to support their preconceived opinions of the case, was properly refused as, if given, it would have invaded the province of the jury. *State v. Paisley*, 36 M 237, 253, 92 P 566.

The jury, in the first instance, are the exclusive judges of the credibility of a witness, and of the weight to be given to his testimony. *Bowen v. Webb*, 37 M 479, 484, 97 P 839.

In instructing the jury as to the manner in which they should exercise their power of judging the effect of evidence, the court should be guided by the provisions of this section, which are authoritative and sufficient. *Murray v. City of Butte*, 51 M 258, 263, 151 P 1051.

The jury is to judge of the credibility of witnesses and it is its province to decide conflicts in the evidence, and unless the testimony of the prevailing party is characterized by such inherent improbability as in effect to destroy it, the supreme court will not interfere. *Callan v. Hample*, 73 M 321, 328, 236 P 550.

The propriety of submitting instructions to the jury based upon the rules prescribed by this section, for weighing evidence, is a matter addressed to the trial court, and its determination is subject to review only for abuse of discretion; ordinarily an instruction in the words of section 10508, is sufficient. *State v. Sedlacek*, 74 M 201, 214, 239 P 1002.

References

Cited or applied as section 3390, Code of Civil Procedure, in *State v. Spotted Hawk*, 22 M 33, 65, 55 P 1026; *State v. Geddes*, 22 M 68, 91, 55 P 919; *Ashley v. Rocky Mountain Bell Tel. Co.*, 25 M 286, 293, 64 P 765; *State v. Lu Sing*, 34 M 31, 37, 85 P 521; as section 8028, Revised Codes, in *Lizott v. Big Blackfoot Milling Co.*, 48 M 171, 174, 136 P 46; *State v. Jones*, 48 M 505, 524, 139 P 441; *Roy v. King's Estate*, 55 M 567, 572, 179 P 821; *Cornell v. Great Northern Ry. Co.*, 57 M 177, 196, 187 P 902; *Knop v. Chicago, Milwaukee & St. Paul Ry. Co.*, 57 M 288, 187 P 1020; *Heilman v. Loughrin et al.*, 57 M 380, 188 P 370; *State v. Brooks*, 57 M 480, 188 P 942; *State v. Pippi*, 59 M 116, 124, 195 P 556; *Wick v. Western Life & Casualty Co.*, 60 M 553, 557, 199 P 272; *Gray v. Grant et al.*, 62 M 452, 476, 206 P 410; *Sommerville v. Greenhood*, 65 M 101, 114, 210 P 1048; *State v. Mott*, 72 M 306, 314, 233 P 602; *First Nat. Bank v. Montana C. L. Co.*, 72 M 419, 423, 234 P 256; *State v. Kessler*, 74 M 166, 168, 239 P 1000; *State v. Wilson*, 76 M 384, 393, 247 P 158; *State v. Duncan*, 82 M 170, 183, 266 P 400; *Durocher v. Myers*, 84 M 225, 237, 274 P 1062; *Putnam v. Putnam*, 86 M 135, 146, 282 P 855; *Torstenson v. Independent Publishing Co.*, 86 M 163, 168, 282 P 861; *In re Wray's Estate*, 93 M 525, 541, 19 P 2d 1051; *Gilerest et al. v. Bowen et al.*, 95 M 44, 55, 24 P 2d 141; *Langston et al. v. Currie et al.*, 95 M 57, 75, 26 P 2d 160; *McMahon v. Cooney et al.*, 95 M 138, 145, 25 P 2d 131; *State ex rel. Hoatson v. District Court*, 95 M 174, 179, 26 P 2d 172.

CHAPTER 170

RIGHTS AND DUTIES OF WITNESSES

- Section 10673. Witness bound to attend when subpoenaed.
 10674. Witness bound to answer questions.
 10675. Right of witnesses to protection.

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10676. Witnesses protected from arrest when attending, or going or returning.
 10677. Arrest made to be void, and party making arrest liable, etc.
 10678. To make affidavit if arrested.
 10679. Court to discharge witness from arrest.

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10673. Witness bound to attend when subpoenaed. A witness, served with a subpoena, must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

History: En. Sec. 327, p. 112, Bannack Stat.; re-en. Sec. 385, p. 213, L. 1867; re-en. Sec. 459, p. 128, Cod. Stat. 1871; re-en. Sec. 638, p. 206, L. 1877; re-en. Sec. 638, 1st Div. Rev. Stat. 1879; re-en. Sec. 659, 1st Div. Comp. Stat. 1887; amd. Sec. 3400,

C. Civ. Proc. 1895; re-en. Sec. 8029, Rev. C. 1907; re-en. Sec. 10673, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2064.

References

State ex rel. Bacorn v. District Court, 73 M 297, 302, 236 P 553.

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10674. Witness bound to answer questions. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

History: En. Sec. 328, p. 112, Bannack Stat.; re-en. Sec. 386, p. 213, L. 1867; re-en. Sec. 460, p. 128, Cod. Stat. 1871; re-en. Sec. 639, p. 206, L. 1877; re-en. Sec. 639, 1st Div. Rev. Stat. 1879; re-en. Sec. 660, 1st Div. Comp. Stat. 1887; amd. Sec. 3401, C. Civ. Proc. 1895; re-en. Sec. 8030, Rev. C. 1907; re-en. Sec. 10674, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2065.

Operation and Effect

Where the defendant testifies on his own behalf, it is competent and material to show, on cross-examination, that he had been convicted of a felony, in order to discredit him and to attack his credibility. State v. Black, 15 M 143, 150, 38 P 674.

On cross-examination, it is not permissible to ask a witness any question merely for the purpose of degrading and discrediting him, but he must answer as to a prior conviction for a felony; and a judgment will be reversed where questions asked of a witness in a criminal case were totally foreign to the matter before the court, where they could have no bearing whatever on the guilt or innocence of the defendant, and where they could subserve no purpose whatever, except to degrade

and discredit the witness. State v. Crowe, 39 M 174, 179, 102 P 579.

Where, in a prosecution for burglary, a witness who was jointly indicted with defendant testified to having taken a fishing trip with defendant about the time of the burglary, questions on cross-examination to show that the trip was for the purpose of committing robbery were improper, as tending to degrade and discredit the witness and defendant, though the witness answered in the negative. State v. Rogers, 31 M 1, 7, 77 P 293.

This section and the following section are designed to protect a witness from improper and irrelevant questions and questions intended merely to degrade him, but if a particular question is pertinent and otherwise proper, the fact that it may tend to prejudice the witness before the jury furnishes no ground for its exclusion. Lukert v. Eldridge, 49 M 46, 50, 139 P 999.

References

State ex rel. Bacorn v. District Court, 73 M 297, 302, 236 P 553; State v. Shannon, 95 M 280, 292, 26 P 2d 360; Sawyer v. United States, 27 F. 2d 569.

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10675. Right of witnesses to protection. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

History: En. Sec. 3402, C. Civ. Proc. 1895; re-en. Sec. 8031, Rev. C. 1907; re-en. Sec. 10675, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2066.

Operation and Effect

To permit questions to be asked a witness, other than the defendant, which subserve no purpose, other than to degrade and discredit him in the eyes of the jury, constitutes reversible error. *State v. Rogers*, 31 M 1, 7, 77 P 293; *State v. Crowe*, 39 M 174, 178, 102 P 579.

The court may protect a witness from a

question, intended to insult and degrade him, by refusing to require him to answer. *State v. Biggs*, 45 M 400, 404, 123 P 410.

References

Cited or applied as section 3402, Code of Civil Procedure, in *State v. Trueman*, 34 M 249, 257, 85 P 1024; as section 8031, Revised Codes, in *Lukert v. Eldridge*, 49 M 46, 50, 139 P 999; *State v. Kanakaris*, 54 M 180, 184, 169 P 42; *State v. Smith*, 57 M 349, 361, 188 P 644; *State ex rel. Bacorn v. District Court*, 73 M 297, 302, 236 P 553.

10676. Witnesses protected from arrest when attending, or going or returning. Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom.

History: En. Sec. 335, p. 113, Bannack Stat.; amd. Sec. 393, p. 213, L. 1867; re-en. Sec. 467, p. 129, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 3403, C. Civ. Proc. 1895; re-en. Sec. 8032, Rev. C. 1907; re-en. Sec. 10676, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2067.

References

Goodell v. Judith Basin County et al., 70 M 222, 236, 224 P 1110; *State ex rel. Coe v. District Court et al.*, 73 M 265, 270, 235 P 766.

10677. Arrest made to be void, and party making arrest liable, etc. The arrest of a witness, contrary to the preceding section, is void, and, when wilfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpoena, for the damages sustained by him in consequence of the arrest.

History: En. Sec. 3404, C. Civ. Proc. 1895; re-en. Sec. 8033, Rev. C. 1907; re-en. Sec. 10677, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2068.

References

State ex rel. Coe v. District Court et al., 73 M 265, 270, 235 P 766.

10678. To make affidavit if arrested. An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption, and make an affidavit stating:

1. That he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,
2. That he has not thus been served by his own procurement, with the intention of avoiding arrest;
3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

History: En. Sec. 394, p. 214, L. 1867; re-en. Sec. 468, p. 129, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 3405, C. Civ. Proc. 1895; re-en. Sec. 8034, Rev. C. 1907; re-en. Sec. 10678, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2069.

References

State ex rel. Coe v. District Court et al, 73 M 265, 270, 235 P 766.

10679. Court to discharge witness from arrest. The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section 10676. If the court have adjourned before the arrest, or before application for discharge, a judge of the court may grant the discharge.

History: En. Sec. 3406, C. Civ. Proc. 1895; re-en. Sec. 8035, Rev. C. 1907; re-en. Sec. 10679, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2070.

References

State ex rel. Coe v. District Court et al, 73 M 265, 270, 235 P 766.

CHAPTER 171

EVIDENCE IN PARTICULAR CASES

- Section 10680. An offer equivalent to tender.
 10681. Whoever pays entitled to receipt.
 10682. Objections to tender must be specified.
 10683. Rules for construing description of lands.
 10684. Compromise offer of no avail.
 10685. In an action for divorce, admission not sufficient.

10680. An offer equivalent to tender. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

History: En. Sec. 3410, C. Civ. Proc. 1895; re-en. Sec. 8036, Rev. C. 1907; re-en. Sec. 10680, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2074.

References

Cited or applied as section 3410, Code of Civil Procedure, in O'Keefe v. Dyer, 20 M 477, 486, 52 P 196.

10681. Whoever pays entitled to receipt. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

History: En. Sec. 3411, C. Civ. Proc. 1895; re-en. Sec. 8037, Rev. C. 1907; re-en. Sec. 10681, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2075.

10682. Objections to tender must be specified. The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objections be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.

History: En. Sec. 3412, C. Civ. Proc. 1895; re-en. Sec. 8038, Rev. C. 1907; re-en. Sec. 10682, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2076.

References

Cited or applied as section 3412, Code of Civil Procedure, in O'Keefe v. Dyer, 20 M 477, 486, 52 P 196.

10683. Rules for construing description of lands. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

5. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance.

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars.

History: En. Sec. 3413, C. Civ. Proc. 1895; re-en. Sec. 8039, Rev. C. 1907; re-en. Sec. 10683, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2077.

Operation and Effect

When there is a conflict between monuments and courses and distances, the latter must yield to the former. *Myrick v. Peet*, 56 M 13, 20, 180 P 574.

In an action in ejectment in which the paramount question was whether a former owner of the land had removed a government quarter section corner monument so as to include an adjoining tract within his

own, held, under subdivision 2 of this section, that in the absence of testimony contradictory of that of plaintiff's that it never had been moved, the rights of the parties were governed by the monuments upon the ground and that rendition of judgment for defendant was error. *Kurth et al. v. Le Jeune*, 83 M 100, 110, 269 P 408.

In a boundary dispute, if there be a conflict between permanent and visible or ascertained boundaries or monuments, and measurements, the boundaries or monuments are controlling under this section. *Nemitz v. Reckards et al.*, 98 M 229, 241, 38 P 2d 980.

10684. Compromise offer of no avail. An offer of compromise is not an admission that anything is due.

History: En. Sec. 3414, C. Civ. Proc. 1895; re-en. Sec. 8040, Rev. C. 1907; re-en. Sec. 10684, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2078.

Operation and Effect

The statement of an independent fact, not essential to the purpose of a compromise, and which is not to be regarded as a concession made for that purpose, is not excluded by this section, but is admissible in evidence. *Lenahan v. Casey*, 46 M 367, 379, 128 P 601.

An offer to compromise is not an admission, by the party making it, that any-

thing is due, and is not admissible in evidence against him. *Huffine v. Lincoln*, 53 M 474, 480, 164 P 888.

An offer of compromise is not an admission that anything is due and is inadmissible in evidence in an action to recover balance due under a contract of sale; hence testimony that an agent of the plaintiff had inquired of defendants whether they would consider a settlement if he were able to secure the consent of his principal was improperly admitted. *Continental Oil Co. v. Bell et al.*, 94 M 123, 135, 21 P 2d 65.

10685. In an action for divorce, admission not sufficient. In an action for divorce on the ground of adultery, a confession of adultery, whether

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in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce.

History: En. Sec. 3415, C. Civ. Proc. 1895; re-en. Sec. 8041, Rev. C. 1907; re-en. Sec. 10685, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2079.

CHAPTER 172

PROCEEDINGS TO PERPETUATE TESTIMONY

- Section 10686. Evidence may be perpetuated.
 10687. Manner of application for order.
 10688. Person appointed by judge authorized to take deposition, when.
 10689. Manner of taking the deposition.
 10690. Papers prima facie evidence.
 10691. When the evidence may be produced.
 10692. Effect of the deposition.

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10686. Evidence may be perpetuated. The testimony of a witness may be taken and perpetuated as provided in this chapter.

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History: En. Sec. 354, p. 117, Bannack Stat.; re-en. Sec. 412, p. 218, L. 1867; re-en. Sec. 486, p. 133, Cod. Stat. 1871; re-en. Sec. 664, p. 212, L. 1877; re-en. Sec. 664, 1st Div. Rev. Stat. 1879; re-en. Sec. 686, 1st Div. Comp. Stat. 1887; re-en. Sec. 3420, C. Civ. Proc. 1895; re-en. Sec. 8042, Rev. C. 1907; re-en. Sec. 10686, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2083.

Operation and Effect

A mode for the perpetuation of testimony is provided by this chapter. Sloan v. Byers, 37 M 503, 513, 97 P 855.

Where a petitioner for an order to take testimony complies with the statutes governing that question, he is entitled to the order. State ex rel. Holcomb v. District Court, 54 M 574, 576, 172 P 329.

Id. Since an adverse party may be a witness, his testimony may be taken under this section and the following section.

10687. Manner of application for order. The applicant must produce to a judge of the district court a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons who he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at any time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be personally served, and, if unknown, such notice must be served on the clerk of the county where the property affected by such evidence is situated or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the court to whom the deposition must be returned when taken.

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History: En. Sec. 355, p. 117, Bannack Stat.; re-en. Sec. 413, p. 218, L. 1867; re-en. Sec. 487, p. 133, Cod. Stat. 1871; amd. Sec. 665, p. 212, L. 1877; re-en. Sec. 665, 1st Div. Rev. Stat. 1879; re-en. Sec. 687, 1st Div. Comp. Stat. 1887; re-en. Sec. 3421, C. Civ. Proc. 1895; re-en. Sec. 8043, Rev. C. 1907; re-en. Sec. 10687, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2084.

Operation and Effect

A petition for the perpetuation of testimony which recited that the applicant ex-

pected to be a party to an action in a district court of this state, naming the intended adverse parties and stating the nature of the controversy, the residence of the witnesses, and that accounts and records in their keeping, and which they were desired to bring with them, were necessary to illustrate and make understandable their testimony, was sufficient to entitle petitioner to the order prayed for. State ex rel. Holcomb v. District Court, 54 M 574, 576, 172 P 329.

10688. Person appointed by judge authorized to take deposition, when.

The person appointed by the judge to take the depositions is authorized, if a resident of this state, on receiving a copy of the order of the judge, and of the notice prescribed in the last section, with proof of its personal service or publication—or, if a resident without the state, on receiving the commission mentioned in the next section, with proof of like service or publication of the notice—to take the deposition of the witness named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time.

History: En. Sec. 666, p. 213, L. 1877; re-en. Sec. 666, 1st Div. Rev. Stat. 1879; re-en. Sec. 688, 1st Div. Comp. Stat. 1887; re-en. Sec. 3422, C. Civ. Proc. 1895; re-en. Sec. 8044, Rev. C. 1907; re-en. Sec. 10688, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2085.

10689. Manner of taking the deposition. The examination must be by question and answer, and if the testimony is to be taken in another state, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the clerk of the court designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the clerk the order for the examination, the petition on which the same was granted, with proof of service of the order and notice.

History: En. Sec. 667, p. 213, L. 1877; amd. Sec. 3423, C. Civ. Proc. 1895; re-en. Sec. 667, 1st Div. Rev. Stat. 1879; Sec. 8045, Rev. C. 1907; re-en. Sec. 10689, re-en. Sec. 689, 1st Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2086.

10690. Papers prima facie evidence. The petition and order and papers filed by the judge, as provided in the preceding section, or a certified copy thereof, are prima facie evidence of the facts stated therein to show compliance with the provisions of this chapter.

History: En. Sec. 668, p. 214, L. 1877; re-en. Sec. 3424, C. Civ. Proc. 1895; re-en. Sec. 668, 1st Div. Rev. Stat. 1879; Sec. 8046, Rev. C. 1907; re-en. Sec. 10690, re-en. Sec. 690, 1st Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2087.

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10691. When the evidence may be produced. If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination.

History: En. Sec. 359, p. 118, Bannack Stat.; re-en. Sec. 417, p. 219, L. 1867; re-en. Sec. 491, p. 134, Cod. Stat. 1871; amd. Sec. 669, p. 214, L. 1877; re-en. Sec. 669, 1st Div. Rev. Stat. 1879; re-en. Sec. 691, 1st

Div. Comp. Stat. 1887; re-en. Sec. 3425, C. Civ. Proc. 1895; re-en. Sec. 8047, Rev. C. 1907; re-en. Sec. 10691, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2088.

10692. Effect of the deposition. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness, or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

History: En. Sec. 670, p. 214, L. 1877; re-en. Sec. 670, 1st Div. Rev. Stat. 1879; re-en. Sec. 692, 1st Div. Comp. Stat. 1887; re-en. Sec. 3426, C. Civ. Proc. 1895; re-en. Sec. 8048, Rev. C. 1907; re-en. Sec. 10692, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2089.

References

Cited or applied as section 8048, Revised Codes, in Sloan v. Byers, 37 M 503, 513, 97 P 855.

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CHAPTER 173

ADMINISTRATION OF OATHS AND AFFIRMATIONS

Section 10693. Judicial and certain officers authorized to administer oaths.

10694. Form of ordinary oath to witness.

10695. Form may be varied to suit witness' belief.

10696. Same—witness not a Christian.

10697. Any person who prefers it may declare or affirm.

10693. Judicial and certain officers authorized to administer oaths. Every court, every judge, or clerk of any court, every justice, and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

History: En. Sec. 360, p. 118, Bannack Stat.; re-en. Sec. 418, p. 219, L. 1867; re-en. Sec. 492, p. 135, Cod. Stat. 1871; amd. Sec. 671, p. 214, L. 1877; re-en. Sec. 671, 1st Div. Rev. Stat. 1879; re-en. Sec. 693, 1st

Div. Comp. Stat. 1887; amd. Sec. 3430, C. Civ. Proc. 1895; re-en. Sec. 8049, Rev. C. 1907; re-en. Sec. 10693, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2093.

10694. Form of ordinary oath to witness. An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter), pending between..... and, shall be the truth, the whole truth, and nothing but the truth, so help you God."

History: En. Sec. 3431, C. Civ. Proc. 1895; re-en. Sec. 8050, Rev. C. 1907; re-en. Sec. 10694, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2094.

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10695. Form may be varied to suit witness' belief. Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may, in its discretion, adopt that mode.

History: En. Sec. 3432, C. Civ. Proc. 1895; re-en. Sec. 8051, Rev. C. 1907; re-en. Sec. 10695, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2095.

10696. Same—witness not a Christian. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

History: En. Sec. 361, p. 118, Bannack Stat.; re-en. Sec. 419, p. 219, L. 1867; re-en. Sec. 493, p. 135, Cod. Stat. 1871; re-en. Sec. 672, p. 215, L. 1877; re-en. Sec. 672, 1st Div. Rev. Stat. 1879; re-en. Sec. 694, 1st Div. Comp. Stat. 1887; re-en. Sec. 3433, C. Civ. Proc. 1895; re-en. Sec. 8052, Rev. C. 1907; re-en. Sec. 10696, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2096.

10697. Any person who prefers it may declare or affirm. Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration by assenting, when addressed in the following form: "You do solemnly affirm (or declare)," etc., as in section 10694.

History: Ap. p. Sec. 362, p. 118, Bannack Stat.; en. Sec. 420, p. 219, L. 1867; re-en. Sec. 494, p. 135, Cod. Stat. 1871; amd. Sec. 673, p. 215, L. 1877; re-en. Sec. 673, 1st Div. Rev. Stat. 1879; re-en. Sec. 695, 1st Div. Comp. Stat. 1887; amd. Sec. 3434, C. Civ. Proc. 1895; re-en. Sec. 8053, Rev. C. 1907; re-en. Sec. 10697, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2097.

CHAPTER 174

DECISION OF QUESTIONS OF FACT AND OF LAW—MONEYS PAID INTO COURT

- Section 10698. Questions of fact to be decided by the jury, and the evidence addressed to them.
10699. Questions of law addressed to the court.
10700. Questions of fact by court or referee.
10701. Moneys paid into court.

10698. Questions of fact to be decided by the jury, and the evidence addressed to them. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code.

History: En. Sec. 3440, C. Civ. Proc. 1895; re-en. Sec. 8054, Rev. C. 1907; re-en. Sec. 10698, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2101.

Operation and Effect

This section is alike applicable to civil and criminal cases. State v. Sherman, 35 M 512, 518, 90 P 981.

References

State v. Newman, 66 M 180, 186, 213 P 805; State v. Wilson, 76 M 384, 392, 247 P 158; State v. Vetter, 76 M 574, 587, 248 P 179; State ex rel. Hoatson v. District Court, 95 M 174, 179, 26 P 2d 172; Simpson v. Miller, 97 M 328, 340, 34 P 2d 528.

10699. Questions of law addressed to the court. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this

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code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

History: En. Sec. 3441, C. Civ. Proc. 1895; re-en. Sec. 8055, Rev. C. 1907; re-en. Sec. 10699, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2102.

Operation and Effect

It is error to submit the question of the admissibility of an admission to the jury and testimony relative thereto taken before the court sitting without the jury will not be examined on appeal. *State v. Sherman*, 35 M 512, 518, 90 P 981. Overruling *State v. Tighe*, 27 M 327, 71 P 3. See also *Territory v. McClintock*, 1 M 394, and *Territory v. Underwood*, 8 M 131, 19 P 398.

The question of the admissibility of a confession, alleged to have been made by defendant while in custody, is one to be determined by the court after hearing evidence, in the presence of the jury, relative to the circumstances under which it was made, and its finding thereon will not be disturbed on appeal, unless clearly against the weight of the evidence. *State v. Berberick*, 38 M 423, 442, 100 P 209.

The orthodox division of function between judge and jury allots, without question, to the judge the determination of all matters of fact on which the admissibility of evidence depends; and therefore of the facts of a witness' capacity to testify. *State v. Newman*, 66 M 180, 186, 213 P 805.

The question whether a dying declaration is admissible is one for the court's decision after hearing preliminary proof concerning the condition of the declarant and the circumstances surrounding the making of the statement, whereupon, if admitted, the question of its sufficiency and the weight to be given it is for the jury's determination; hence refusal to submit instructions stating the rule governing the admission of such declarations was not error. *State v. Vetter*, 76 M 574, 587, 248 P 179.

References

State v. Kacar, 74 M 269, 280, 282, 240 P 365.

10700. Questions of fact by court or referee. The provisions contained in this part of the code, respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer.

History: En. Sec. 3442, C. Civ. Proc. 1895; re-en. Sec. 8056, Rev. C. 1907; re-en. Sec. 10700, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2103.

10701. Moneys paid into court. Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court. The treasurer shall keep each fund distinct, and open an account with each. Such appointment shall be filed with the county treasurer, who shall exhibit it, and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who shall thereupon write "revoked," in ink, across the face of the appointment.

History: En. Sec. 3443, C. Civ. Proc. 1895; re-en. Sec. 8057, Rev. C. 1907; re-en. Sec. 10701, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2104.

References

State v. McGraw, 74 M 152, 162, 240 P 812.

CHAPTER 175

DEFINITIONS AND GENERAL PROVISIONS

- Section 10702. When this code takes effect.
 10703. Common law, applicability of.
 10704. Provisions similar to existing laws—how construed.
 10705. Rights not affected.
 10706. Limitations shall continue to run.
 10707. Computation of time.

10702. When this code takes effect. This code takes effect at twelve o'clock, noon, on the first day of July, A. D. 1895.

History: En. Sec. 3450, C. Civ. Proc. 1895; re-en. Sec. 8058, Rev. C. 1907; re-en. Sec. 10702, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 2.

References

Cited or applied as section 3450, Code of Civil Procedure, in *In re Pomeroy*, 33 M 69, 73, 81 P 629.

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10703. Common law, applicability of. In this state there is no common law in any case where the law is declared by the code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the code or other statutes, the common law shall be the law and rule of decision.

History: En. Sec. 3452, C. Civ. Proc. 1895; re-en. Sec. 8060, Rev. C. 1907; re-en. Sec. 10703, R. C. M. 1921.

Operation and Effect

There is in this state no action for money had and received, as such; and there is no common law in any case where the law is declared by the code. *Truro v. Passmore*, 38 M 544, 549, 100 P 966.

The legislature may alter or repeal the common law, and many of its rules have been abolished. *Cunningham v. Northwestern Improvement Co.*, 44 M 180, 216, 119 P 554.

Id. Common-law actions for negligence may be changed so as to cover happenings.

By adopting the common law, as shown in this section and section 5032, this state adopted the crown's prerogative with respect to public debts, and the state as sovereign is entitled to priority of payment over private creditors of the same debtor. *American Bonding Co. v. Reynolds*, 203 F. 356, 358.

Where a right sought to be asserted was not known to the common law at the time it became part of the jurisprudence of the state, authority for the right must be found in the acts of the legislature. *Simonsen v. Barth et al.*, 64 M 95, 100, 208 P 938; *Conley v. Conley*, 92 M 425, 437, 15 P 2d 922.

Held, that since there is no common law in Montana where the law is declared by the codes or the statutes, and under section 5695, consent of the parties to marry is not alone sufficient to bring about the relation but in the absence of a solemnization there must be a public assumption of

the relation, there is no common-law marriage in this state where such public assumption was absent. *State v. Newman*, 65 M 180, 190, 213 P 805.

Statutes are but continuations of the basic common law and are not presumed to make any alterations in it further than is expressly declared, and a statute made in the affirmative, without any negative expressed or implied, does not take away the common law, the rules of which are not to be overturned except by clear and unambiguous language. *State ex rel. La Point v. District Court*, 69 M 29, 33, 220 P 88.

References

Cited or applied as section 3452, Code of Civil Procedure, in *Forrester v. Boston & M. C. C. & S. M. Co.*, 21 M 544, 557, 55 P 229; *McKnight v. Oregon Short Line R. R. Co.*, 33 M 40, 42, 82 P 661; as section 8060, Revised Codes, in *State v. Crowe*, 39 M 174, 178, 102 P 579; *Marron v. Great Northern Ry. Co.*, 46 M 593, 603, 129 P 1055; *Aetna Accident & Liability Co. v. Miller*, 54 M 377, 382, 170 P 760; *Tetrault v. Ingraham*, 54 M 524, 526, 171 P 1148; *Jonosky v. Northern Pac. Ry. Co.*, 57 M 63, 77, 187 P 1014.

Cited or applied as section 8060, Revised Codes, in *American Bonding Co. v. Reynolds*, 203 F. 356, 357; *Brown v. American Bonding Co.*, 210 F. 844, 846, 127 C. C. A. 406; *Grimstad et al. v. Johnson et al.*, 61 M 18, 22, 201 P 314; *Angell v. Lewistown State Bank et al.*, 72 M 345, 353, 232 P 90; *In re Connolly's Estate*, 73 M 35, 58, 235 P 408; *Mieyr v. Federal Surety Co. et al.*, 97 M 503, 510, 34 P 2d 982.

10704. Provisions similar to existing laws—how construed. The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

History: En. Sec. 3454, C. Civ. Proc. 1895; re-en. Sec. 8062, Rev. C. 1907; re-en. Sec. 10704, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 5.

Operation and Effect

Statutes are but continuations of the basic common law and are not presumed to make any alterations in it further than is

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expressly declared, and a statute made in the affirmative, without any negative expressed or implied, does not take away the common law, the rules of which are not to be overturned except by clear and unambiguous language. *State ex rel. La Point v. District Court*, 69 M 29, 33, 220 P 88.

10705. Rights not affected. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions.

History: En. Sec. 3455, C. Civ. Proc. 1895; re-en. Sec. 8063, Rev. C. 1907; re-en. Sec. 10705, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 8.

Operation and Effect

This section was intended to save vested rights from being interfered with, but did not affect statutes relating merely to the remedy. A change in the rules of evidence is not unconstitutional as to a case pending; there is no vested right to have

References

Cited or applied as section 3454, Code of Civil Procedure, in *Boston & B. Co. v. M. O. P. Co.*, 25 M 41, 76, 63 P 825; as section 8062, Revised Codes, in *Melville v. Butte-Balakhava Copper Co.*, 47 M 1, 10, 130 P 441.

a case determined by the existing rules of evidence. *Baxter v. Hamilton*, 20 M 327, 336, 51 P 265.

References

Cited or applied as section 3455, Code of Civil Procedure, in *Guterman v. Wishon*, 21 M 458, 460, 54 P 566; *Kimpton v. Jubilee Placer Co.*, 22 M 107, 108, 55 P 918; *Montana O. P. Co. v. Butte & B. C. M. Co.*, 25 M 427, 430, 65 P 420.

10706. Limitations shall continue to run. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed part of the time prescribed as such limitation by this code.

History: En. Sec. 3456, C. Civ. Proc. 1895; re-en. Sec. 8064, Rev. C. 1907; re-en. Sec. 10706, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 9.

Operation and Effect

An application by an executor for the sale of real estate, while partaking somewhat of the nature of an action, does not fall within the provisions of this section and other sections of the code prescribing the time within which action may be

brought to recover real estate, or the possession thereof. In *re Tuohy's Estate*, 33 M 230, 246, 83 P 486.

References

Cited or applied as section 3456, Code of Civil Procedure, in *Guterman v. Wishon*, 21 M 458, 459, 54 P 566; *Sherman v. Nason*, 25 M 283, 285, 64 P 768; *Montana O. P. Co. v. Butte & B. C. M. Co.*, 25 M 427, 430, 65 P 420; *Wilson v. Pickering*, 28 M 435, 439, 72 P 821.

10707. Computation of time. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

History: En. Sec. 430, p. 130, *Bannack Stat.*; amd. Sec. 501, p. 233, L. 1867; re-en. Sec. 578, p. 153, *Cod. Stat.* 1871; re-en. Sec. 519, p. 176, L. 1877; re-en. Sec. 519, 1st Div. Rev. Stat. 1879; re-en. Sec. 536, 1st Div. Comp. Stat. 1887; amd. Sec. 3459, C. Civ. Proc. 1895; re-en. Sec. 8067, Rev. C. 1907; re-en. Sec. 10707, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 12.

Applied to Computation Under the Statutes in All Cases

The rule prescribed by this section is applicable to computations under the statute in all cases, whether the actions be ex contractu or ex delicto; it therefore ap-

plies to an action for libel. *Kelly v. Independent Publishing Co.*, 45 M 127, 134, 122 P 735.

Double Holidays Both Excluded

Where the limitation of time in which an act may be done falls upon the first of two consecutive holidays, both days are excluded, and the words "any act provided by law" applies to acts which may be done within a specified time, and not to acts which the law provides shall be done. *Kelly v. Independent Publishing Co.*, 45 M 127, 135, 122 P 735.

Id. Two holidays, appearing in succession at the end of the time limited, are to be excluded.

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Not Applicable to Time for Filing Nominating Petitions

Held, on application for writ of injunction to prevent certification of names of certain aspirants for state office as candidates to be voted on at the primary election to be held on July 17, the date fixed by law for such election, that the provision of section 644, as amended by Chapter 133, Laws of 1923, page 385, requiring the filing of petitions for nomination for state offices with the secretary of state "not less than forty days before the date" of the election, construed in the light of other sections of the code fixing the time within which the secretary of state shall certify the names of such candidates as in *pari materia*, is exclusive, making inapplicable the provision of this section, that the time in which any act provided by law is to be done must be computed by excluding the first day and including the last; that, forty full days being required, the date of filing must be excluded from computation and, the section providing that the filing must be done forty days before the date of the election, July 17 may not be counted; that therefore nominating petitions were required to be filed before midnight of June 6 and petitions filed on June 7 were too late and the names of the candidates therein mentioned not entitled to certification. *State ex rel. Bevan v. Mountjoy*, 82 M 594, 599, 601, 268 P 558.

Operation and Effect

Under section 9895, summons in an action for unlawful detainer must be served at least four days before the return day designated therein. Summons in such an action was issued out of a justice of the peace court and served on the eighth day of a certain month and made returnable on the twelfth of that month. Held, on appeal from a judgment quashing an alternative writ of prohibition attacking the jurisdiction of the justice, that the statute contemplates at least four full days before return day; that therefore in computing the time for service the return day as well as the day of service, the latter under this section, relating to computation of time generally in which an act provided by law is to be done, must be excluded; that, in the instant case, four full days from day of

service, to return day had not expired and hence that the justice court did not obtain jurisdiction of the action. *State ex rel. St. George v. Justice Court*, 80 M 53, 59 et seq., 257 P 1034.

The rule declared by this section, that the time within which the law requires an act to be done shall be computed by excluding the first and including the last day, applies to the provision of section 10076, that notice of application for letters of administration must be posted at least ten days before the hearing—an event; it has no application where the thing is required to be done a certain number of days before a given date. In *re Esterly's Estate*, 97 M 206, 211, 34 P 2d 539.

Recognized Prior to Enactment of This Statute

The rule of exclusion of the last day of limitation when it falls on a holiday was recognized in this jurisdiction in the case of *Schnepel v. Mellen*, 3 M 118, 126, prior to the enactment of any legislation on the subject. The purpose of the legislation was also to settle the rule in this behalf, so that a person having a right to bring an action, or to do any other act in the course of legal proceedings, might have a whole legal day at the end of the prescribed period in which to exercise his option. *Kelly v. Independent Publishing Co.*, 45 M 127, 135, 122 P 735.

When a Departure From This Rule is Permitted

For most purposes, the law regards the day as an indivisible unit. It is only when it becomes necessary to inquire into the order of sequence of two or more events occurring on the same day, for the purpose of determining a question of priority of right, or when the computation includes only one day or less, that departure from this rule is permitted. *Harmon v. Comstock Horse & Cattle Co.*, 9 M 243, 250, 23 P 470; *Kelly v. Independent Publishing Co.*, 45 M 127, 133, 122 P 735.

References

Cited or applied as section 8067, Revised Codes, in *Smith v. Collis*, 42 M 350, 359, 112 P 1070; *McDonnell v. Huffine*, 44 M 411, 428, 120 P 792; *Abell et al. v. Bishop*, 86 M 478, 496, 284 P 525.

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CODE OF CIVIL PROCEDURE

CHAPTER 3, SUPREME COURT

8805. Powers and duties of supreme court on appeals.

While under section 8805, Revised Codes, the supreme court may in equity cases where a judgment cannot be sustained under the evidence direct the entry of a proper judgment, it will not do so where the evidence on important points is meager and confused, and where the determinative finding of the court presented an entirely new element not included in the pleadings or proof, but will remand the cause for a new trial. *Horst v. Staley*, 101 M, 543, 549, 54 P 2d 876.

Where defendant in a foreclosure suit pleaded want of consideration but failed to sustain it by her evidence, and introduced evidence, over objection, which would have sustained a finding of failure of consideration, insufficiently pleaded, and the court erroneously made a finding that defendant had admitted the debt, on which its judgment in favor of plaintiff was apparently based, the supreme court instead of exercising its power conferred by section 8805, Revised Codes, to finally determine all questions presented in an

equity case, will order a new trial. *Sommer v. Wigen*, 103 M 327, 335, 62 P 2d 333.

Under the power given to the supreme court by section 8805, Revised Codes, to affirm, reverse or modify any judgment, or direct a new trial, it will, in a case in which the successful party made neither a cross-assignment of error on the trial court's action in rejecting an offer of proof which should have been admitted, nor perfected a cross-appeal, remand the cause for a new trial. *Phelps v. Union Central Life Ins. Co.*, 105 M 195, 202, 71 P 2d 887.

References

Peck v. Bersanti et al., 101 M 6, 9, 52 P 2d 168.

Boepple v. Mohalt, 101 M 417, 448, 54 P 2d 857.

State ex rel. Nagle v. Naughton et al., 103 M 306, 310, 63 P 2d 123.

Herrin v. Herrin, 103 M 469, 472, 63 P 2d 137.

CHAPTER 4, DISTRICT COURTS

8829. Original Jurisdiction.

The district court, when sitting in probate, is a court of record exercising general jurisdiction by virtue of the constitution; it is not one of limited jurisdiction and in heirship proceedings has

all the power and jurisdiction made inherent in district courts by the constitution and statutes. In *re Baxter's Estate*, 101 M 504, 511, 54 P 2d 869.

CHAPTER 5, JUSTICE AND POLICE COURTS

8842. Criminal Jurisdiction.

The criminal jurisdiction of justice of the peace courts being limited to misdemeanors punishable by fine not exceeding \$500 or imprisonment not exceeding six months, or both such fine and imprisonment, they have no jurisdiction of

an offense where the fine prescribed exceeds the amount named, or the imprisonment provided for is greater than six months. *State v. District Court et al.*, 105 M 77, 79, 69 P 2d 748.

CHAPTER 10, DISQUALIFICATIONS OF JUDICIAL OFFICERS

8868. Cases in which judge may be disqualified—calling in another judge.

The statute (sec. 8868, Rev. Codes) providing for the disqualification of district judges by the filing of affidavits is inapplicable in contempt proceedings. *State ex rel. Tague v. District Court et al.*, 100 M 383, 387, 47 P 2d 649.

Appellant (relator in a mandamus proceeding) filed his petition for the writ on the 10th day of a certain month and one of the two judges of the district court granted an order to show cause on the 20th of the same month, at which time respondent filed a demurrer to the petition, a motion to quash and a return. On

the 17th relator made and on the 19th filed an affidavit of disqualification against the other judge of the court before whom the matter was to be heard. Section 8868, Revised Codes, as amended by chapter 93, laws of 1927, provides that such an affidavit must be filed at least five

days before the day set for the hearing, or, in the absence of notice thereof, immediately upon receiving notice. Held, that the court did not err in disregarding the affidavit. *State ex rel. Eden v. Schneider*, 102 M 286, 290; 57 P 2d 783.

CHAPTER 12, MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS

8882. Means to carry jurisdiction into effect.

In the absence of specific direction as to how proceedings shall be conducted under sections 828.1 to 828.7, Revised Codes, the court could proceed in any suitable manner or mode most conformable "to the spirit" of the code (sec. 8882, Rev. Codes), and, therefore, acted within jurisdiction when it advised the board of county canvassers, acting in a ministerial capacity, when it made a partial report

and stated it was in doubt as to whether certain ballots were to be counted or not, by directing the attention of the members to the sections of the codes covering the points in dispute. *State ex rel. Riley v. District Court*, 103 M 576, 588, 64 P 2d 115.

References

State ex rel. Regis v. District Court et al., 102 M 74, 77, 55 P 2d 1295.

CHAPTER 13, DIFFERENT KINDS OF JURIES DEFINED

8883. Jury defined. A jury is a body of persons temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or to try a question of fact. [As amended Sec. 1, Ch. 203, L. 1939.]

8885. Grand jury defined. A grand jury is a body of persons, seven in number, returned in pursuance of law, from the citizens of a county, before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county. [As amended Sec. 2, Ch. 203, L. 1939.]

8886. Trial jury defined. A trial jury is a body of persons returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact. [As amended Sec. 3, Ch. 203, L. 1939.]

8887. Number of a trial jury. A trial jury consists of twelve persons; provided, that in civil actions and cases of misdemeanor, it may consist of twelve, or any number less than twelve, upon which the parties may agree in open court. [As amended Sec. 4, Ch. 203, L. 1939.]

8889. Jury of inquest defined. A jury of inquest is a body of persons summoned from the citizens of a particular district before the sheriff, coroner, or other ministerial officer, to inquire concerning particular facts. [As amended Sec. 5, Ch. 203, L. 1939.]

CHAPTER 14, QUALIFICATIONS AND EXEMPTIONS OF JURORS

8890. Who competent to act as juror. A person is competent to act as a juror if:

1. A citizen of the United States of the age of twenty-one and not more than seventy years, who shall have been a resident of the state one year, and of the county ninety days before being selected and returned.

2. In possession of natural faculties, and of ordinary intelligence and not decrepit.

3. Possessed of sufficient knowledge of the English language.

4. Assessed on the last assessment roll of the county on property belonging to him or her. [As amended Sec. 6, Ch. 203, L. 1939.]

Whether a juror serving at a criminal trial in 1936, who had been committed to the insane asylum in 1927 where he remained about two months, he being then released as cured, but who had never been restored to competency by court order or on a certificate of discharge from the asylum (sec. 5685, *supra*), was mentally

competent to serve at the trial, was a question of fact. *State v. Bucy*, 104 M 416, 418, 66 P 2d 1049.

Id. Under sections 8890 and 8892, Revised Codes, a person not in possession of his natural faculties is not competent to act as a juror.

8892. Who not competent to act as juror.

Under sections 8890 and 8892, Revised Codes, a person not in possession of his natural faculties is not competent to act

as a juror. *State v. Bucy*, 104 M 416, 418, 66 P 2d 1049.

8893. Who exempt from jury duty. A person is exempt from liability to act as juror if:

1. A judicial, civil or military officer of the United States or of this state;

2. A person holding a county, township, or town office;

3. An attorney-at-law in practice;

4. A minister of the gospel, or a priest of any denomination, or editor, following his profession;

5. A teacher in a university, college, academy or school;

6. A practicing physician, dentist, or druggist actually engaged in the business of dispensing medicines, or a regularly licensed embalmer or undertaker;

7. An officer, keeper or attendant of an almshouse, hospital, asylum, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the state prison, penitentiary, or of a county jail;

9. An express agent, mail carrier, superintendent, employee or operator of a telegraph line doing general telegraph business in the state;

10. An active member of the national guard of Montana, or an active member of a fire department of any city or town of this state. The number of firemen hereby exempted must not exceed twenty-eight, including officers for each company organized; and such members from each company must be selected from the roll of such company, according to the seniority of membership, and a list containing the names of such persons must be made out by the secretary of each company and filed with the clerk of the board of county commissioners on the first Mondays of December, March, June and September, and any failure to file the list hereby required is considered a waiver of such exemption.

11. A superintendent on a railroad.

12. A nurse engaged on a case or a person caring directly for one or more children.

The court must discharge a person from serving as a trial juror, in either of the following cases:

Where it satisfactorily appears that he or she is not competent; and,

Where it satisfactorily appears that he or she is exempt and claims the benefit of exemption. [As amended Sec. 7, Ch. 203, L. 1939.]

8894. Who may be excused. - A juror must not be excused by a court for a slight or trivial cause, or for hardship or inconvenience to his or her business, but only when material injury or destruction to his or her property, or of property entrusted to him or her is threatened, or when his or her own health, or the sickness or death of a member of his or her family requires his or her absence. [As amended Sec. 8, Ch. 203, L. 1939.]

8895. Affidavit of claim to exemption. If a person, exempt from liability to act as a juror, as provided in section 8893, be summoned as a juror, he or she may make and transmit his or her affidavit to the clerk of the court for which he or she is summoned, stating his or her office, occupation or employment; and such affidavit must be delivered by the clerk to the judge of the court where the name of such person is called, and if sufficient in substance, must be received as evidence of his or her right to exemption and as an excuse for non-attendance in person. The affidavit must then be filed by the clerk. [As amended Sec. 9, Ch. 203, L. 1939.]

8895.1. It is specifically provided that wherever the term "he" or "him" appears in any statute of the state of Montana, relative to jurors, it shall be construed as including all persons. [As amended Sec. 10, Ch. 203, L. 1939.]

NOTE.—Chapter 203 of the laws of 1939 is by its terms effective from and after January 1, 1940. (Section 11, omitted here).

CHAPTER 16, DRAWING AND SUMMONING JURORS FOR COURTS OF RECORD

8903. District judge to draw jury. Immediately upon the order mentioned in the preceding section having been made the district judge shall in the presence of the clerk of the court proceed to draw the jurors from jury box No. 1. [As amended Sec. 1, Ch. 151, L. 1937; Amd. Sec. 1, Ch. 3, L. 1939.]

References

Ledger et al. v. McKenzie, 107 M 335, 339, 85 P 2d 352.

8904. Drawing—how conducted. 1. The clerk must place said box on a rod so that the same may readily revolve and said box must be revolved a sufficient number of times so as to insure that the capsules in said box shall become thoroughly mixed, and thereafter the judge must draw from said box one at a time, as many of said capsules containing the names of jurors as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary, until the number of jurors required shall have been drawn. After the drawing shall have been completed, the clerk shall make

a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of the jurors drawn, and the time when and the place where such jurors shall be required to appear. Such certificate and list shall be delivered to the sheriff for service. [As amended Sec. 2, Ch. 151, L. 1937; Amd. Sec. 2, Ch. 3, L. 1939.]

References

Ledger et al. v. McKenzie, 107 M 335, 339, 85 P 2d 352.

CHAPTER 20, STENOGRAPHERS

8928. Appointment of stenographers.

References

Pelletier v. Glacier County, 107 M 221, 224, 82 P 2d 595.

8929. Duties of stenographers.

Though the matter of requiring the presence of the official court stenographer in court lies within the sound legal discretion of the district court, its refusal to comply with the request of counsel for defendant for his presence in a prosecution for robbery during the course of prosecuting attorney's closing argument deemed objectionable, was an abuse of such discretion, rendered harmless, however, by the fact that objecting counsel was able to have a common-law bill of exceptions settled sufficient to preserve defendant's rights. State v. Hogan, 100

M 434, 438, 49 P 2d 446.

While section 8929, Revised Codes, makes it the duty of the district court stenographer to take full stenographic notes of the testimony in cases on trial, the court may in its discretion dispense with such services in the absence of a request by the parties or one of them that he be present. State v. District Court et al., 105 M 510, 514, 74 P 2d 8.

References

Pelletier v. Glacier County, 107 M 221, 224, 82 P 2d 595.

8930. Same.

In view of the importance of preserving a record of the proceedings in controverted matters, district courts should in the absence of an express stipulation waiving the recording of the testimony by the court stenographer, inquire of the contending parties whether a record is desired, and where the testimony is not taken the

records of the court should show the reason,—whether by stipulation of the parties or on account of the exercise of the court's discretion. State v. District Court et al., 105 M 510, 514, 74 P 2d 8.

References

Pelletier v. Glacier County, 107 M 221, 224, 82 P 2d 595.

8931. To furnish copies to parties, etc.

Where a district court stenographer prefers a claim against a county for services rendered in the preparation of a transcript of the proceedings had in a contempt matter for use on writ of certiorari brought in the supreme court to review the judgment rendered, and upon rejection of the claim brings suit to recover such fees, he must, in order to prevail, be able to show clearly and unequivocally that his claim comes within the provisions of section 8931, Revised Codes, allowing certain fees over and above his official salary; otherwise the presumption is that his services were rendered for his official salary prescribed by section 8933. Pelletier v. Glacier County, 107 M 221, 223, et seq., 82 P 2d 595.

Id. While contempt proceedings are

referred to as criminal in nature, failure to do something ordered to be done by a court in a civil action by one of the parties for the benefit of the other is a civil contempt, and therefore a court stenographer directed by the district judge to prepare a transcript of the proceedings had at the hearing of a contempt proceeding for use in the supreme court on a writ of certiorari, could not justify his charge against the county for such services under the provision of section 8931, Revised Codes, declaring that where the trial judge requires a copy of the evidence in a criminal case the stenographer is entitled to his fees therefor.

References

State v. District Court et al., 105 M 510, 514, 74 P 2d 8.

8932. Salary and expenses of stenographer—apportionment.

Where a district court stenographer prefers a claim against a county for services rendered in the preparation of a transcript of the proceedings had in a

contempt matter for use on writ of certiorari brought in the supreme court to review the judgment rendered, and upon rejection of the claim brings suit to re-

cover such fees, he must, in order to prevail, be able to show clearly and unequivocally that his claim comes within the provisions of section 8931, Revised Codes, allowing certain fees over and

above his official salary; otherwise the presumption is that his services were rendered for his official salary prescribed by section 8933. *Pelletier v. Glacier County*, 107 M 221, 225, 82 P 2d 595.

8934. Stenographer pro tempore.

References

Pelletier v. Glacier County, 107 M 221, 225, 82 P 2d 595.

CHAPTER 21, QUALIFICATIONS, ADMISSION, LICENSE AND DISBARMENT OF ATTORNEYS

8936. Who may be admitted as attorneys.

Since the supreme court has been given the exclusive power to authorize persons to practice law and to deprive them of that right, it has jurisdiction to punish one attempting to practice in any court of law without a license as for a contempt. *State v. Merchants' Credit Service, Inc.*, 104 M 76, 94 et seq., 66 P 2d 337.

The supreme court has the power to adopt, promulgate and enforce all necessary, proper and appropriate rules for its own government and for the admission and regulations of attorneys at law in the state. In re Unification of Montana Bar Assn., 107 M 559, 566, 87 P 2d 172.

8937. Qualifications, examination, and admission.

References

In re Unification of the Montana Bar Association, 107 M 559, 566, 87 P 2d 172.

8940. Admission of attorneys from other states.

References

In re Unification of the Montana Bar Association, 107 M 559, 566, 87 P 2d 172.

8943. Penalty for practicing without license.

A collection agency which, inter alia, in cases where suits in the district court were necessary on assigned claims of the nature of the above (i.e., in which it was not the real party in interest, and not entitled to bring the action) caused pleadings to be prepared and filed in such court by an attorney employed by it, was doing something usually done and performed by

attorneys at law in the practice of their profession, and therefore practicing law within the meaning of section 8944, Revised Codes, which if done without having first obtained a license, constitutes contempt under section 8943. *State v. Merchants' Credit Service, Inc.*, 104 M 76, 100 et seq., 66 P 2d 337.

8944. Who deemed to be practicing law.

A collection agency which, inter alia, in cases where suits in the district court were necessary on assigned claims of the nature of the above (i.e., in which it was not the real party in interest, and not entitled to bring the action) caused pleadings to be prepared and filed in such court by an attorney employed by it, was doing something usually done and performed by attorneys at law in the practice of their

profession, and therefore practicing law within the meaning of section 8944, Revised Codes, which if done without having first obtained a license, constitutes contempt under section 8943. *State v. Merchants' Credit Service, Inc.*, 104 M 76, 100 et seq., 66 P 2d 337.

References

In re Unification of the Montana Bar Assn., 107 M 559, 566, 87 P 2d 172.

8951. Complaints against attorney—how instituted and prosecuted.

References

In re Unification of the Montana Bar Association, 107 M 559, 566, 87 P 2d 172.

8752. Same—complaints to attorney-general or district judge.

References

In re Unification of the Montana Bar Association, 107 M 559, 566, 87 P 2d 172.

8953. Appointment of attorney as special investigator.

References

In re Hansen, 101 M 490, 492, 54 P 2d 882.

In re Unification of the Montana Bar Association, 107 M 559, 566, 87 P 2d 172.

8954. Supreme court to make rules—powers of referees.

References

In re Unification of the Montana Bar Association, 107 M 559, 566, 87 P 2d 172.

8958. Allowance of attorneys' fees to unlicensed persons forbidden.

Under section 8958, Revised Codes, the allowance of an attorney's fee by any court is unlawful in an action where the party to whom allowed is represented by one other than a duly licensed attorney;

demand for such allowance by one not an attorney in a justice court amounts to an unlawful practice of law. *State v. Merchants' Credit Service, Inc.*, 104 M 76, 102 et seq., 66 P 2d 337.

8961. Disbarment of attorneys—causes—jurisdiction.**References**

State v. Merchants' Credit Service, Inc., 104 M 76, 94, 66 P 2d 337.

In re Unification of the Montana Bar Association, 107 M 559, 566, 87 P 2d 172.

CHAPTER 22. GENERAL PROVISIONS RELATING TO THE POWERS, DUTIES, LIABILITIES AND COMPENSATION OF ATTORNEYS

8974. Authority.

Under section 8974, Revised Codes, an attorney has implied authority to bind his client by entering into an agreed statement of facts upon which the case is to be tried; but independently of such statute, the presumption is, in the absence of a showing to the contrary, that

the attorney was acting within the scope of his authority in entering into the stipulation. *Rieckhoff v. Woodhull et al.*, 106 M 22, 32, 75 P 2d 56.

References

Stocking v. The Charles Beard Co., 102 M 65, 71, 55 P 2d 949.

8980. Attorney prohibited from acquiring claims for purpose of bringing action thereon.

Section 8980, Revised Codes, declaring that an attorney must not, directly or indirectly, buy, or be in any manner interested in buying a thing in action with the purpose of bringing an action thereon, and section 9067, providing that every action must be prosecuted in the name of the real party in interest, by clear implication intend to discourage litigation and keep it within certain bounds in the interest of

a sound public policy, and express the public policy of the state in that behalf. *Streetbeck v. Benson et al.*, 107 M 110, 114, 80 P 2d 861.

References

State v. Merchants' Credit Service, Inc., 104 M 76, 107 et seq., 66 P 2d 337.

Baker v. Tullock et al., 106 M 375, 379, 77 P 2d 1035.

8981. Certain other transactions prohibited—penalty for violation of two preceding sections.**References**

Baker v. Tullock et al., 106 M 375, 379, 77 P 2d 1035.

8983. Same rule when party prosecutes in person.**References**

State v. Merchants' Credit Service, Inc., 104 M 76, 117, 66 P 2d 337.

8993. Lien for compensation.

Section 8993, Revised Codes, providing for an attorney's lien on his client's cause of action or counterclaim, is a remedial statute which should be construed in advancement of the remedy and so as to secure and protect, and not to defeat, the rights and objects intended by its enactment. *Baker v. Tullock et al.*, 106 M 375, 377, 77 P 2d 1035.

Id. The lien awarded by the above section to an attorney for services performed does not merely attach to his client's cause of action but as well to the proceeds of such cause of action, i.e., the judgment, successfully enforced, unaffected by any settlement between the parties.

Id. After reversal of a judgment against it with remand of the cause for a new trial, defendant company obtained judgment for its costs on appeal and cause execution to be issued and levied upon plaintiff's cause of action. Plaintiff's attorney, claiming a lien on such cause of action for services rendered, brought suit to enjoin execution sale thereof. Held, that the district court did not abuse its discretion in restraining the sale in the exercise of its inherent equitable powers and in thus maintaining the status quo until the rights of the parties could be determined on retrial.

8994. Attorney may be compelled to show his authority.

Since only parties interested in an estate have any right to object to the report of an administrator, the latter may,

under section 8994, Revised Codes, require the attorney of the objector to prove his authority to act for his client; his motion

in that behalf should, however, be made on his first appearance in the proceeding, or at least at the earliest time possible,

else he will be deemed to have waived his right to move at all. *In re Astibia's Estate*, 100 M 224, 232, 46 P 2d 712.

CHAPTER 24, FORM OF CIVIL ACTION

9008. One form of civil actions only.

While under the code system of pleading the common-law distinctions of form of actions have been abolished, the substantial rights remain unchanged, the reasons underlying the causes of action re-

main the same and a plaintiff may not recover beyond the case stated in his complaint. *Frisbee v. Coburn et al.*, 101 M 58, 71, 52 P 2d 882.

CHAPTER 25, TIME OF COMMENCING ACTIONS GENERALLY

9011. Commencement of civil actions.

References

Shaffroth et al. v. Lamere et al., 104 M 175, 179, 65 P 2d 610.

CHAPTER 26, LIMITATION OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY

9015. Seizin within ten years—when necessary in actions for real property—action for dower.

References

Hodgkiss v. Northland Petroleum Consol. 104 M 328, 331 et seq., 57 P 2d 811.
Smith v. Whitney, 105 M 523, 527 et seq., 74 P 2d 450.

9016. Such seizin, when necessary in action or defense arising out of title to or rents of real property.

References

Smith v. Whitney, 105 M 523, 527 et seq., 74 P 2d 450.

9019. Occupation under written instrument or judgment—when deemed adverse.

The term "claim of title" as used in section 9019, Revised Codes, declaring when one entering into possession of property under claim of title, founding such claim upon a written instrument, and remaining in continued occupancy and possession thereof for ten years will be deemed to have held adversely, is synonymous with "color of title". *Sullivan v. Neel et al.*, 105 M 253, 256, 73 P 2d 206.

Id. Where a purchaser of a tract of land held by a county under tax deed obtained possession under a quitclaim deed which correctly described only a portion thereof, but later was given a correction deed which accurately described the whole tract, such latter deed was sufficient to give the purchaser color of title to the

land, under section 9019, supra, in his action to quiet title in which he relied upon adverse possession.

Id. Where plaintiff in an action to quiet title to a tract of land used it only for grazing and placer mining purposes for limited periods each year, under a claim of adverse possession based on color of title evidenced by a quitclaim deed (sec. 9019, Revised Codes), the fact that the land was not inclosed did not defeat his claim, since under subdivision 3, section 9020, for the purpose of constituting adverse possession, land of such a character is deemed to have been possessed and occupied, although not inclosed, if used, *inter alia*, for pasturage.

9020. What constitutes adverse possession under written instrument or judgment.

Where plaintiff in an action to quiet title to a tract of land used it only for grazing and placer mining purposes for limited periods each year, under a claim of adverse possession based on color of title evidenced by a quitclaim deed (sec. 9019, Revised Codes), the fact that the land was not inclosed did not defeat his claim since under subdivision 3, section

9020, for the purpose of constituting adverse possession, land of such a character is deemed to have been possessed and occupied, although not inclosed, if used, *inter alia*, for pasturage. *Sullivan v. Neel et al.*, 105 M 253, 258, 73 P 2d 206.

Id. The rule that possession of realty, to be adverse, must be actual, visible, exclusive, hostile and continuous, is satis-

fied in such a case as that last referred to, in view of the provision of subdivision 3, section 9020, declaring what shall con-

stitute adverse possession in such circumstances.

9022. What constitutes adverse possession under claim of title not written.

References

Sullivan v. Neel et al., 105 M 253, 259, 73 P 2d 206.

9023. Relation of landlord and tenant as affecting adverse possession.

As applied to adverse possession of real property, the possession of a tenant is the possession of his landlord, under section 9023, Revised Codes. Sullivan v. Neel et al., 105 M 253, 258, 73 P 2d 206.

9024. Occupancy and payment of taxes necessary to prove adverse possession.

Under section 9018, Revised Codes, when plaintiff in an action to quiet title shows that he is the owner of the record title, he has proved a prima facie case, the burden then being cast upon defendant relying upon adverse possession to prove, *inter alia*, that he or his predecessor paid all the taxes upon the property (sec. 9024); his failure to furnish such proof deprives him of the right to relief. Smith v. Whitney, 105 M 523, 527 et seq., 74 P 2d 450.

Id. Where neither defendant nor his predecessor in interest had ever paid, or offered to pay, taxes on a tract of land formed by accretion and the subject of a suit to quiet title, he was in no position, under section 9024, Revised Codes, to assert the defense of adverse possession.

References

Sullivan v. Neel et al., 105 M 253, 256, 73 P 2d 206.

Irion et al., v. Hyde et al., 107 M 84, 88, 81 P 2d 353.

CHAPTER 27, LIMITATION OF OTHER ACTIONS

9027. Periods of limitation prescribed.

References

Missoula Light & Water Co. v. Hughes, 106 M 355, 362, 77 P 2d 1041.

9028. Within ten years.

Section 9028, Revised Codes, which limits the time within which an action on a judgment or decree of a court of record may be brought to ten years, has no application to a water right suit in which plaintiff's right as established in a former decree was sought to be protected, in-

junction relief asked in such a suit being in the nature of an action to quiet title to realty, in which the running of time strengthens rather than destroys a title determined by decree. Missoula Light & Water Co. v. Hughes, 106 M 355, 362, 77 P 2d 1041.

9029. Within eight years.

Upon the assumption that the general statute of limitations is a meritorious defense to an action seeking the foreclosure of a real estate mortgage, defendant, though a purchaser and not bound to pay the mortgage debt, must plead it; failure to plead it waives the defense. Frisbee v. Coburn et al., 101 M 58, 69, 52 P 2d 882.

In an action to foreclose a real estate mortgage, in which defendants pleaded the statute of limitations, one to whom they had addressed a letter acknowledging the debt, thus taking the case out of the operation of the statute, evidence held sufficient to show that the addressee was the agent of the plaintiff assignee of the note and mortgage, and that therefore the acknowledgment inured to the benefit of the plaintiff. Breese v. O'Brien et al., 102 M 547, 552, 59 P 2d 65.

Under the liberal rule of construction of pleadings, held, in a mortgage foreclosure suit commenced on June 13, 1935, where the mortgage note, due November

25, 1924, was given on June 25, 1919, that an allegation in the complaint that interest on the note had been paid to the 25th day of November, 1925, when taken in connection with an endorsement on the note as follows: "2-25-28 interest paid to Nov. 25-25", was sufficient to show payment of interest on February 25, 1928 contrary to the contention of defendant, relying on the statute of limitations, that the figures "2-25-28" were meaningless. Matteson v. Ackerson et al., 104 M 239, 241, 66 P 2d 797.

Id. Where the complaint in a mortgage foreclosure suit showed on its face that the action was barred by the statute of limitations, but plaintiff in addition alleged that a payment of interest had been made within the eight-year statutory period, he thus in effect relying on a new promise created by such payment, and the defendant in his answer interposed the plea of the statute, plaintiff was not required to reply to such defense, nothing

new having been brought into the case by the answer.

References

State ex rel. DeKalb v. Ferrell, 105 M

9032. Within two years.

Under section 9032, subdivision 3, Revised Codes, providing a two-year limitation for an action for seduction, held that where the first act of sexual intercourse between plaintiff and defendant, a married man, under an alleged promise of marriage, occurred in September, 1932, like acts continuing until November 1, 1935, and the action was brought on November 14 thereafter, the cause of action accrued at the time the first act of intercourse was completed, and that therefore the

218, 220, 70 P 2d 290.

Fergus County v. Osweller, 107 M 466, 472, 86 P 2d 410.

action was barred two years thereafter, in September, 1934; as against the contention of plaintiff that the first and continued acts of intercourse under a like implied promise, constituted one transaction and that therefore the statute did not begin to run until the last act of intercourse, or until the breaking of the parties' meretricious relations, i.e., until November 1, 1935. Taylor v. Rann, 106 M 588, 591, 80 P 2d 376.

9033. One-year limitation.

Treating a suit to set aside a judgment in a mortgage foreclosure proceeding as one covered, so far as the statute of limitations is concerned, by omnibus section 9041, Revised Codes, its accrual dated from the time of its entry, in 1925, and was barred in five years; or treating it as one for extrinsic fraud, it accrued when

plaintiff became cognizant of some of the facts relative to the fraud and therefore then discovered it, i.e., in November, 1932; hence his action in either event was barred in August, 1933, when he commenced suit. Frisbee v. Coburn et al., 101 M 58, 72, 52 P 2d 883.

9041. Actions for relief not hereinbefore provided for.

Treating a suit to set aside a judgment in a mortgage foreclosure proceeding as one covered, so far as the statute of limitations is concerned, by omnibus section 9041, Revised Codes, its accrual dated from the time of its entry, in 1925, and was barred in five years; or treating it as one for extrinsic fraud, it accrued when plaintiff became cognizant of some of the facts relative to the fraud and therefore then discovered it, i.e., in November, 1932; hence his action in either event was barred in August, 1933, when he commenced suit. Frisbee v. Coburn et al., 101 M 58, 72, 52 P 2d 883.

While the statutes relating to the writ of certiorari make no provision as to the limitation of time within which such a proceeding must be brought, the limitation of five years provided for by section 9041, Revised Codes, in an "action" not otherwise provided for is controlling, in view

of the provision of section 9066 that the word "action" as used in the chapter relative to limitation of actions shall include special proceedings of a civil nature. Shaffroth et al. v. Lamere et al., 104 M 175, 179, 65 P 2d 610.

The five-year limitation prescribed by section 9041, Revised Codes, "in an action not hereinbefore provided for", held applicable in a mandamus proceeding; hence a county treasurer, made by law custodian of the funds of an irrigation district the office of which is located in his county, and therefore charged with the duty not to pay out funds of the district on claims believed by him to be invalid, could properly assert the defense of such limitation in a proceeding to compel payment of a registered district warrant. State ex rel. DeKalb v. Ferrell, 105 M 218, 220, 70 P 2d 290.

CHAPTER 28, GENERAL PROVISIONS RELATING TO THE TIME OF COMMENCEMENT OF ACTIONS

9054. Provision where judgment has been reversed.

References

Boepple v. Mohalt, 101 M 417, 437, 54 P 2d 857.

9061. Limitations prescribed in actions against directors, etc.

References

Capital Nat. Bank v. Bartley et al., 101 M 591, 594, 56 P 2d 728.

9062. Acknowledgment and part payment.

Held in an action to foreclose a mortgage on farm lands executed by man and wife, in which defendants pleaded the statute of limitations, that a letter written

by the wife and signed by her in behalf of both, in effect stating, after giving the correct number the loan bore, that there was a failure of crops the year before but

they hoped to get a fair crop "this year" and be able "to pay out", and asking how much "we owe and the terms" was sufficient to show an admission of the debt and take the case out of the operation of the statute of limitations. *Breese*

v. O'Brien et al., 102 M 547, 556, 59 P 2d 65.

References

Rieckhoff v. Woodhull et al., 106 M 22, 34, 75 P 2d 56.

9065. Objection that action was not commenced in time—how taken.

It has been held that where new matter in the answer merely negatives the allegations of the complaint no reply is necessary, or where the alleged new matter consists of a pleading of the statute of

limitations, plaintiff need not reply thereto if matter in avoidance of the plea of the bar of the statute be found in any of his pleadings. *Matteson v. Ackerson et al.*, 104 M 239, 246, 66 P 2d 797.

CHAPTER 29, PARTIES TO CIVIL ACTIONS

9067. Action to be in name of party in interest.

Where an oil and gas permittee in due time secured a lease on the premises from the federal government, and thereupon assigned the lease to an operator who assumed all obligations of a prior operating agreement entered into with another, one provision of which was that the operator would pay a certain sum of money when a paying well was brought into production, the permittee's assignee of such sum of money was, under section 9067, Revised Codes, the real party in interest and entitled to bring action for its recovery. *Herigstad v. Hardrock Oil Co.*, 101 M 22, 38, 52 P 2d 171.

Held, that the assignee of a chose in action who acquires the mere title to a claim for the purpose of collection, without any consideration other than an agreement to proceed with diligence in its collection and pay the proceeds, or any part thereof, to the assignor, does not become

the real party in interest within the meaning of section 9067, Revised Codes, so as to entitle him to prosecute an action on the assigned claim, unless it be based on a negotiable promissory. *State v. Merchants' Credit Service, Inc.*, 104 M 76, 94 et seq., 66 P 2d 337.

Section 3980, Revised Codes, declaring that an attorney must not, directly or indirectly, buy, or be in any manner interested in buying a thing in action with the purpose of bringing an action thereon, and section 9067, providing that every action must be prosecuted in the name of the real party in interest, by clear implication intend to discourage litigation and keep it within certain bounds in the interest of a sound public policy, and express the public policy of the state in that behalf. *Streetbeck v. Benson, et al.*, 107 M 110, 113 et seq., 80 P 2d 861.

9068. Assignment of thing in action not to prejudice defense.

References

State v. Merchants' Credit Service, Inc., 104 M 76, 110 et seq., 66 P 2d 337.

9071. Infant, etc., to appear by guardian.

References

State ex rel. Haynes v. District Court, 106 M 578, 584, 81 P 2d 422.

9073. Unmarried female may sue for her own seduction.

Held, that where plaintiff in an action for her seduction brought under section 9073, Revised Codes, granting a right of action therefor to an unmarried female, married one other than defendant between

the time of the commencement of the action and the trial, such marriage did not abate the action. *Taylor v. Rann*, 106 M 588, 591, 80 P 2d 376.

9078. Who may be joined as defendants.

References

Board of Railroad Commrs. v. Reed, 102 M 382, 386, 58 P 2d 271.

9085. Tenants in common, etc., may sever in bringing or defending action.

Where plaintiff in an action to quiet title claimed to be the owner of an entire leasehold in oil lands but the proof showed that he had entered into agreement with another to convey to him an undivided one-half interest therein, which agreement had not been executed, the latter became

a tenant in common with plaintiff in the ownership of the leasehold, and as such could, in prosecuting or defending actions concerning the common property, treat it as his own against everyone except his cotenant. *Nadeau v. Texas Company*, 104 M 558, 567, 69 P 2d 586, 593.

9086. Actions—when not to abate by death, marriage, or other disability—proceedings in such case.

Under section 9086, Revised Codes, where during the pendency of an action there is a transfer of interest, the action may be continued in the name of the original party; hence where a land owner commenced suit to enjoin an irrigation district from assessing the land for interest on bonds of the district, but pending appeal transferred its interest to another

corporation, the appealing district was not deprived of its right to have the judgment against it reviewed because of the transfer; the question presented for review was not moot, and motion to dismiss the appeal did not lie. *Rosebud L. & I. Co. v. Carterville Irr. Dist.*, 102 M 465, 467, 58 P 2d 765.

9087. Another person may be substituted for the defendant—interpleader.

Under section 9087, Revised Codes, covering the subject of interpleader both at law and in equity, interpleader results (1) where the action is brought by the person against whom conflicting claims to a fund held by him are made to compel the claimants to interplead, and (2) where an action is brought by one of several claimants against the stakeholder and he petitions the court for permission to deposit the fund in court, that the claimants be substituted in his place as parties, that they then interplead and have their rights determined; if the petition is granted there is a substitution of parties, and thereafter interpleader. *Union B. & T. Co. v. State Bk. of Townsend*, 103 M 260, 270, 62 P 2d 677.

Id. In an action by a bank which had cashed a cashier's check of another bank after payment thereon had been stopped, against the issuing bank and the indorsers on the check to recover thereon, certain persons making claim to the funds represented by the check intervened; thereafter the plaintiff bank dismissed its complaint against the issuing bank, which thereupon moved that the order dismissing the action against it be set aside, and for an order interpleading the various claimants, it

offering to deposit the fund in court; the motion was denied. Held, that the trial court erred; that in an endeavor to expedite litigation and prevent a multiplicity of suits it should have considered the petition for interpleader as an original action in interpleader by a stakeholder as authorized by the latter portion of section 9087, Revised Codes, to the end that the rights of all the parties be fully and finally determined.

The fact that an elevator company in its action seeking interpleader of various parties under special section 4095, Revised Codes, a part of the uniform warehouse receipts act, and not under section 9087, the general interpleader statute, to determine ownership of a quantity of grain held in storage, on which storage charges had not been paid, in its complaint sought affirmative relief by way of payment of such charges and cancellation of certain storage tickets erroneously issued to the grower, did not defeat its right to maintain the suit, section 4095, contemplating that all issues between the parties should be settled. *Rocky Mt. Elevator Co. v. Bammel et al.*, 106 M 407, 413, 81 P 2d 673.

9088. Intervention—when it takes place, and how made.

Since under section 9088, Revised Codes, the parties to an action who have appeared and upon whom a complaint in intervention has been served, may plead to it the same as if it were an original complaint, and defendant, under section 9151, may in certain instances file a cross-complaint, defendant in a mortgage foreclosure suit could file a cross-complaint to a complaint in intervention seeking relief by way of interpleader. *State v. District Court et al.*, 102 M 371, 376, 58 P 2d 491.

The purpose of section 9088, permitting

intervention, is to avoid circuity of action and multiplicity of suits, and, under it intervention is permissible in any case, if the person seeking to intervene can show an interest in the subject matter of the action which will be prejudicially affected as a necessary consequence of the determination of the action without his presence as a party, or an interest in the success of the parties, or an interest in the subject matter as against both. *Burgess et al. v. Hooks*, 103 M 245, 257, 62 P 2d 228.

9089. Associates may be sued by name of association.

Held, on application for writ of prohibition, that service of notice of a hearing for perpetuation of testimony in a contemplated action against a voluntary association having its headquarters in another state, on its local district secretary

was sufficient under section 9111, Revised Codes, to bring the association within the jurisdiction of the district court granting the order for perpetuation, and that service on one or more of the associates, under section 9089 was not required. *State ex*

rel. Cook v. District Court, 102 M 424, 428 et seq., 58 P 2d 273.

References

Board of Railroad Commrs. v. Reed, 102 M 382, 386, 58 P 2d 271.

9090. When other parties must be brought in.

Since, under section 9090, Revised Codes, the district court may on its own motion order a party brought in whose presence it deems necessary to a full determination of an action pending before it (a water right suit), the fact that an affidavit filed by plaintiff suggesting that certain persons be brought in did not name a certain company did not render the order of the court including such company invalid. State ex rel. Delmoe v. District Court, 100 M 131, 138, 46 P 2d 39.

Where necessary parties to a full determination of a cause are not before the district court, it is its duty on its own motion to order them brought in, even though the objection of defect of parties is not raised by defendant by demurrer or answer. State v. Board of County Commrs. et al., 100 M 581, 590, 51 P 2d 635.

Where plaintiff in an injunction proceeding against an individual did not know of the existence of an association of which defendant in his answer claimed to be the manager, plaintiff, instead of going to trial, should have asked for a continuance and reframed his pleadings so as to bring the association into the case to the end that a complete determination of the rights of all interested parties might be had, or, under section 9090, Revised Codes, the association might have been brought in by order of the court. Board of Railroad Commissioners v. Reed, 102 M 382, 386, 58 P 2d 271.

Under the power granted the district court by section 9090, Revised Codes, to cause to be brought into a case, of its own motion, a party it deems necessary to a complete determination thereof, and under its general power to control the proceedings before it, it may refuse to

permit the withdrawal of a party whose presence is necessary to such complete determination, unless the withdrawal is made in such a way as to be a definite and irrevocable determination of the rights of that party. Union B. & T. Co. v. State Bk. of Townsend, 103 M 260, 270, 62 P 2d 677.

Where the only purpose of a suit to quiet title was to determine the validity of an oil and gas lease held by plaintiff as against the claims of another claiming to hold a lease upon the same land, and not as against the whole world, contention of defendant that the court erred in not abating the action until all persons who had signed a pooling agreement for lands in the section of which the land in question was a part were brought in as necessary parties to a complete determination of the controversy, held not meritorious, it not appearing that plaintiff or his predecessors had any transactions with any others prior to the execution of the lease in question. Nadeau v. Texas Co., 104 M 558, 571, 69 P 2d 586, 593.

In view of the authority lodged in the district court under section 9090, Revised Codes, to order additional parties brought into court whenever necessary to a complete determination of an action, contention that defendant railway company should be denied the right to amend its answer under the above state of facts and should be held to have waived the defect of parties defendant by its failure to demur before answering, held not persuasive. State v. District Court et al., 105 M 396, 400, 73 P 2d 204.

Conley et al. v. Johnson et al., 101 M 376, 405, 54 P 2d 585.

9091. Action by joint-tenant against his cotenant.

While at common law, one tenant in common who occupies all of the property, or more than his proportionate share of it, is not liable to his cotenants because of such occupancy either for rent, use and occupation, in this country a cotenant who receives more than his share of the

rents and profits may be required to account to his cotenant, the accounting being based on actual receipts rather than the value of the use, unless the cotenant has been ousted or excluded. Thompson et al. v. Flynn, 102 M 446, 452, 58 P 2d 769.

CHAPTER 30, PLACE OF TRIAL OF CIVIL ACTIONS

9093. Certain actions to be tried where the subject, or some part thereof, is situated.

References

State ex rel. Haynes v. District Court et al., 106 M 578, 585, 81 P 2d 422.

9094. Other actions—where the cause or some part thereof arose.

In the absence of statutory direction as to the manner of delivery by the treasurer of a corporation of a statement of its financial condition demanded by a stockholder under section 5957, he could have complied with the demand in the same

manner in which it was made (by mail) by depositing it in the postoffice at the county seat of the county where he lived and where the corporation had its principal place of business; hence the cause of action resulting from his refusal arose

in that county within the meaning of section 9094, and therefore the place of trial was properly changed to that county.

9095. Place of trial of actions against counties.

References

Johnson v. City of Billings et al., 101 M 462, 472, 54 P 2d 579.

9096. Other actions, according to the residence of the parties.

Chapter 20, laws of 1931, declares that any state board or commission (such as the state highway commission) entering into a contract for the doing of public work, shall require the contractor to furnish a bond that he will, inter alia, pay for any supplies furnished to a subcontractor where the latter fails to do so. In an action by a merchant against a state highway contractor and his bondsman to recover for supplies furnished the former's subcontractor, brought in the county where plaintiff had his place of business, defendant contractor moved for a change of place of trial to the county of his residence; the court denied the motion. Held, that the court ruled properly, the action being one upon a contract between the contractor and the state made for the express benefit of a third person, the plaintiff merchant, triable in the county in which the person entitled to payment resided or had his place of business. *H. Earl Clack Co. v. Staunton et al.*, 100 M 26, 29, 44 P 2d 1069.

Under section 9096, Revised Codes, the court in determining whether an action to recover for money loaned was commenced in the proper county must ascertain where the contract was to be performed, i.e., where payment was to be made, defendant's residence not being a material consideration; in such a case the action must be tried in the county where performance was to be made. *Kroehnke v. Gold Creek Min. Co.*, 102 M 21, 24, 55 P 2d 678.

Id. Where defendant on motion for change of venue in an action to recover for money loaned raises the question of the plaintiff's residence when the action was commenced, he contending that plaintiff was a nonresident of the state and that therefore, under section 9096, Revised Codes, the place of trial was determined by the residence of defendant, the question is one of fact and the trial court's determination of the motion based on conflicting affidavits will not, in the absence of a manifest abuse of the court's discretion, be interfered with on appeal.

The rule that where a contract for the

Stanton Trust & Savings Bank v. Johnson, 104 M 235, 238, 65 P 2d 1188.

payment of money is entered into between persons residing at different places within the state but the place of payment is not agreed upon, the place of residence of the creditor becomes the place of performance and therefore the place of trial of an action upon the contract does not apply to municipal corporations, such a corporation not being required to seek its creditors in order to discharge its debts. *Lillis v. City of Big Timber*, 103 M 206, 209, 62 P 2d 219.

The word "may" as used in section 9096, Revised Codes, in declaring that actions upon contracts may be tried in the county in which the contract was to be performed, means "must". *Colbert Drug Co. v. Electrical Prod. Consol.* 106 M 11, 14, 74 P 2d 437.

Id. An action to rescind a contract entered into between a corporation engaged in installing neon signs, and a concern doing business in a city located in a county other than that in which the corporation had its principal place of business in this state, under which the corporation obligated itself to maintain, repair and service such signs after installation, which obligation plaintiff alleged was breached, held to have been properly brought in the county where the installation was made and where the obligation to maintain, repair and service the signs was to be performed, and therefore the trial court properly denied defendant corporation's motion for change of venue to the county in which it had its principal place of business.

Where defendant had taken up his residence and rented a farm in C. county and invited his wife and children, then living in the adjoining county of L., to join him, which invitation the wife accepted, later, however, returning to L. county where she filed her complaint for divorce, the proper place of trial was in C. county, the place of residence of defendant, and the trial court in denying his motion for change of venue to C. county committed error. *Archer v. Archer*, 106 M 116, 119, 75 P 2d 783.

9097. Actions may be tried in any county, unless the defendant demands a trial in the proper county.

References

State ex rel. Haynes v. District Court, 106 M 578, 585, 81 P 2d 422.

CHAPTER 31, MANNER OF COMMENCING CIVIL ACTIONS— SERVICE OF SUMMONS

9111. Summons—how served. The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this state, to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier or secretary, or to a person designated as provided in section 6652 of the civil code.

3. If against a minor child, residing within this state, to such minor, personally, and also to either his father, mother, or legal guardian; or, if the father, mother or legal guardian be not within this state, then to such minor, personally, and also to any person having the care, custody or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person residing within this state, who has been judicially declared to be of unsound mind or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such person, and also to his guardian.

5. If against a county, city or town, to the president or chairman of the board of county commissioners, president of the council or trustees, mayor, or other head of the legislative department thereof.

6. If the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members, and if none such can be found, service may be made upon the secretary of state in the manner prescribed by section 9112 of the Revised Codes of Montana, 1935.

7. In all other cases to the defendant personally. [As amended Sec. 1, Ch. 175, L. 1937; Amd. Sec. 1, Ch. 186, L. 1939.]

The general rule with relation to the question when a foreign corporation is "doing business" within this state so as to make it subject to service of process, within this state so as to make it subject to service of process, within the meaning of section 9111, Revised Codes, appears to be that the business must be of such nature as to warrant the inference that it has subjected itself to the local jurisdiction, and is by its duly authorized agent or officers represented within the state where service is attempted. *State v. District Court et al.*, 102 M 275, 279, 57 P 2d 772.

Id. Held, on application for writ of supervisory control to annul an order quashing service of summons in an action against a foreign corporation, that where one of its representatives contacted customers, supervised installation, adjustment and repair of machinery sold, and accepted old machinery as part payment on the purchase price on new sales in a continuous course of business, it must be held to have been doing business in the state and that the agent was a "business agent" under section 9111, *supra*.

Id. To constitute one a "business

agent" of a foreign corporation upon whom service of process may be made in behalf of the corporation under section 9111, *supra*, he must be one who stands in the shoes of the corporation in relation to the particular business managed, conducted or controlled by him for it; he must be one having in fact a representative capacity and derivative authority, and if such be the character of his agency the law will impute authority to him notwithstanding denial of authority on the part of other officers of the corporation.

Id. To warrant service of summons on a business agent of a foreign corporation he need not be a resident of the state, section 9111, *supra*, requiring only that at the time service is made upon him he must be within the state attending to the corporation's business.

Held, on application for writ of prohibition, that service of notice of a hearing for perpetuation of testimony in a contemplated action against a voluntary association having its headquarters in another state, on its local district secretary was sufficient under section 9111, Revised Codes, to bring the association within the jurisdiction of the district court granting

the order for perpetuation, and that service on one or more of the associates, under section 9089 was not required. *State ex rel. Cook v. District Court*, 102 M 424, 428 et seq., 58 P 2d 273.

Id. Contention that in construing the provision of section 9111, relating to service of summons on a foreign corporation "or on a nonresident joint-stock company or association", the word "association" must be deemed modified by the word "joint-stock" held without merit, the purpose of the section being to make all types of foreign corporations, associations

and stock companies doing business in the state subject to the jurisdiction of its courts by service of process upon an agent.

Id. Statutory provisions of other states, such as contained in section 9111 construed as above with relation to service of process upon agents of foreign associations doing business in the state, seem to have been held not open to constitutional objection.

References

State ex rel. Charlette v. District Court, 107 M 489, 494 et seq., 86 P 2d 750.

9124. Return of summons.

Copies of summons and complaint in an action against a corporation were served upon its president and mislaid; diligent search was made but the papers could not be found until too late. In an intermediate proceeding defendant's counsel made the assertion that no service had ever been had upon his client, and opposing counsel remained silent when he should have spoken. The files in the office of the clerk of court showed no return of service of

process, required to be made not later than ten days after service, until the day of entry of judgment, it appearing that the return had been mailed by the serving officer to the office of plaintiff's attorney where it remained for eighteen days. Held, that the district court erred in denying defendant's motion to set aside the judgment. *Madson v. Petrie Tractor & Equipment Co.*, 106 M 382, 387, 77 P 2d 1038.

CHAPTER 32, PLEADINGS IN GENERAL

9127. What pleadings are allowed. The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The reply to defendant's answer;
4. Any motion.

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer;
3. The demurrer to reply;
4. Any motion. [As amended Sec. 1, Ch. 8, L. 1937.]

CHAPTER 34, DEMURRER TO COMPLAINT

9136. Objections—when deemed waived.

The sufficiency of a complaint may be raised for the first time on appeal; however, where it is so raised, every reasonable inference will be drawn from the facts stated necessary to uphold the pleading. *Calkins v. Smith*, 106 M 453, 456, 78 P 2d 74.

CHAPTER 35, ANSWER

9138. Counterclaim defined.

References

State v. District Court et al., 102 M 371, 376, 58 P 2d 491.

9151. Cross-complaint—filing—service.

In the absence of any such limitation in section 9151, Revised Codes, relating to the filing of cross-complaints, as that contained in the statute referring to counterclaims under which counterclaims may only be filed if they were in existence at the commencement of the original action, defendant in a mortgage foreclosure suit

could properly file a cross-complaint against an intervening grain company for the recovery of the price of grain sold to it by him after the filing of the complaint in the foreclosure suit. *State v. District Court et al.*, 102 M 371, 375 et seq., 58 P 2d 491.

Id. Since under section 9088, Revised

Codes, the parties to an action who have appeared and upon whom a complaint in intervention has been served, may plead to it the same as if it were an original complaint, and defendant, under section 9151, may in certain instances file a cross-complaint, defendant in a mortgage foreclosure suit could file a cross-complaint to a complaint in intervention seeking relief by way of interpleader.

Id. As against the contention made on application for writ of supervisory control that in order to maintain a cross-complaint it must state a cause of action against all the parties to the action, section 9151, held to mean that any defendant who desires relief against any party to the action may prosecute it by cross-complaint and obtain relief against any party, but all the parties to the action are likewise parties to the cause of action set forth in the cross-complaint.

Id. In a suit to foreclose a mortgage

on farm lands a grain buyer filed a complaint in intervention in the nature of interpleader to determine the party entitled to the unpaid purchase price of grain sold by the mortgagor or to wheat delivered to the buyer by croppers. The defendant mortgagor filed a cross-complaint to the complaint in intervention. Held, as against the contention of plaintiff mortgagee that the trial court erred in refusing to strike the cross-complaint in that the relief sought did not to any extent affect the plaintiff's cause of action or interfere with the relief sought by him, that determination of the matter of title to the purchase price and wheat held will result in an adjudication of the ultimate rights between the mortgagor and grain buyer, and hence under rule 4 above the cross-complaint was sufficient.

References

Malvaney v. Yager et al., 101 M 331, 342, 54 P 2d 135.

CHAPTER 37, REPLY

9158. What reply to contain—time for filing.

It has been held that where new matter in the answer merely negatives the allegations of the complaint no reply is necessary, or, where the alleged new matter consists of a pleading of the statute of

limitations, plaintiff need not reply thereto if matter in avoidance of the plea of the bar of the statute be found in any of his pleadings. Matteson v. Ackerson et al., 104 M 239, 244, 66 P 2d 797.

CHAPTER 38, VERIFICATION OF PLEADINGS

9163. Verification of pleadings.

The verification is no part of a pleading; its absence is waived by failure to object to the defect, and, on objection, the defect may be cured by amendment of the pleading on file. Chisholm v. Vocational School et al., 103 M 503, 507, 64 P 2d 838.

Id. Where the only defect in a claim for compensation under the workmen's compensation act, filed within the six-months period allowed by the statute, was the fact that it was not verified, and, it

being returned to the claimant with the request that it be sworn to, the verified claim was not returned to the industrial accident board until thirteen days after the expiration of such period, the board held not justified in rejecting the claim as not filed within time, in view of the liberal construction of the act required by it in terms, and the fact that the strict rules of pleading and practice should not be applied to such claims.

CHAPTER 39, GENERAL RULES OF PLEADING

9164. Pleadings to be liberally construed.

Pleadings must be liberally construed, and if a complaint states a cause of action, matters of form and irrelevant and redundant allegations must be disregarded, and if from any view of the matters stated plaintiff is entitled to relief, the pleading will be sustained. Matteson v. Ackerson et al., 104 M 239, 243, 66 P 2d 797.

References

Hodgkiss v. Northland Petroleum Consol. 104 M 328, 347, 57 P 2d 811.

State ex rel. Sadler v. Evans et al., 106 M 286, 291, 77 P 2d 394.

9181. Supplemental pleading.

Where a supplemental complaint is made necessary by actions of the defendant after the filing of the original complaint, the two pleadings must be taken as one. Merchants Fire Assur. Corp. v. Watson, 104 M 1, 12, 64 P 2d 617.

The proper method of pleading a fact

material to a cause occurring after the filing of a former pleading is by way of a supplemental pleading; application to file such a pleading is addressed to the discretion of the trial court. Story Gold Dredging Co. v. Wilson, 106 M 167, 171, 76 P 2d 73.

CHAPTER 40, VARIANCES—AMENDMENTS—MISTAKES IN PLEADING

9183. Material variances—how provided for.

Unless appellant relying upon an alleged variance between pleading and proof was misled thereby, it will be deemed immaterial; in any event, if the question of variance was not called to the attention

of the trial court, appellant will not be heard to complaint thereof for the first time on appeal. *Nadeau v. Texas Company*, 104 M 558, 566, 69 P 2d 586, 593.

9187. Amendments by the court—enlarging time to plead and relieving from judgment, etc.

Where defendant, after an order striking his answer in an action to enjoin the sale of real property on execution, was granted twenty days in which to amend but did not file the amended pleading until sixty-four days elapsed and then filed an admittedly inadequate pleading with the undisclosed intention of thereafter filing a sufficient one, and thereafter moved for permission to file a second amended complaint on the ground that his attorneys did not have an opportunity to secure desired information from records in the county seat some eighty miles away, but failing to state why the information could not be obtained in the intervening time or why an application for additional time within which to make filing had not been made to the court, overruling of the motion to amend held not an abuse of discretion. *Granger v. Erie et al.*, 101 M 170, 173, 53 P 2d 443.

The legal remedy by motion, provided by section 9187, Revised Codes, for procuring the vacation of a judgment by default is not as adequate and complete as that afforded by a suit in equity; hence plaintiff in such a suit who deems the legal remedy inadequate is not required as a condition precedent to pursue such remedy before resorting to equity. *Stocking v. Charles Beard Co.*, 102 M 65, 73, 55 P 2d 949.

Held, that where after both sides in an action on an injunction bond had rested, plaintiff asked permission to amend his complaint to conform to the proof so as to show loss of wages for two months more than alleged in the complaint, the court did not err in granting permission, the testimony showing such loss having gone in without objection, and counsel for defendant neither having moved for a nonsuit on the ground of fatal variance between pleading and proof, nor requested a continuance on the ground of surprise. *Hatch et al. v. National Surety Corp.*, 105 M 245, 249, 72 P 2d 107.

Relief under section 9187, Revised Codes, by way of setting aside a judgment on the ground of mistake, may not be had where the mistake was one of law, the rule being based upon the common-law maxim that ignorance of the law excuses no one; otherwise there could be no security in legal rights, no certainty in judicial investigations and no finality in

litigation. *Rieckhoff v. Woodhull et al.*, 106 M 22, 28 et seq., 75 P 2d 56.

Id. Neglect of an attorney to make proper inquiry into the facts of a case before entering into an agreed statement of facts upon which the case was tried was the neglect of his client, and, unless excusable, relief could not be had from the resultant adverse judgment under section 9187, Revised Codes.

Id. A resident of Iowa, holder of a mortgage on lands in Montana, employed local counsel to bring foreclosure suit but failed to advise such counsel of a payment made on the debt which would have removed the bar of statute of limitations. Defendant pleaded such statute. An affidavit of renewal of the mortgage was filed within time. The cause was tried on an agreed statement of facts. The court found that the debt was barred and therefore the lien of the mortgage had expired, and entered judgment for defendant. Four months later plaintiff filed a motion to set aside the judgment on the ground of his mistake, inadvertence and excusable neglect in failing properly to advise his counsel in the premises. Held, under the above rules that the trial court did not abuse its discretion in refusing to set the judgment aside.

On motion to set aside a default judgment under the provisions of section 9187, Revised Codes, the applicant must, acting with diligence, make a statement of facts from which the trial court can determine whether or not the mistake, inadvertence, surprise or excusable neglect urged in support of it is within the contemplation of the section, in order to move the discretion of the court. *Madson v. Petrie Tractor & Equipment Co.*, 106 M 382, 388, 77 P 2d 1038.

Id. Copies of summons and complaint in an action against a corporation were served upon its president and mislaid; diligent search was made but the papers could not be found until too late. In an intermediate proceeding defendant's counsel made the assertion that no service had ever been had upon his client, and opposing counsel remained silent when he should have spoken. The files in the office of the clerk of court showed no return of service of process, required to be made not later than ten days after service, until the day of entry of judgment, it appearing that

the return had been mailed by the serving officer to the office of plaintiff's attorney where it remained for eighteen days. Held, that the district court erred in denying defendant's motion to set aside the judgment.

References

Davis v. Bell Boy Gold Min. Co., 101

9191. No error or defect to be regarded unless it affects substantial rights.

Where the sufficiency of the complaint in an action brought under the automobile guest law was not attacked for insufficiency as to the allegations of gross negligence until after the plaintiff's testimony had been received, on motion for nonsuit, but evidence relating to such negligence was admitted without objection, the pleading will be deemed amended at the trial to conform to the proof if necessary to affirm the judgment, under section 9191, Revised Codes. Baatz v. Noble, 105 M 59, 71, 69 P 2d 579.

Contention that plaintiff in an action to recover on a life insurance certificate issued by a fraternal society could not rely on an incontestable clause therein

M 534, 540, 54 P 2d 563.

State ex rel. Eden v. Schneider, 102 M 286, 294, 57 P 2d 783.

State v. Bruce et al., 106 M 322, 326, 77 P 2d 403.

Calkins v. Smith, 106 M 453, 460, 78 P 2d 74.

because of failure to plead it, held without merit, where the certificate containing the clause was offered in evidence without objection and was before the court; under such circumstances plaintiff's pleadings being deemed amended to conform to the proof, if necessary to sustain the judgment in plaintiff's favor. (Sec. 9191, Rev. Codes). Stevens v. Woodmen of the World, 105 M 121, 138, 71 P 2d 898.

References

State v. Patton, 102 M 51, 63, 55 P 2d 1290.

Doheny v. Coverdale et al., 104 M 534, 557, 68 P 2d 142.

Gibbons v. Huntsinger, 105 M 562, 572, 74 P 2d 443.

9192. Time for amendment, answer or reply after ruling on demurrer or motion. When a demurrer or motion to any pleading is sustained or overruled, and time to amend, answer, or reply is given, the time so given runs from service of notice of the decision or order, except when the party against whom the decision is made is in court. In such case the time runs from the making of the decision or order. [As amended Sec. 2, Ch. 8, L. 1937.]

CHAPTER 43, INJUNCTION

9244. Injunction order—at what time granted, and on what papers—who may serve.

References

State v. District Court et al., 105 M 89, 93, 70 P 2d 440.

9245. When notice required.

Under section 9245, Revised Codes, no injunction order or restraining order shall be issued without notice unless it appears to the court that irreparable injury would result by the delay of giving notice. State ex rel. Cook v. District Court et al., 105 M 72, 75, 69 P 2d 746.

9247. Order to show cause.

References

State v. District Court et al., 103 M 461, 467, 64 P 2d 835.

9250. Application to dissolve or modify.

References

State v. District Court et al., 103 M 563, 567, 63 P 2d 1032.

CHAPTER 44, ATTACHMENT

9256. When attachment may issue.

Section 9467 does not prohibit a personal action where the security given the creditor has become valueless without any fault on his part, in which event he may secure an attachment under the provisions

of section 9256. Bailey v. Hansen, 105 M 552, 555 et seq., 74 P 2d 438.

Id. To entitle a mortgagee to a writ of attachment under section 9256, Revised Codes, it is not necessary for him to fore-

close his mortgage in order to prove that his security has become valueless without fault on his part, due to a change of circumstances after the taking of the mortgage, but he may prove such fact in any way he can.

9262.1. Additional method for attaching stocks or shares in corporations when officer not in state. In addition to the method prescribed in paragraph 4 of section 9262 of the revised codes of Montana, 1935, for attaching stocks or shares or interest therein of any corporation or company, if the president or other head of the same or the secretary, cashier, or other managing agent thereof does not live in Montana or cannot be found within the said state and an affidavit is filed in the office of the clerk of the court in which the action is pending setting forth that the above named officers or managing agent of said corporation does not live or cannot be found within the state the clerk of the court shall make an order directing the writ to be served upon the secretary of state of the state of Montana or in his absence from his office, upon the deputy secretary of state of Montana. When such order has been made the said writ of attachment shall be served upon the secretary of state or in his absence upon the deputy secretary of state by leaving with him a copy of said writ and a notice that the stock or interest therein of the defendant is attached in pursuant of such writ. [En. Sec. 1, Ch. 128, L. 1937.]

9262.2. Duty of secretary of state—fee. Upon such service being so made upon the secretary of state or his deputy the said secretary of state or his deputy shall promptly mail the copy of the writ, notice and copy of said order by registered mail to the address of such corporation at its principal home office as shown by the papers on file in the office of secretary of state and shall make out and mail to the clerk of the court in which the action is pending a certificate of such mailing which shall have attached thereto the registry receipt for such letter that such attachment so made upon the secretary of state as herein provided shall be effective and the said stock or shares or the interest therein of the defendant shall be attached upon the service of the said writ as herein provided. At the time of the service of said writ there shall be paid to the secretary of state a fee of two (\$2.00) dollars which shall be by him paid into the state treasury and which may be taxed as cost by the plaintiff. [En. Sec. 2, Ch. 128, L. 1937.]

9266. Levy of attachment by sheriff according to instructions of plaintiff or attorney.

References

Weir v. Hum Tong, 100 M 1, 7, 46 P 2d 45.

9267. Garnishment—when garnishee liable to plaintiff.

Held, that a cause of action in tort (for personal injuries) is neither a "chase in action" which may be classed as personal property nor a "debt", and therefore is not subject to attachment prior to judgment rendered thereon. Coty v. Cogswell et al., 100 M 496, 500, 50 P 2d 249.

Id. In order to constitute a "debt"

made attachable by section 9267, the obligation must be due at the time of service of the writ or become due at some future period; it must be absolutely payable and not dependent on any contingency.

References

Toole v. Paumie Parisian Dye House, 101 M 74, 76, 52 P 2d 162.

CHAPTER 48, JUDGMENT IN GENERAL

9313. Judgment defined.

While section 9313, Revised Codes, defines a judgment as the final determination of the rights of the parties to an

action or proceeding, the action must be regarded as still pending within the meaning of the section until final determina-

tion on appeal or until the time for appeal has passed. *Davis v. Bell Boy Gold Min. Co.*, 101 M 534, 540, 54 P 2d 563.

Where an order of the district court dismissing an appeal from a justice's court constitutes in effect a judgment from which an appeal could have been taken, the writ of supervisory control does not lie to annul the order, unless the remedy by appeal is inadequate. *State ex rel. Meyer v. District Court*, 102 M 222, 225, 57 P 2d 778.

While an order dismissing an action is a final judgment from which an appeal

9314. Execution against principal debtor before surety may be directed in judgment—judgment may be for or against one of the parties.

The rule announced in *Callender v. Crossfield Oil Syndicate*, 84 Mont. 263, that, to constitute a cross-complaint, the relief sought must to some extent defeat, overcome or affect plaintiff's cause of action, or lessen, modify or interfere with the relief sought by him, held to apply where the relief sought relates to or is dependent upon the subject matter on which the action is brought or affects the

property to which it relates, but not where the judgment in the action may determine the ultimate rights of the defendants as between themselves, in view of the provision of section 9314, Revised Codes, that the trial court may determine the ultimate rights of the parties plaintiff or defendant as between themselves. *State v. District Court et al.*, 102 M 371, 373 et seq., 58 P 2d 491.

9315. Judgment may be against one party and action proceed as to other.

Under section 9315, Revised Codes, a judgment against one of several makers of a promissory note, jointly and severally liable thereon, does not merge the instrument so as to bar an action thereon against the others. *Lepper v. Jackson*, 102 M 259, 273, 57 P 2d 768.

9317. Action may be dismissed or nonsuit entered.

While, under section 9317, Revised Codes, where defendant has not interposed a counterclaim or asked for affirmative relief, the usual procedure for plaintiff to obtain a dismissal of his action before trial is the filing of a praecipe for dismissal and direction to the clerk to enter it on the register of actions, whereupon the case is beyond the jurisdiction of the court except for the purpose of entering judgment for costs in favor of defendant, the same result may be reached by a motion to the court for dismissal and having the order entered on the register. *Graham et al. v. Superior Mines*, 100 M 427, 430, 49 P 2d 443.

Held, on application for writ of mandate, that submission of a motion for a directed verdict constitutes a "submission of the case", within the meaning of subdivision 4, section 9317, Revised Codes, declaring that an action may be dismissed or a nonsuit entered where, before the submission of the case, the plaintiff abandons it, and that therefore after defendant had moved for a directed verdict and the motion had been argued and submitted, the court stating that the motion "will be granted", a motion by plaintiff for a voluntary dismissal of the cause came too late, and that the court in granting it committed error. *State v. District Court et al.*, 102 M 503, 507, 59 P 2d 45.

Plaintiff has no absolute right at all times and under all circumstances to dismiss his action or take a nonsuit, but

under subdivision 1 of section 9317, Revised Codes, he may do so at any time before trial only if a counterclaim has not been made or affirmative relief sought by the answer of defendant. *State v. District Court et al.*, 103 M 140, 142, 61 P 2d 828.

Id. While it has been held that where a judgment has been reversed and a new trial ordered, a dismissal or nonsuit may be taken by plaintiff under statutes similar to section 9317, supra, allowing dismissal or nonsuit before trial, such rule has no application where the supreme court remands the cause for further proceedings.

All that is necessary to effectuate a dismissal of his complaint by plaintiff before trial under subdivision 1 of section 9317, Revised Codes, is the filing of his praecipe for dismissal and the formal entry of dismissal by the clerk of court in his register; this holding not to be understood as declaring that the same result may not be reached by an order of court entered in the minutes on motion of plaintiff. *Union B. & T. Co. v. State Bk. of Townsend*, 103 M 260, 267, 62 P 2d 677.

Id. A dismissal of his complaint by plaintiff under subdivision 1, section 9317, supra, is without prejudice to the bringing of another action on the same facts; if he desires to finally end the matter he should declare that the voluntary dismissal is without prejudice.

9318. All other judgments are on the merits.**References**

Union B. & T. Co. v. State Bk. of Townsend, 103 M 260, 268, 62 P 2d 677.

9320. Effect of judgment dismissing complaint.

Under section 9320, Revised Codes, where the judgment-roll in a former action between the same parties did not show that the judgment or dismissal of the complaint was rendered upon the merits, its rendition did not prevent the institution of the new action, and therefore re-

jection of such judgment-roll in evidence in support of a plea of *res judicata* was not error. *McCulloch v. Horton*, 102 M 135, 147, 56 P 2d 1344.

References

Boepple v. Mohalt, 101 M 417, 437, 54 P 2d 857.

9321. Judgment for costs, duty of court to render, when.

A judgment of dismissal carries with it a judgment for costs as much so as does one on the merits. *Graham et al. v. Superior Mines*, 100 M 427, 431, 49 P 2d 443.

9322. In what cases judgment by default may be entered. Judgment may be had, if the defendant fails to answer the complaint or to challenge the jurisdiction of the court, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer, demurrer, motion, or special appearance, coupled with a motion, has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, or no motion to quash or set aside the service of summons, or to challenge the jurisdiction of the court, has been made and filed, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section 9121.

2. In other actions, if no answer, demurrer, motion, or special appearance, coupled with a motion, has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, or within twenty days after a motion to quash or set aside the service of summons, or any motion challenging the jurisdiction of the court, has been denied, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved, by a reference, as above provided.

3. In an action where the service of summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer or motion to quash or set aside the service of summons, or motion to challenge the jurisdiction of the court, has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff, or his agent, to be examined on oath respecting any payments that may have been made to the plaintiff, or to anyone for his use, on account of such demand, and may render judgment for the amount for which he is entitled to recover.

4. At any time within twenty days after the service of summons upon a defendant in any action commenced in any district court of this state, the defendant may, in writing acknowledged before a notary public, or judge or clerk of the district court, waive his time and right to demur, answer, or otherwise plead to the complaint in the action and consent and agree that his default for failure to demur, answer or otherwise plead to the complaint be entered by the court and that judgment may be rendered and caused to be entered against him by the court in accordance with the prayer of the complaint; whereupon, proof having first been made to the court as required by law, the court shall be authorized to render and enter judgment in favor of the plaintiff and against the defendant in the action in accordance with the prayer of the complaint. Such waiver shall be filed in the action and be made a part of the judgment roll therein. [As amended Sec. 1, Ch. 28, L. 1939.]

CHAPTER 50, ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS

9325. Issue of law—how tried.

References

Sample v. Murray Hospital, 103 M 195, 202, 62 P 2d 241.

9326. Issue of fact—how raised.

Held, on application for writ of mandate to compel the district court to set a cause for trial, after filing of answer, because then at issue within the meaning of its rules and subdivision 1 of section 9326, Revised Codes, that where a cause had been set after answer filed containing

affirmative matter requiring a reply and a reply was filed, that the court properly granted a motion to vacate the setting of the cause, as at the time it was set it was not at issue. Roush v. District Court et al., 101 M 166, 168, 53 P 2d 96.

9327. Issues of fact—how tried—when issues both of law and fact, the former to be first disposed of—pre-trial procedure by the court in formulating issues in civil actions. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a referee for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

The court may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of

counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions. [As amended Sec. 1, Ch. 61, L. 1939.]

References

Merchants Fire Assur. Corp. v. Watson, 104 M 1, 14, 64 P 2d 617.

9329. Counterclaim to be deemed an action within the meaning of foregoing sections.

References

Rock Island Plow Co. v. Cut Bank Imp. Co., 101 M 117, 123, 53 P 2d 116.

9330. Clerk must enter cause on the calendar, to remain until disposed of.

References

Roush v. District Court et al., 101 M 166, 169, 53 P 2d 96.

9331. Parties may bring issue to trial.

Denial of a motion for a continuance asked for on the ground of the absence of defendant from the state on account of long-continued illness and without whose presence his counsel would be handicapped in the examination of witnesses,

held not an abuse of discretion where no showing was made that defendant would probably be able to give his deposition or attend the trial in person at some later date. O'Neill v. Wall, 103 M 388, 396, 62 P 2d 672.

CHAPTER 51. TRIAL BY JURY—FORMATION OF THE JURY

9334. Judge to draw capsules containing ballot. When an issue of fact to be tried by a jury is brought to trial, the district judge in the presence of the clerk of the court must openly draw out of the trial juror box as many of the capsules containing ballots, with the names of jurors thereon, one after another, as are sufficient to form a jury. [As amended Sec. 3, Ch. 151, L. 1937; Amd. Sec. 3, Ch. 3, L. 1939.]

References

Ledger et al. v. McKenzie, 107 M 335, 339, 85 P 2d 352.

9335. Mode of drawing capsules containing ballot. Before the first capsule containing a ballot shall have been drawn, the box must be closed and well shaken, so as to thoroughly mix the capsules therein; and the district judge must draw a capsule containing a ballot with the juror's name thereon, through an aperture made in the lid large enough only to admit his hand conveniently, and without said judge gazing into said box before or while drawing said capsule. [As amended Sec. 4, Ch. 151, L. 1937; Amd. Sec. 4, Ch. 3, L. 1939.]

9341. Ballots—when drawn from box No. 3. If a sufficient number of jurors duly drawn and notified do not attend to form a jury, or a jury is impaneled to another cause and not discharged, the district judge shall pursuant to an order to be entered in the minutes, in the presence of the clerk of the court draw a sufficient number of ballots from box No. 3, specified in section 8907 of this code, to complete the jury. The sheriff must notify the persons thus drawn to attend forthwith, or at a time fixed by court. If for any reason a sufficient number of jurors to try the issue is not obtained from the persons notified, under an order made as prescribed in this section, the court may make another order, or successive orders, until a sufficient number is obtained. Each person so notified must attend at a time required by the notice, and unless excused by the court or set aside,

must serve as a juror upon the trial. For a neglect or refusal so to do, he may be fined in the same manner as a trial juror regularly drawn and notified, as prescribed in this code; and he is subject to the same exceptions and challenges as any other trial juror. [As amended Sec. 5, Ch. 151, L. 1937; Amd. Sec. 5, Ch. 3, L. 1939.]

References

Ledger et al., v. McKenzie, 107 M 335, 339, 85 P 2d 352.

9343. Challenge.

References

Ledger et al., v. McKenzie, 107 M 335, 340, 85 P 2d 352.

9344. Challenges for cause.

One challenging a juror in a civil case must specify one or more of the grounds enumerated in section 9344, Revised Codes, and on appeal in which it is urged that the court erred in refusing to sustain a challenge, no ground will be considered other than that urged in the court below, nor will the court's ruling be disturbed unless an abuse of discretion lodged in it is shown. *Simons v. Jennings et al.*, 100 M 55, 59, 46 P 2d 704.

Id. Where a juror who was an employee of a corporation and a member of an association of the corporation's employees, both of which bodies were defendants on a former trial of the cause being tried, was challenged as a juror on a ground other than his relation to the two then defendants (no longer in the case), error urged on the action of the court in refusing the challenge for the first time on appeal may not be considered.

Id. Quaere: Is a prospective juror who as a spectator attended a former trial of the cause in which he is to sit, subject to a challenge for cause on the ground, specified in subdivision 6 of subdivision 6 of section 9344, Revised Codes, of having an unqualified opinion or belief as to the merits of the action?

Id. The fact that a prospective juror was a spectator at a former trial of the cause and then heard some of the testimony, is not one of the grounds of challenge for cause specified by section 9344, but, if it be considered a ground, the court did not abuse its discretion in refusing the challenge, where the juror on his voir dire testified that he could not remember anything he heard, had no opinion as to who should prevail, and could and would try the cause fairly and impartially.

References

Ledger et al. v. McKenzie, 107 M 335, 340, 85 P 2d 352.

CHAPTER 52, CONDUCT OF THE TRIAL

9349. Order of trial.

Alleged error in an instruction on appeal on a ground different from that urged in the district court on settlement of instructions is not available either on motion for new trial or on appeal. *Brennan v. Mayo et al.*, 100 M 439, 445, 50 P 2d 245.

9359. Proceedings when verdict is informal.

A jury may correct its verdict up to the time it is discharged from the case by the court; hence, where two defendants were charged with the crime of larceny, but only one was tried and the verdict found the defendant "in the above en-

titled cause" guilty without naming him, the court did not err in sending the jury back to the jury room for a correction of their verdict in this regard. *State v. Semmens*, 105 M 113, 120, 71 P 2d 913.

CHAPTER 53, THE VERDICT

9361. When a general or special verdict may be rendered.

Under section 9361, Revised Codes, whether a general or special verdict shall be returned is addressed to the sound discretion of the trial judge. *Hatch et al. v. National Surety Corp.*, 105 M 245, 250, 72 P 2d 107.

Id. Where in an action by a number of plaintiffs to recover on an injunction

bond they in their prayer asked for judgment in a lump sum and but one judgment was recoverable, trial court held not to have erred in refusing to submit the defendant surety company's proposed special verdict requiring the jury to set out the separate amounts awarded to each plaintiff.

9364. Directed verdict—when.

References

Boepple v. Mohalt, 101 M 417, 438 et seq., 54 P 2d 857.

CHAPTER 54, TRIAL BY THE COURT

9367. Facts found and conclusions of law must be separately stated—judgment on.**References**

State ex rel. King v. District Court, 107 M 476, 480, 86 P 2d 755.

9369. Want of findings—judgment not reversed.

Where attack is made upon findings of the district court for what they declare, the rules declared by sections 9369 and 9370, Revised Codes, having to do with the necessity of requesting findings where

none were made or where those made were defective, have no application. Atlantic-Pacific Oil Co. v. Gas Dev. Co., 105 M 1, 14, 69 P 2d 750.

9370. Exception for defective findings—particular defect to be pointed out.

Where attack is made upon findings of the district court for what they declare, the rules declared by sections 9369 and 9370, Revised Codes, having to do with the necessity of requesting findings where

none were made or where those made were defective, have no application. Atlantic-Pacific Oil Co. v. Gas Dev. Co., 105 M 1, 14, 69 P 2d 750.

9372. Trial upon agreed statement of facts.

An agreed statement of facts automatically becomes the trial court's findings and has the effect of a special verdict as to the facts agreed upon; and where a cause was submitted on such a statement, the court committed error in basing its conclusions on other and con-

trary facts. State ex rel. Nelson v. District Court, 107 M 167, 169 et seq., 81 P 2d 699.

References

Rieckhoff v. Woodhull et al., 106 M 22, 32, 75 P 2d 56.

CHAPTER 56, PROVISIONS RELATING TO TRIALS IN GENERAL—EXCEPTIONS

9390. Exceptions not presented at time of ruling—notice to adverse party, how settled upon, etc.

Where amendments are proposed to a bill of exceptions which are not accepted, the proponent may secure its settlement by (1) presenting the bill and amendments, within ten days after service of the amendments, to the judge on five days' notice to the adverse party, or (2) by delivering them to the clerk, or (3) by delivering them to the judge. Frisbee v. Coburn et al., 101 M 58, 62, 52 P 2d 882.

Id. Appellant served his proposed bill of exceptions within the statutory time on November 14 and filed it with the clerk of court on the 15th; on the 19th respondents served upon appellant's counsel and filed with the clerk their proposed amendments which were not accepted; on the 23rd counsel for respondents were served with notice that on December 12 appellant would call his proposed bill with amendments for settlement; on the latter date respondents objected to its settlement on the ground that it was not presented to the court within the time allowed by statute; the bill was settled on December 18th. Held, on motion to dismiss the appeal on the ground that the notice for settlement of the bill was faulty in failing to fix the time for settlement at a date within the ten-day period imme-

diately following the service of the amendments and on five days' notice, that the procedure followed was in substantial compliance with the statute, and motion to dismiss denied.

Where appellant was by order of the trial court granted an extension of time within which to file his proposed bill of exceptions in excess of sixty days, permissible under section 9390, Revised Codes, upon a showing of necessity therefor made by affidavit, but the record merely recited the fact that the extension had been granted upon presentation of an affidavit without setting it forth, the supreme court will, on objection to its jurisdiction to consider the bill, presume, in the absence of a showing to the contrary, that the affidavit was sufficient to invoke the discretion of the trial court and consider the case on its merits. Atlantic-Pacific Oil Co. v. Gas Dev. Co., 105 M 1, 13, 69 P 2d 750.

Where a party appealing desired time for filing his bill of exceptions in addition to the fifteen days allowed by section 9390, Revised Codes, and the sixty days allowed for the asking, he must present his request, supported by affidavit, before the expiration of the time theretofore allowed, else the trial court loses juris-

diction. *Vicain v. City of Missoula et al.*, 107 M 105, 107, 81 P 2d 350.

Id. Where appellant had been granted additional time in which to prepare, serve and file his bill of exceptions some nine different times, in four of which instances the requests were made after the time theretofore allowed had expired, the trial court lost jurisdiction to allow the extensions, rendering the bill subject to a motion in the supreme court to strike it from the transcript.

Where defendant (appellant) before expiration of fifteen days within which he was required to file his bill of exceptions after his motion for new trial was deemed overruled as above set forth, obtained an order extending his time for a period less than sixty days, and thereafter obtained two more extensions on affidavits of necessity, each time before the date of expiration of the previous period allowed,

and the bill was actually filed before the last extension period had expired, it was not subject to a motion to strike it from the files. (*Distinguishing O'Donnell v. City of Butte*, 72 M 449, 235 Pac. 797). *Ingman v. Hewitt*, 107 M 267, 272, 86 P 2d 653.

Where the district court, after granting appellant 45 days in addition to the time allowed by law in which to prepare, serve and file his bill of exceptions, subsequently upon affidavit of the court reporter that he had been engaged in taking the testimony in a matter in which the state was interested and in other cases, which made a further extension of 60 days necessary to complete the transcript, granted such extension, the showing held sufficient to appeal to the court's discretion under section 9390, Revised Codes. *Jensen v. Cloud*, 107 M 593, 596, 88 P 2d 36.

9392. When exception is refused—application to supreme court to prove the same, etc.

References

Wills v. Morris et al., 100 M 504, 506, 50 P 2d 858.

CHAPTER 57, PROVISIONS RELATING TO TRIALS IN GENERAL— NEW TRIALS

9395. New trial defined.

The term "issue of fact" as used in section 9395, Revised Codes, stating that a new trial is a re-examination of an issue of fact, refers only to issues arising under the pleadings; hence a motion for a new

trial does not lie from a ruling on a motion, the ruling being reviewable on appeal from the judgment. *Davis v. Bell Boy Gold Min. Co.*, 101 M 534, 540, 54 P 2d 563.

9396. New trial in equity cases.

Held, that subdivision 8 of section 9397, Revised Codes, added as an amendment to the section by chapter 68, laws of 1935, and providing that a new trial may be granted where the right to have a bill of exceptions has been lost either through the death or incapacity of the court reporter or in any manner not the fault of the losing party, applies in all cases where

the facts come within such subdivision, and that in so far as it conflicts therewith, section 9396, declaring that no new trial shall be granted in equity cases or cases tried without a jury except where asked for on certain other grounds, it must be deemed repealed by implication. *State ex rel. Jackson v. District Court*, 107 M 30, 32, 79 P 2d 665.

9397. When a new trial may be granted.

Where a motion for a new trial was based on all the grounds enumerated in section 9397, Revised Codes, and the trial court in granting it did so in a general order, the supreme court on appeal from the order, after determining that all grounds other than the one based on the insufficiency of the evidence have no merit, will presume that the trial court in the exercise of its discretion granted the motion on the latter ground. *Brennan v. Mayo et al.*, 100 M 439, 444, 50 P 2d 245.

Held, that subdivision 8 of section 9397, Revised Codes, added as an amendment to the section by chapter 68, laws of 1935, and providing that a new trial may be granted where the right to have a bill of exceptions has been lost either through

the death or incapacity of the court reporter or in any manner not the fault of the losing party, applies in all cases where the facts come within such subdivision, and that in so far as it conflicts therewith, section 9396, declaring that no new trial shall be granted in equity cases or cases tried without a jury except where asked for on certain other grounds, it must be deemed repealed by implication. *State ex rel. Jackson v. District Court*, 107 M 30, 32, 79 P 2d 665.

Id. Where, after trial of a divorce case by the court without a jury, the court reporter died before transcribing his notes and thus the appealing wife lost her right to have a bill of exceptions prepared, she was entitled to a new trial under subdivi-

vision 8 of section 9397, *supra*, and the trial court in denying her motion committed error.

References

Wibaux Realty Co. v. Northern Pac. Ry.

Co. 101 M 126, 138, 54 P 2d 1175.

McCartan v. Park Butte Theater Co., 103 M 342, 349, 62 P 2d 338.

Chancellor v. Hines Motor Supply Co., 104 M 603, 614, 69 P 2d 597.

9399. Notice of intention—contents and service.

Section 9399, Revised Codes, dealing with notice of motion for a new trial and declaring that the movant must within ten days after return of the verdict or after receiving notice of the decision of the court, serve and file notice of motion for new trial, is intended for the benefit of the moving party and he may, if he chooses, waive the requirement of formal notice of the verdict or decision of the court. State ex rel. King v. District Court, 107 M 476, 480, 86 P 2d 755.

Id. Section 9399, provides in effect that (in a case tried without a jury) the party desiring to move for a new trial must within ten days after receiving

notice of the court's decision serve upon the adverse party a notice of motion to move for a new trial. Movant filed such notice five days after service of notice of the court's findings of fact and conclusions of law upon him. In answer to the contention of his opponent that the notice of motion was premature, since made before the court's decision, and hence, in legal effect, no notice, held that the court's findings of fact and conclusions of law, though not constituting a judgment, were equivalent to a decision and that, therefore, the notice of motion was timely.

9400. Hearing of motion—continuance—papers used.

After submission of a motion for a new trial, it must, under section 9400, Revised Codes, be decided within fifteen days, or it will be deemed denied by operation of law, and the court loses jurisdiction to do anything further in the case. State ex rel. King v. District Court, 107 M 476, 478 et seq., 86 P 2d 755.

Id. The method for making known a decision of the district court on a motion

for new trial, as prescribed by section 9400, i. e., either by entry in its minutes or by writing made in chambers in any county of the state where the judge may be, filed with the clerk of the court of the county where the action is pending, is exclusive.

References

Ingman v. Hewitt, 107 M 267, 272, 88 P 2d 653.

9402. Contents of record on appeal.

An order denying a motion for new trial is not appealable but may be reviewed on appeal from the judgment, or, where a new trial is a matter of absolute right, review may be had by writ of mandate. State ex rel. Jackson v. District Court, 107 M 30, 33, 79 P 2d 665.

CHAPTER 58, THE MANNER OF GIVING AND ENTERING JUDGMENT

9409. Judgment-roll—contents and filing.

Though section 9409, Revised Codes, enumerates among the papers which must be included in the judgment-roll in case the defendant has not appeared, the summons with proof of service the absence

of such documents therefrom is not sufficient to make it affirmatively appear that the court was without jurisdiction. State ex rel. Delmoe v. District Court, 100 M 131, 137, 46 P 2d 39.

9410. Judgment lien—when it begins and when it expires.

A judgment is a lien against the real property of the judgment debtor only as provided by statute, section 9410, Revised Codes, i. e., upon the docketing of the judgment it becomes a lien upon all such property owned by the debtor at the time, or which he may thereafter acquire. Gaines v. Van Demark, 106 M 1, 6 et seq., 74 P 2d 454.

Id. In an action to quiet title, held, that where a judgment against one G. was obtained and docketed in 1919, and he in 1924 after the death of his intestate father, gave a quitclaim deed to an interest in the latter's estate subsequently distributed to him, whereupon the judgment

creditor caused an execution to be issued and the interest sold, the district court erred in holding in favor of the holder of the quitclaim deed on the grounds that when the judgment was docketed there was nothing to which the creditor's lien could have attached, and that, since the interest had previously passed under the quitclaim deed, the execution purchaser acquired nothing by his purchase, the holding being erroneous, under section 9410, declaring when a judgment becomes a lien upon property, even though there was nothing in the records of the county recorder showing the interest of G. in his deceased father's realty.

CHAPTER 59, THE EXECUTION

9424. What shall be liable on execution—not affected until levy.

A cause of action for personal injuries held not subject to execution at the instance of the judgment creditor of one bringing the action, such a cause of action being neither property nor a debt, within the meaning of section 9424, Revised

Codes, prescribing what may be seized under execution. *Toole v. Paumie Parisian Dye House*, 101 M 74, 76, 52 P 2d 162.

References

Coty v. Cogswell et al., 100 M 496, 501, 50 P 2d 249.

9427. Property exempt from execution.

In an action by a sheriff to recover on an implied promise to indemnify him for making an attachment on household goods subsequently in an action in conversion against him shown to have been exempt, refusal of an instruction offered by the attaching creditor enumerating in the language of section 9427, Revised Codes, the general exemptions to all creditors was not error; the property claimed having been adjudged exempt, the question of its status was not an issue in the case. *Weir v. Hum Tong*, 100 M 1, 8, 46 P 2d 45.

Chapter 120, laws of 1933, exempting a truck or automobile not exceeding \$300 in value where the debtor is over sixty years

of age, held to be in effect an amendment of sections 9427 and 9428, Revised Codes, and therefore and in view of the provision of section 3 of the chapter that nothing in the act shall be construed as repealing any provision of the two sections, the final clause of section 9427 that "only a bona fide resident of the state shall have the benefit of these exemptions" applies to the new class of persons mentioned in the chapter. *White v. Corbett*, 101 M 1, 4, 52 P 2d 156.

References

State v. Justice of the Peace Court et al., 102 M 1, 6, 55 P 2d 691.

9428. Specific exemptions.

Chapter 120, laws of 1933, exempting a truck or automobile not exceeding \$300.00 in value where the debtor is over sixty years of age, held to be in effect an amendment of sections 9427 and 9428, Revised Codes, and therefore and in view of the provision of section 3 of the chapter that nothing in the act shall be construed as repealing any provision of the two sections, the final clause of section 9427 that "only a bona fide resident of the state shall have the benefit of these exemptions" applies to the new class of persons mentioned in the chapter. *White*

v. Corbett, 101 M 1, 4, 52 P 2d 156.

Held, that a miner's coal cars, mining and tie timbers, rails and a wagon scale used in coal mining were properly held exempt from attachment to the value of \$1,000 under subdivision 5, section 9428, Revised Codes, declaring what shall be exempt from execution to a miner who is married or the head of a family, as "implements" forming a part of his equipment for work. *State v. Justice of the Peace Court et al.*, 102 M 1, 3 et seq., 55 P 2d 691.

9428.1. Exemptions to osteopaths and chiropractors. In addition to the property mentioned in the two immediately preceding sections, there shall be exempt to all judgment debtors who are married or who are heads of families, the following:

(a) To Osteopaths and Chiropractors. The instruments and equipment necessary to the exercise of his profession, with his scientific and professional library and necessary office furniture. [En. Sec. 1, Ch. 127, L. 1937.]

9429. Exemption of earnings—debts incurred for necessities. The earnings of the judgment debtor for his personal services rendered at any time within forty-five days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family, supported in whole or in part by his labor, are exempt; but where debts are incurred by any such person or his wife or family for gasoline and for the common necessities of life, then the one-half of such earnings above mentioned are nevertheless subject to execution, garnishment, and attachment, to satisfy debts so incurred. The words "his family", as used herein, are to be construed

with the words "head of family", as used in section 6969. [As amended Sec. 1, Ch. 77, L. 1939.]

An affidavit claiming certain earnings of a judgment debtor as exempt from execution or attachment, under section 9429, Revised Codes, and alleging that affiant was "the head of a family" and that his personal earnings were necessary for the support of himself and his family, held sufficient as against the contention that failure to state in the words of the state that his family was "supported in whole or in part by his labor" rendered the claim of exemption faulty; affiant by styling himself "head of the family", meaning one who resides with and has under his care and maintenance those dependent upon him, in substance expressed what is intended by the words omitted. *Williams v. Sorenson et al.*, 106 M 122, 124 et seq., 75 P 2d 784.

Id. Mileage and traveling expenses al-

9430.1. Exemptions of aged persons.

Chapter 120, laws of 1933, exempting a truck or automobile not exceeding \$300.00 in value where the debtor is over sixty years of age, held to be in effect an amendment of sections 9427 and 9428, Revised Codes, and therefore and in view of the provision of section 3 of the chapter that nothing in the act shall be construed as repealing any provision of the two

lowed by law to a county officer (assessor) may properly be considered "earnings" within the meaning of section 9429, Revised Codes, exempting certain earnings of a judgment debtor when it appears that such earnings are necessary for the use of his family, the word "earnings" being more comprehensive than "wages" and "salary".

Id. It is not necessary under section 9429, Revised Codes, that an exemption claimant must show that his earnings are necessary for the support of his family in the purchase of the necessities of life; if they are "necessary for the use" of the family it is sufficient, the word "necessary" not meaning an absolute or indispensable necessity, but reasonable, requisite and proper.

sections, the final clause of section 9427 that "only a bona fide resident of the state shall have the benefit of these exemptions" applies to the new class of persons mentioned in the chapter. *White v. Corbett*, 101 M 1, 5, 52 P 2d 156.

References

State v. Gallatin Co. H. S. Dist. et al., 102 M 356, 367, 58 P 2d 264.

9430.2. Truck or automobile—when exempt from execution.

Held, that chapter 120, laws of 1933 (section 9430.2, Rev. Codes), creating an additional exemption in favor of a debtor who is the head of a family or over sixty years of age to the extent of an automobile of the value of not more than

\$300, is invalid under section 11, article III of the constitution where the judgment on which execution was issued was obtained on a contract antedating the effective date of the act. *Rieger v. Wilson et al.*, 102 M 86, 91, 56 P 2d 176.

9431. Writ—how executed.

References

Baker v. Tullock et al., 106 M 375, 379, 77 P 2d 1035.

9441. Real property—when sale absolute, and what certificate to contain.

References

Parcells v. Nelson et al., 103 M 412, 419, 63 P 2d 131.

9443. Redemption money—computation of amount to be paid. The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within one year after the sale, on paying the purchaser the amount of his purchase, with one-half of one per cent ($\frac{1}{2}\%$) per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest. [As amended Sec. 1, Ch. 103, L. 1937.]

9444. Redemptioners' rights—manner of redeeming—when purchaser entitled to deed—certificate of redemption—redemption by stockholders—redeeming from wife. If property be so redeemed by a redemptioner, another redemptioner may, within sixty (60) days after the last redemption,

again redeem it from the last redemptioner on paying the sum on such last redemption, with interest thereon at the rate of one-half of one per cent ($\frac{1}{2}\%$) per month in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount, and, in addition, the amount of any liens held by the said last redemptioner prior to his own, with interest; but the judgment under which the property was so sold need not be so paid as a lien. The property may be again, and as often as any redemptioner is so disposed, redeemed from any previous redemptioner, within sixty (60) days after the last redemption, on paying the sum paid on the last previous redemption, with interest thereon at the rate of one-half of one per cent ($\frac{1}{2}\%$) per month, and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him, with like interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with like interest. Written notice of redemption must be given to the sheriff, and a duplicate filed with the county clerk, and if any taxes or assessments are paid by the redemptioner, or if he has or acquired any liens other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the county clerk; and if such notice be not filed, the property may be redeemed without paying such tax, assessments, or lien. If no redemption be made within one year after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases, the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property. If the judgment debtor or his wife redeem, he or she must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. If the wife redeem, she shall become the owner of her husband's interest, subject to any liens thereon at the time of the execution sale. Upon a redemption by a debtor, or his wife, the person to whom the payment was made must execute and deliver to him or her a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the county clerk of the county in which the property is situated, and the county clerk must note the record thereof in the margin of the record of the certificate of sale.

If a stockholder of a corporation redeems, the corporation, within one (1) year after the date of sale, may redeem by paying to the redemptioner, or the sheriff for his benefit, the amount paid to effect the redemption, with interest thereon at the rate of one-half of one per cent ($\frac{1}{2}\%$) per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the redemptioner, with like interest thereon. When a stockholder redeems, any other stockholder or stockholders may, at any time after such redemption, and within sixty (60) days after the expiration of one (1) year from

the date of sale, contribute to the redemption by paying to the redeeming stockholder, or depositing with the sheriff for his benefit, a sum which bears the same proportion to the amount necessary to redeem which the number of shares owned by such contributing stockholder or stockholders bears to the number of shares of such corporation outstanding, with interest on such sum from the date of redemption until the date of contribution at the rate of one-half of one per cent ($\frac{1}{2}\%$) per month, together with a like proportion of the taxes or assessments paid by such redeeming stockholder, with like interest thereon, and if the corporation does not redeem the property within the time and in the manner and form as aforesaid, the said redeeming and contributing stockholders shall be entitled to receive a sheriff's deed for such property so redeemed, and shall succeed to the said property as tenants in common in such proportions, respectively, as they shall respectively pay or contribute to such redemption as aforesaid. The redeeming or contributing stockholder shall, in all cases when applying to redeem or contribute as aforesaid, present an affidavit, setting forth the number of shares of stock owned by him, and to the best of his knowledge, the number of shares of stock of the corporation outstanding.

If the wife of a judgment debtor redeem, the husband, within one year after the date of sale, may redeem by paying the wife or her successors in interest or the sheriff for her or their benefit, the amount paid to effect the redemption, with interest thereon at the rate of one-half of one per cent ($\frac{1}{2}\%$) per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the wife or her successors in interest, with like interest thereon. [As amended Sec. 2, Ch. 103, L. 1937.]

References

Malvaney v. Yager et al., 101 M 331, 347, 54 P 2d 135.

9448. Who entitled to rents and profits.

References

Parcells v. Nelson et al., 103 M 412, 419, 63 P 2d 131.

9449. Possession of lands prior to foreclosure and during period of redemption.

A mortgagor of real property is entitled to possession thereof after foreclosure during the period of redemption only when he occupies the premises as a home for him-

self and his family. Rock Island Plow Co. v. Cut Bank Imp. Co., 101 M 117, 121, 53 P 2d 116.

CHAPTER 61. ACTIONS FOR FORECLOSURE OF MORTGAGES

9467. Proceedings in foreclosure suits.

The purpose of section 9467, Revised Codes, declaring that there is but one action for the recovery of debt or the enforcement of a right secured by mortgage, is to compel the creditor to exhaust his remedy before resorting to the general assets of the debtor, and under it the former cannot waive his security and sue on the debt unless he can show that the security has become worthless through no fault of his. Lepper v. Jackson, 102 M 259, 263, 57 P 2d 768 (see also Bailey v. Hansen, 105 M 552, 555 et seq., 74 P 2d 438).

Section 9467, Revised Codes, declaring that there is but one action for the recovery of a debt or the enforcement of a right secured by mortgage on real or personal property, i. e., an action for the foreclosure of the mortgage, applied only to actions for the recovery of debts or the enforcement of rights secured by a mortgage, or what amounts to a mortgage in law, and has no application to an action for the cancellation of a land contract brought by the vendor. White v. Jewett, 106 M 416, 419, 78 P 2d 85.

CHAPTER 63, QUIETING TITLE

9488.1. Provisions to apply if no known claimants or possible claimants.

If, in any case, there are no known claimants, or possible claimants, to any of the property involved in any action contemplated by sections 9479 to 9488, both inclusive, of this code, the action may nevertheless be maintained against all persons, unknown, claiming or who might claim any right, title, estate, or interest in, or lien or encumbrance upon, the real property described in the complaint, or any part thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, and such action may be prosecuted to judgment in the same manner and with like effect as though there had been known claimants or possible claimants; and in any such case, the complaint, the affidavit for service by publication, the order for service by publication, and the decree shall state the facts and the summons shall be directed to such unknown persons. [En. Sec. 1, Ch. 68, L. 1939.]

CHAPTER 65, QUO WARRANTO

9576. When proceedings may be instituted.

Held, that where a newly elected treasurer of a firemen's relief association petitioned for a writ of mandate to compel the former treasurer to turn over the funds and property of the association to him, and an alternative writ was issued, but in the course of the proceeding a substitution of parties defendant was made, thereby injecting into the matter the question

of title to the office of treasurer thus warranting the remedy by writ of quo warranto, the district court erred in quashing the alternative writ issued and dismissing the proceeding instead of disposing of the cause on its merits as shown by the admitted or uncontradicted pleadings. State ex rel. Casey v. Brewer et al., 107 M 550, 554, 88 P 2d 49.

CHAPTER 68, MANNER OF COMMENCING ACTIONS IN JUSTICE COURTS

9627. Summons may issue within a year.**References**

Ex Parte Sheehan, 100 M 244, 253, 49 P 2d 438.

9629. Parties may appear in person or by attorney.

Held, that the provision of section 9629, Revised Codes, that "any person" may act as attorney in a justice's court does not include a corporation, in view of section 5903, which declares the purposes for

which private corporations may be formed, but does not include the profession of practicing law. State v. Merchants' Credit Service, Inc., 104 M 76, 100 et seq., 66 P 2d 337.

9631. Summons—how issued, directed, and what to contain. The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, the name of the county and city or township in which the action is commenced, and the names of the parties thereto;

2. A sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him, but a copy of the complaint in the action when served with the copy of the summons upon defendant in lieu of said statement, is sufficient;

3. A direction that the defendant appear and answer before the justice, at his office, as specified in the next section. And that if he fail to appear and answer, judgment will be taken against him according to the complaint. [As amended Sec. 1, Ch. 91, L. 1939.]

9632. Time for appearance of defendant. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest be endorsed upon the summons, forthwith.
2. In all other cases the summons shall provide that the defendant shall answer, and if such answer be in writing file the same and serve a copy thereof upon the plaintiff or his attorney, within six days after service of this summons, exclusive of the day of service; and in case of his failure to appear or answer, judgment will be taken against him by default for the relief demanded in the complaint. [As amended Sec. 3, Ch. 34, L. 1937; Amd. Sec. 1, Ch. 196, L. 1939.]

9633. Alias summons. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons in the same form as the original. [As amended Sec. 4, Ch. 34, L. 1937.]

9636. Service of summons.

References

Ex Parte Sheehan, 100 M 244, 253, 49 P 2d 438.

9637. Fixing day for trial. When all parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiffs and the defendants who have appeared thereof. [As amended Sec. 5, Ch. 34, L. 1937.]

CHAPTER 71, JUDGMENTS BY DEFAULT

9664. Judgment when defendant fails to appear. If the defendant fails to appear, answer or demur within the time specified in the summons, then the defendant shall be in default, and his default shall be entered accordingly by the court. Evidence may then be submitted and judgment rendered and entered in accordance with the statement in the summons or as prayed for in the complaint at any time within ninety days from the date of the entry of such default of the defendant. [As amended Sec. 1, Ch. 34, L. 1937; Amd. Sec. 2, Ch. 91, L. 1939.]

CHAPTER 74, JUDGMENTS (OTHER THAN DEFAULT) IN JUSTICE COURTS

9680. Judgment of dismissal entered in certain cases without prejudice. Judgment that the action be dismissed without prejudice to a new action, may be entered with costs in the following cases:

1. When the plaintiff voluntarily dismisses the action, at or before the close of his evidence, when there is no counterclaim.
2. When he fails to appear at any time within five days after default has been entered, or at the time to which the action has been postponed.
3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court.
4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, town, or city; but if the objection is taken and overruled, it is the cause of a reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived. [As amended Sec. 2, Ch. 34, L. 1937.]

CHAPTER 75, EXECUTION FROM JUSTICE COURTS

9693. Execution—time for issuance.

References

Ex Parte Sheehan, 100 M 244, 253, 49 P 2d 438.

CHAPTER 77, DOCKETS OF JUSTICES

9703. Docket—what to contain.

References

Ex Parte Sheehan, 100 M 244, 253, 49 P 2d 438.

9703.1. County commissioners to furnish justices of the peace with blanks and forms—office quarters, furniture. The several boards of county commissioners shall furnish at the expense of their respective counties to all qualified and acting justices of the peace all necessary justice dockets, all blanks or forms required by the justices of the peace in the handling of criminal cases. In townships having a population of 1500 or more, according to the last previous United States census, the board of county commissioners may at their discretion, furnish such office quarters, furniture, fixtures and other supplies as they may deem necessary, provided, however, that the office quarters so furnished shall be located in the county court house, if possible. [En. Sec. 1, Ch. 75, L. 1937.]

9704. Entries therein primary evidence of the facts.

References

Ex Parte Sheehan, 100 M 244, 253, 49 P 2d 438.

9705. An index to the docket must be kept.

References

Ex Parte Sheehan, 100 M 244, 253, 49 P 2d 438.

CHAPTER 78, GENERAL PROVISIONS RELATING TO JUSTICE COURTS

9716. Who entitled to costs. The prevailing party in justice courts is entitled to costs of the action and also of all proceedings taken by him in aid of execution issued upon any judgment recovered therein. [As amended Sec. 1, Ch. 156, L. 1937.]

CHAPTER 80, APPEALS TO SUPREME COURT

9729. How judgments and orders may be reviewed.

References

In re Augustad's Estate, 107 M 619, 622, 88 P 2d 32.

9731. From what judgment or order an appeal may be taken.

The statute not providing therefor, an appeal from an order taxing costs does not lie; however, the order, being in theory deemed an intermediate order, and costs being an important part of the judgment, is reviewable on appeal from the judgment even though the matter of costs be the only question presented on the appeal. *Gahagan v. Gugler*, 100 M 599, 602, 52 P 2d 150.

An order appointing a receiver in a mortgage foreclosure suit being an appealable one, it may not under section 9750, Revised Codes, be reviewed on appeal from

the judgment. *Rock Island Plow Co. v. Cut Bank Imp. Co.*, 101 M 117, 121, 53 P 2d 116.

It would seem that there is no appeal from an order refusing to vacate a decree of settlement of final account and distribution of an estate, or a part thereof. *State ex rel. Regis v. District Court et al.*, 102 M 74, 76, 55 P 2d 1295.

Where the complaint, in an action by a public utility company against the public service commission to enjoin the commission from putting into effect new rates fixed by it, petitioned the trial court for

a restraining order until final determination of the action, and that court, after hearing on the order to show cause, granted such order, its action amounted to an adjudication of plaintiff's right to an injunction *pendente lite*, from which an appeal lies under section 9731, Revised Codes. *State v. District Court et al.*, 103 M 563, 566, 63 P 2d 1032.

Held, that where a father who sought appointment as a guardian of his minor son failed to appeal from an order appointing another nominated by such minor, within the sixty days permitted by section 9731, Revised Codes, for taking an appeal, he was in no position to apply for a writ of supervisory control to annul the order of the district court, his laches in failing to appeal not constituting an emergency such as to warrant issuance of the writ. *State v. District Court et al.*, 105 M 510, 515, 74 P 2d 8.

Where, under the terms of a will, the widow of decedent was granted a life estate in all of his property, and upon her death the remaindermen petitioned for termination of the life estate and, pending such termination, in an intermediary proceeding against the executor of the widow's separate estate asked the court to determine whether certain expenditures made by the widow during her enjoyment

9732. Time for taking appeal.

The fact that a special order made after judgment is appealable does not necessarily defeat the right to relief by writ of prohibition. *State ex rel. Redle v. District Court*, 102 M 541, 544, 59 P 2d 58.

9733. Appeal, how taken.

Under the provision of section 9733, Revised Codes, declaring that an appeal is taken by filing a notice "stating the appeal" from the judgment "or some specific part thereof", held that where the judgment is divisible, an appeal may be taken from a part thereof. (Overruling *Lohman v. Poor*, 68 M 579, holding otherwise) *Wills v. Morris et al.*, 100 M 504, 507, 50 P 2d 858.

An "adverse party" within the meaning of section 9733, Revised Codes, which requires a notice of appeal on such a party or his attorney, is one whose rights may be injuriously affected by a reversal or modification of the judgment appealed from, irrespective of the fact that he did

of the life estate were properly chargeable to such estate or to her own personal estate, and the court without objection to the irregular mode of procedure pursued determined the matter, the remaindermen were in no position to urge dismissal of the appeal of the executor taken from the "judgment and order" of the court which in effect amounted to a distribution of a part of the estate of the deceased husband and as such was appealable under section 9731, subdivision 3, Revised Codes, on the ground that the appeal was not from a final judgment or order; in any event the motion came too late. *In re Yergy's Estate*, 106 M 505, 510, 79 P 2d 555.

An erroneous order sustaining a demurrer to a petition for the probate of a will and dismissing the petition is neither a judgment nor an order made appealable by section 9731, Revised Codes, and therefore an attempted appeal therefrom will be dismissed on motion. *In re Augestad's Estate*, 107 M 619, 622, 88 P 2d 32.

References

Wills v. Morris et al., 100 M 504, 507, 50 P 2d 858.

State ex rel. King v. District Court, 107 M 476, 481, 86 P 2d 755.

References

State v. District Court et al., 105 M 510, 515, 74 P 2d 8.

State ex rel. Duckworth v. District Court, 107 M 97, 100, 80 P 2d 367.

not answer the complaint. *In re Roberts' Estate*, 102 M 240, 255, 58 P 2d 495.

Held, that inability of relator to furnish an appeal bond, required to be posted by section 9733, Revised Codes, to stay execution of a judgment rendered contrary to an agreed statement of facts on which the cause was tried and from which requirement there is no relief other than waiver, presented such an emergency as to warrant the issuance of a writ of supervisory control, relator's right of appeal being effectually cut off by his inability to furnish such bond. *State ex rel. Nelson v. District Court*, 107 M 167, 172, 81 P 2d 699.

9745. Record on appeal from orders other than new trial.

References

Boepple v. Mohalt, 101 M 417, 448, 54 P 2d 857.

Refer v. Refer, 102 M 121, 129, 56 P 2d 750.

Rogge v. Petroleum County et al., 107 M 37, 43, 80 P 2d 380.

9746. Authentication of copies—abbreviated record.

References

State v. Driscoll, 101 M 348, 357, 54 P 2d 571.

9747. When an appeal may be dismissed.

Under section 9747, Revised Codes, failure to move for dismissal of an appeal on the ground that, because of the absence of the court stenographer at a hearing,

there was no stenographic report of the evidence and no bill of exceptions settled, waived the irregularity where the trial court and clerk certified that the record

contained the oral testimony in substance. Refer v. Refer, 102 M 121, 129, 56 P 2d 750.

9750. What the court may review on an appeal from a judgment.

An order appointing a receiver in a mortgage foreclosure suit being an appealable one, it may not under section 9750, Revised Codes, be reviewed on appeal from the judgment. Rock Island Plow Co. v. Cut Bank Imp. Co., 101 M 117, 121, 53 P 2d 116.

9751. Ruling against respondent may be reviewed.

Section 9751, Revised Codes, permitting cross-assignments of error, is not intended to do away with cross-appeals where a party feels himself aggrieved by rulings on matters separate and distinct from that sought to be reviewed by the appellant; hence where claimant for compensation to whom an award was made for 300 weeks as for a temporary total disability did not in any way bring to the attention of the trial court his contention that he was entitled to compensation for 500 weeks for a total permanent disability, his cross-assignment of error in that behalf held not entitled to consideration by the supreme court. Best v. London Guarantee & Acc. Co., 100 M 332, 345, 47 P 2d 456.

The provision of section 9751, Revised Codes, which in effect declares that no judgment shall be reversed for commission of trivial or nonprejudicial error, may not be extended to a judgment in favor of defendant in a bastardy proceeding where in addition to prejudicial error in the admission of testimony, the evidence

in support of the judgment of dismissal was meager and unconvincing, while that showing defendant to be the father of the child of prosecutrix was direct and forceful. State v. Patton, 102 M 51, 62, 55 P 2d 1290. (See also Doyle v. Union Bank & Trust Co., 102 M 563, 583, 59 P 2d 1171.)

Section 9751, Revised Codes, providing for cross-assignments of error, applies only to cases in which respondent makes such assignments on rulings adverse to him and preserved in a bill of exceptions to enable the supreme court to determine whether the errors complained of by appellant were compensated or rendered harmless thereby; the section does not do away with cross-appeals where a party feels himself aggrieved by rulings on matters distinct from those sought to be reviewed by appellant. Osnes Livestock Co. et al. v. Warren, 103 M 284, 300, 62 P 2d 206. (See also Phelps v. Union Central Life Ins. Co., 105 M 195, 202, 71 P 2d 887.)

9752. Remedial powers of an appellate court.

The mere fact that the supreme court finds no merit in an appeal taken by the industrial accident board in a compensation case does not warrant the allowance of damages, under section 9752, Revised

Codes, on the alleged ground that the appeal was taken for the purpose of delay. O'Neil v. Industrial Assistent Board, 107 M 176, 181, 81 P 2d 688.

CHAPTER 81, APPEALS TO DISTRICT COURT

9754. Appeal from judgment of justice's or police court.

An appeal lies to the district court from a judgment of the justice of the peace court, and from an order of the justice setting aside, of refusing to set aside, a default judgment; there is no appeal from an order made by him after judgment. White v. Corbett, 101 M 1, 4, 52 P 2d 156.

The statutory provision (sec. 9754, Rev. Codes) that an appeal from justices' courts may be taken at any time within

thirty days after rendition of judgment, is a statute of limitations, and unless the appeal is taken within such time, the appellate court acquires no jurisdiction and the appeal must be dismissed. Davis v. Bell Boy Gold Min. Co., 101 M 534, 538, 54 P 2d 563.

References

State v. Justice of the Peace Court et al., 102 M 1, 5, 55 P 2d 691.

9755. Must be tried anew.

Under section 9755, Revised Codes, there is no appeal from a default judgment entered in a justice of the peace court except where the court has abused its discretion in refusing to set it aside, and on such appeal the district court can go no further than being a trial *de novo*. Davis v. Bell Boy Gold Min. Co., 101 M 534, 538, 54 P 2d 563.

Id. Held, in the absence of specific statutes on the subject, that in order to bring section 9755, Revised Codes, on the matter of appeal from a judgment by default entered by a justice of the peace into harmony with the mandate of section 23, article VIII of the constitution, providing for appeal from justices' courts "in all cases", on timely motion to set

aside a default judgment in a justice court, the judgment is suspended and the time for taking an appeal therefrom begins to run from the time the motion is disposed of.

References

White v. Corbett, 101 M 1, 4, 52 P 2d 156.

State v. Justice of the Peace Court et al., 102 M 1, 5, 55 P 2d 691.

CHAPTER 85, MOTIONS AND ORDERS

9772. Order and motion defined.

A "motion" to retax costs may be made by filing a writing or by word of mouth; it must specifically show in what respects the taxation is claimed to be erroneous and point out the items object to, its

paramount purpose being notice to opposing counsel and giving him an opportunity to be present and intelligently to oppose it. Gahagan v. Gugler, 100 M 599, 606, 52 P 2d 150.

CHAPTER 87, COSTS AND DISBURSEMENTS—COST BILL— SUITS IN FORMA PAUPERIS

9786. Compensation of attorneys—costs to parties.

References

Gahagan v. Gugler, 100 M 599, 603, 52 P 2d 150.

9787. When allowed, of course, to the plaintiff.

(On motion for rehearing.) Under section 9787, Revised Codes, one recovering nominal damages only is not entitled to costs. Doyle v. Union Bank & Trust Co., 102 M 564, 589, 59 P 2d 1171.

In view of the nature of water rights suits where every party thereto is an antagonist of every other party, the provisions of section 9787, Revised Codes,

relative to costs recoverable by the successful party, is not strictly applicable, and may only be applied by making some apportionment of costs. Osnes Livestock Co. et al. v. Warren, 103 M 284, 305, 62 P 2d 206.

References

Gahagan v. Gugler, 100 M 599, 603, 52 P 2d 150.

9788. Defendant's costs must be allowed, of course, in certain cases.

References

Gahagan v. Gugler, 100 M 599, 603, 52 P 2d 150.

9791. Costs of appeal discretionary with the court, in certain cases, and when.

Where the supreme court, in modifying a judgment and affirming it as modified, makes no mention of the matter of costs, one addressed to its discretion under section 9791, Revised Codes, and appellant in his motion for rehearing did not ask for an express ruling to determine the

matter, the district court in thereafter modifying the judgment as directed on remittitur did not err in making an order requiring each party to pay his own costs in both courts. Lloyd v. City of Great Falls et al., 107 M 588, 592, 87 P 2d 187.

9795. Costs in actions by or against an administrator, etc.

Under section 9795, Revised Codes, costs of suit are allowable against an administrator in his official capacity the same as against a person defending in his own right. Swanson v. Gnose, 106 M 262, 267, 76 P 2d 643.

9796. Costs in a review other than by appeal.

On dismissal of an application for writ of certiorari to review an order of the district court adjudging one guilty of contempt, the respondent court is entitled to recover the costs incident to the preparation and certification of its return to the supreme court, under section 9796, Revised Codes, and upon service of a proper memo-

randum of costs and allowance thereof by the reviewing court it will enter judgment and award the lower court execution therefor. State ex rel. Young v. District Court, 102 M 487, 494, 53 P 2d 1243.

References

State ex rel. Clark v. District Court et al., 103 M 145, 146, 61 P 2d 836.

9797. Costs of demurrer or motion.

Where a mortgage foreclosure suit was dismissed by plaintiff before the trial court passed upon defendant's demurrer to the complaint, contention of plaintiff, on appeal by defendant from an order

denying him part of his costs, that by dismissing the action he (plaintiff) in effect confessed the demurrer and that defendant, therefore, could recover no costs other than those allowed under section

9797, Revised Codes, providing that where a demurrer or motion is sustained, the losing party must pay to the other \$10 as

costs, held without merit. *Graham et al. v. Superior Mines*, 100 M 427, 433, 49 P 2d 443.

9798. Counsel fees on foreclosure of mortgage.

Section 9798, Revised Codes, making it incumbent upon the district court in a mortgage foreclosure action to allow a reasonable attorney's fee is reciprocal, and therefore applicable to plaintiff and defendant. *Graham et al. v. Superior Mines*, 100 M 427, 432, 49 P 2d 443.

9802. What are costs and disbursements.

Fees and mileage paid to one not an officer and a minor for serving subpoenas upon witnesses held properly stricken from a cost bill, since one under twenty-one years of age cannot be an officer and under section 9802, Revised Codes, mileage is recoverable only if, *inter alia* paid or owing "officers". *Gahagan v. Gugler*, 100 M 599, 603, 52 P 2d 150.

Held, that expense incident to a physical examination of an injured workman and the physician's report thereon is not recoverable; hence the district court, on appeal by the claimant, properly struck the item from the memorandum of costs. *Lunardello v. Republic Coal Co.*, 101 M 94, 101, 53 P 2d 87.

In construing section 9802, Revised Codes, prescribing what items of costs and disbursements are recoverable by successful party, effect must be given to every provision thereof, including the last relating to "such other reasonable and neces-

sary expenses" as are taxable according to the course and practice of the court. *Gahagan v. Gugler*, 103 M 521, 523 et seq.

Id. Held, that the expense incident to the preparation of type-written briefs for use in the supreme court on appeal, though not specifically allowable under section 9802, Revised Codes, was properly recoverable as costs under the provision of the section making such other reasonable and necessary expenses as are taxable according to the course and practice of the court a proper item of costs where the claimant showed by a number of affidavits of attorneys that it was the course and practice of district courts of the state to allow such items of costs, opposing counsel filing an affidavit to the contrary.

Costs are not allowable unless expressly authorized by statute. (Sec. 9802, Rev. Codes) *Swanson v. Gnose*, 106 M 262, 265, 76 P 2d 643.

9803. Bill of costs.

Under section 9803, Revised Codes, declaring that a party dissatisfied with the costs claimed by his opponent must "file and serve a notice to have the same taxed", the notice may not be held insufficient for failure to specify the items of costs to be attacked on the motion to retax them. *Gahagan v. Gugler*, 100 M 599, 605, 52 P 2d 150.

Held, that section 9803, Revised Codes, declaring that the party in whose favor

judgment is rendered, and who claims his costs, must within five days after notice of the decision of the court deliver to the clerk and serve upon the adverse party a memorandum of his costs and necessary disbursements, applies not only to matters arising in the district court but as well to original proceedings commenced in the supreme court. *State ex rel. Clark v. District Court et al.*, 103 M 145, 147, 61 P 2d 836.

9805. Costs on appeal—how claimed.

Held, that section 9803, Revised Codes, declaring that the party in whose favor judgment is rendered, and who claims his costs, must within five days after notice of the decision of the court deliver to the clerk and serve upon the adverse party a memorandum of his costs and necessary

disbursements, applies not only to matters arising in the district court but as well to original proceedings commenced in the supreme court. *State ex rel. Clark v. District Court et al.*, 103 M 145, 147, 61 P 2d 836.

9806. Interest and costs included in judgment.

References

Gahagan v. Gugler, 100 M 599, 603, 52 P 2d 150.

CHAPTER 90, UNIFORM DECLARATORY JUDGMENTS ACT

9835.1. Scope.

References

Toole County Irr. Dist. v. State et al., 104 M 420, 427, 67 P 2d 989.

CHAPTER 91, WRIT OF REVIEW

9836. Writ of review defined.

References

Shaffroth et al. v. Lamere et al., 104 M 175, 179, 65 P 2d 610.

9837. When and by what courts granted.

A writ of certiorari may be granted only where there is no appeal from the order or judgment complained of. *Shaffroth et al., v. Lamere et al.*, 104 M 175, 179, 65 P 2d 610.

9838. Application for—how made.**References**

Pelletier v. Glacier County, 107 M 221, 226, 82 P 2d 595.

9839. The writ to be directed to the inferior tribunal, etc.

Though under section 9839, Revised Codes, it is the duty of the clerk of the district court to prepare the return required by the supreme court on issuance of a writ of certiorari, the court to which the writ is directed has the power to order the court stenographer to prepare not only

a transcript of the evidence heard in the particular case, but the entire transcript, as one of his implied duties by reason of his official position as a court officer, without extra compensation. *Pelletier v. Glacier County*, 107 M 221, 227, 82 P 2d 595.

CHAPTER 92, WRIT OF MANDATE**9848. When and by what court issued.**

Where a board of county commissioners has acted in awarding a contract for county printing, its discretion cannot be controlled by mandamus, and a court may not substitute its judgment for that of the board. *State v. Board of County Commrs.*, 106 M 251, 261, 76 P 2d 648.

As against a public officer, the writ of mandamus issues to compel the performance of an act which the law specially enjoins upon him as a duty resulting from his office; it will not issue except upon a showing of a clear, legal right to the relief sought. *State ex rel. Sadler v. Evans et al.*, 106 M 286, 289, 77 P 2d 394.

Held, that where a newly elected treasurer of a firemen's relief association petitioned for a writ of mandate to compel

the former treasurer to turn over the funds and property of the association to him, and an alternative writ was issued, but in the course of the proceeding a substitution of parties defendant was made, thereby injecting into the matter the question of title to the office of treasurer thus warranting the remedy by writ of **quo warranto**, the district court erred in quashing the alternative writ issued and dismissing the proceeding instead of disposing of the cause on its merits as shown by the admitted or uncontradicted pleadings. *State ex rel. Casey v. Brewer et al.*, 107 M 550, 555, 88 P 2d 49.

References

State ex rel. Wilson v. Weir et al., 106 M 526, 532, 79 P 2d 305.

9852. The adverse party may answer under oath.**References**

State ex rel. Eden v. Schneider, 102 M 286, 291, 57 P 2d 783.

9853. If an essential question of fact is raised, the court may order a jury trial.**References**

State ex rel. Eden v. Schneider, 102 M 287, 291, 57 P 2d 783.

9855. Motion for new trial—where made.**References**

State ex rel. Lynch v. Batani et al., 103 M 353, 362, 62 P 2d 565.

9857. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.**References**

State ex rel. Eden v. Schneider, 102 M 286, 291, 57 P 2d 783.

9858. Damages, costs and peremptory mandate allowed applicant, when.

Under section 9858, Revised Codes, a successful relator in a mandamus proceeding is entitled to recover a reasonable attorney's fee as damages, and the supreme court in such a proceeding heard by it may fix such fee without hearing proof as to the services performed by the attorney therein. *State ex rel. Lynch v.*

Batani et al., 103 M 353, 364, 62 P 2d 565.

Where the relator in a proceeding for writ of prohibition instituted in the supreme court against a county board or officer secures judgment in his favor and the respondent made defense in good faith, he is entitled to recover his damages sus-

tained as a result of the proceeding, including a reasonable attorney's fee and costs, which items are a proper claim

against the county. State ex rel. Williams v. Kamp et al., 106 M 444, 452, 78 P 2d 585.

CHAPTER 93, WRIT OF PROHIBITION

9861. Prohibition defined.

Where a petition for a writ of supervisory control (a writ which lies only where the lower tribunal has committed error within jurisdiction) also prays for any other appropriate relief and it appears that the court has acted without or in excess of jurisdiction, the supreme court will treat the petition as one for a writ of prohibition. State v. District Court et al., 103 M 487, 498, 63 P 2d 141.

Id. The writ of prohibition is not, strictly speaking, a proceeding to review a proceeding in a lower court in its entirety; it is a new proceeding in the higher court to determine whether the lower court has exceeded its jurisdiction, and in arriving at its determination the reviewing court may consider facts which were not before the court whose action is sought to be reviewed.

The supreme court will arrest proceedings of the trial court in a contempt mat-

ter (or any other) by writ of prohibition only when they are in excess of its jurisdiction; the right of the district court to hear and determine the matter before it, i. e., its jurisdiction, carrying with it the right to make a wrong decision. State et al. v. District Court et al., 105 M 281, 287, 72 P 2d 1014.

While section 9861, Revised Codes, limits the application of the writ of prohibition to cases in which there is no plain, speedy and adequate remedy in the ordinary course of law, the remedy by appeal does not necessarily defeat relief by the writ; if in such a case it appears that the district court, sought to be prevented from proceeding further, cannot render a valid judgment because of lack of jurisdiction, the writ may run to end litigation and save expense. State ex rel. King v. District Court, 107 M 476, 481, 86 P 2d 755.

9862. Where and when issued.

A judgment creditor who had secured a money judgment on default of defendant and purchased real property of defendant on execution sale, assigning the certificate of sale to his attorney who secured sheriff's deed, held the party "beneficially interested" within the meaning of section 9862, Revised Codes, and as such

entitled to petition for writ of prohibition to restrain the court from further proceeding in the cause after vacating the default judgment. State ex rel. Redle v. District Court 102 M 541, 545, 59 P 2d 58.

References

State ex rel. King v. District Court, 107 M 476, 481, 86 P 2d 755.

9864. Certain provisions of the preceding chapter applicable.

Where the relator in a proceeding for writ of prohibition instituted in the supreme court against a county board or officer secures judgment in his favor and the respondent made defense in good faith, he is entitled to recover his damages sus-

tained as a result of the proceeding, including a reasonable attorney's fee and costs, which items are a proper claim against the county. State ex rel. Williams v. Kamp et al., 106 M 444, 452, 78 P 2d 585.

CHAPTER 94, ISSUANCE OF WRITS AND RULES OF PRACTICE AND APPEALS

9866. Certain provisions applicable.

References

Shaffroth et al. v. Lamere et al., 104 M 175, 179, 65 P 2d 610.

CHAPTER 96, SUBMISSION OF CONTROVERSIES WITHOUT ACTION

9872. Controversies—how submitted without action.

References

State ex rel. Casey v. Brewer et al., 107 M 550, 555, 88 P 2d 49.

CHAPTER 100, CONTEMPTS

9908. What acts or omissions are contempts.

The power to punish for contempt is inherent in courts of record and a necessary incident to the exercise of judicial functions, and in the absence of constitu-

tional or statutory provision therefor, one charged with contempt of court is not entitled to a jury trial. In re Nelson et al., 103 M 43, 53, 60 P 2d 365.

9910. A contempt committed in the presence of the court may be punished summarily—when not so committed, an affidavit or statement shall be made.

Affidavit charging contempt committed without the presence of the court must contain some direct charge, either positively or upon information and belief, that the person charged committed an act constituting a contempt; hence an affidavit

setting forth many facts directly and positively, in which appeared certain statements made on information and belief, was not for that reason insufficient. *State ex rel. Young v. District Court*, 102 M 487, 491, 58 P 2d 1243.

9917. Judgment and penalty, if guilty.

References

Nadeau v. Texas Co., 104 M 558, 572, 69 P 2d 586, 593.

9921. Judgment and orders in such cases final.

While there is no appeal from a judgment or order made in a contempt case, the matter may be reviewed on writ of certiorari, and on such writ the supreme court may review the evidence to determine whether the charges against the contemnor are unsupported by the evidence or the findings are contrary thereto or the judgment of contempt has no evidence to support it, but the court may not re-

view the evidence to determine the preponderance thereof. *State ex rel. Tague v. District Court et al.*, 100 M 383, 387, 47 P 2d 649. (See also *State et al. v. District Court et al.*, 105 M 281, 287, 72 P 2d 1014.)

References

In re Nelson et al., 103 M 43, 53, 60 P 2d 365.

CHAPTER 102, DISSOLUTION OF CORPORATIONS BY ACT OF DIRECTORS

9929. Voluntary dissolution of corporations.

A bank going into voluntary liquidation may not prefer one creditor to another; and if its assets be distributed to others in preference to one who has a claim against

it, he has a right of action. *Fitzpatrick v. Stevenson et al.*, 104 M 439, 445, 67 P 2d 310.

9932. Same with reference to foreign corporations.

References

Fitzpatrick v. Stevenson et al., 104 M 439, 445, 67 P 2d 310.

CHAPTER 103, EMINENT DOMAIN

9934. What are public uses.

References

State v. District Court et al., 103 M 30, 41, 60 P 2d 380.

9936. Private property defined—classes enumerated.

References

State v. District Court et al., 103 M 30, 39 et seq., 60 P 2d 380.

9939. Jurisdiction in district court. All proceedings under this chapter must be brought in the district court of the county in which the property, or some part thereof, is situated. They must be commenced by filing a complaint and issuing a summons thereon. [As amended Sec. 1, Ch. 22, L. 1937.]

9943. Power of court to appoint commissioners, etc.

Under the eminent domain statute the district court has the power to determine all matters presented except the fixing of damages to be paid the owner of the

land condemned, which is the function of the commissioners appointed by the court. *State v. District Court et al.*, 103 M 30, 41, 60 P 2d 380.

9945. The date with respect to which compensation shall be assessed, and the measure thereof.

The measure of compensation for the taking of property by eminent domain is, under section 9945, Revised Codes, its actual value, i. e., the market value, or the price which in all probability may be

obtained from fair negotiations where the seller is willing to sell and the buyer desires to buy. *State v. Lee et al.*, 103 M 482, 485, 63 P 2d 135.

CHAPTER 107, PUBLIC ADMINISTRATOR

10000. Every year to make and publish report of condition of estates. The public administrator must, once each year, make to the district court or a judge thereof, under oath, a return of all estates of decedents which have come into his hands, the value of the same:

1. The money which has come into his hands from each estate.
2. What he has done with it.
3. The amount of his fees and expenses incurred.
4. The balance, if any, remaining in his hands.
5. Post a copy of the same in the office of the clerk of the district court of the county. [As amended Sec. 1, Ch. 116, L. 1939.]

CHAPTER 108, GENERAL JURISDICTION OF DISTRICT COURTS

10018. Jurisdiction of the court over the estate—when exercised.

References

State v. District Court et al., 105 M 510, 515, 74 P 2d 8.

State ex rel. Haynes v. District Court, 106 M 578, 585, 81 P 2d 422.

CHAPTER 109, PROBATE OF WILLS—PETITION NOTICE
AND PROOF

10028. Hearing proof of will after proof of service of notice.

References

Minter et al. v. Minter et al., 103 M 219, 230, 62 P 2d 283.

10030. Proof required when no contest.

While section 6080, subd. 4, Revised Codes, makes the indispensable requirement to a valid will that two attesting witnesses must sign it, the satisfactory testimony of one witness entitles the will to probate as against the objection of

defective execution of the attestation clause. (See sec. 10505.) In re Bragg's Estate, 106 M 132, 138, 76 P 2d 57.

References

Minter et al. v. Minter et al., 103 M 219, 230, 62 P 2d 283.

CHAPTER 110, CONTESTING PROBATE OF WILLS

10032. Contestant to file grounds of contest, and petitioner to reply.

The statute relating to the matter of contesting the probate of wills (secs. 10032 et seq., Rev. Codes) must be strictly followed. In re Augestad's Estate, 107 M 619, 620, 88 P 2d 32.

Id. In the absence of a provision in the above statute for the filing of a demurrer to a petition for the probate of a holographic will, the trial court's action in sustaining the demurrer and dismissing

the petition, instead of hearing it after objections filed and issues joined as provided by section 10032, was in effect a refusal to take jurisdiction, an error which could have been corrected by mandamus.

References

In re Cissel's Estate, 104 M 306, 320, 66 P 2d 779.

In re Bragg's Estate, 106 M 132, 160, 76 P 2d 57.

10036. Testimony reduced to writing for future evidence.

References

In re Bragg's Estate, 106 M 132, 136, 76 P 2d 57.

CHAPTER 111, PROBATE OF FOREIGN WILLS

10039. Wills proved in other states to be recorded, when and where. All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the district court of any county in which the testator shall have left any estate, or

shall have been a resident at the time of his death. [As amended Sec. 1, Ch. 44, L. 1939.]

CHAPTER 112, CONTESTING WILLS AFTER PROBATE

10042. The probate may be contested within one year.

Under section 10042, Revised Codes, one desiring to contest or set aside the probate of a will must act within one year after probate; any proceeding thereafter in that behalf (in the instant case on the ground

that probate was secured by extrinsic fraud) is addressed to the equitable jurisdiction of the district court. *Minter et al. v. Minter et al.*, 103 M 219, 228, 62 P 2d 283.

CHAPTER 114, EXECUTORS AND ADMINISTRATORS—ISSUANCE AND FORM OF LETTERS TESTAMENTARY AND ADMINISTRATION

10062. Acts of a portion of executors valid.

One of two administrators could not, under section 10062, Revised Codes, effectively bind the estate of a deceased partner by an agreement with the surviving partner in charge of the partnership

landed property under which the administrator accepted a portion of the produce from the land as rental over objection of his co-representative. *Thompson et al. v. Flynn*, 102 M 446, 453, 58 P 2d 769.

CHAPTER 115. PERSONS TO WHOM AND ORDER IN WHICH LETTERS OF ADMINISTRATION ARE GRANTED

10068. Order of persons entitled to administer—partner not to administer. Administration of estate of all persons dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled to preference thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The public administrator.
9. A creditor.
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of the estate. [As amended Sec. 1, Ch. 219, L. 1939.]

CHAPTER 116, PETITION FOR LETTERS OF ADMINISTRATION AND ACTION THEREON

10074. Application—how made.

Where a general creditor of an estate whose claim against it amounted to \$22,000 in his action to have a default judgment against the administrator in a foreclosure suit set aside as constructively fraudulent for failure to plead the invalidity of the mortgage based on the omission of the mortgagee to file a renewal affidavit, asserted that the estate

was insolvent, the showing made by the holder of the mortgage in her petition for the appointment of the administrator, under section 10074, Revised Codes, that the property of the estate did not exceed in value the sum of \$1,075, held sufficient evidence that the estate was prima facie insolvent. *Missoula T. & S. Bank v. Boos et al.*, 106 M 294, 297, 77 P 2d 385.

10078. Hearing of application.**References**

State ex rel. McCabe v. District Court, 106 M 272, 279, 76 P 2d 634.

**CHAPTER 117, PROCEEDINGS FOR REVOCATION OF LETTERS
OF ADMINISTRATION****10083. Revocation of letters of administration.**

If the district court in appointing the nominee of a minor nineteen years of age as his guardian, where the father also had petitioned for preference appointment, did so without regard to the fitness of the father (sec. 10402, Rev. Codes), his qualifications were never passed upon; hence the order of appointment did not

become *res judicata* on that issue, and the father had a plain, speedy and adequate remedy at law under section 10083 et seq., Revised Codes, by petition for ousting the guardian appointed, and therefore was not entitled to a writ of supervisory control to annul the order. State v. District Court et al., 105 M 510, 517 et seq., 74 P 2d 8.

**CHAPTER 118, OATHS AND BONDS OF EXECUTORS AND
ADMINISTRATORS****10088. Bond of administrators and executors, form and requirement of.**

Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Montana, with two or more sufficient sureties or a sufficient surety company, to be approved by the district court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than the value of the personal property and the annual rents and profits of real property belonging to the estate, nor more than twice the value of such personal property and rents and profits; provided that upon written request of all the heirs, devisees or legatees and all being over twenty-one years of age and entitled to all of the estate upon distribution, the court may in its discretion fix the penalty of the bond at any sum less than the value of the personal property and the annual rents and profits of the real property belonging to the estate. [As amended Sec. 1, Ch. 167, L. 1937.]

References

State v. District Court et al., 105 M 37, 42, 69 P 2d 119.

10089. Additional bonds. Except when it is expressly provided in the will that no bond shall be required of the executor, the court or judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court or judge that the penalty of the bond given before receiving letters or any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold. [As amended Sec. 1, Ch. 150, L. 1937.]

10096. When bond may be dispensed with. When it is expressly provided in the will that no bond shall be required of the executor, or when it appears to the satisfaction of the court or judge that the estate has, at the time of hearing on the application for letters in such estate, no assets warranting the necessity of a bond, letters testamentary or letters of administration with the will annexed may issue, without any bond,

unless the court or judge, for good cause, require one to be executed; but the executor or administrator with the will annexed may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond as in other cases. [As amended Sec. 2, Ch. 150, L. 1937.]

Neither the fact that on appeal from a judgment in a will contest, appellant, as in other cases, is required at some expense to secure a transcript of the evidence where the evidence is essential to a proper determination of the appeal, nor the fact that the executor under the will was not required to execute a bond for the protection of the estate, is a sufficient

reason for the issuance of the writ of supervisory control seeking the annulment of the judgment, since, in the latter case, the court under section 10096, Revised Codes, as amended by chapter 150, laws of 1937, may for good cause order that a bond be executed notwithstanding such testamentary provision. *State v. District Court et al.*, 105 M 37, 42, 69 P 2d 119.

10096.1. Petition concerning excessive bond. Any person interested in any estate may by verified petition represent to the court or judge that any bond theretofore given in such estate is for a greater amount than the assets of the estate at the time of such petition justify. [En. Sec. 1, Ch. 179, L. 1937.]

10096.2. Reduction of bond. If the court or judge is satisfied from such verified petition or upon evidence introduced at a hearing thereon if such hearing be ordered by the court or judge, then such court or judge may make an order reducing the penalty of such existing bond, as to future acts of such executor or administrator, to an amount not less than the then value of the personal property and annual rents and profits of real estate belonging to the estate. [En. Sec. 2, Ch. 179, L. 1937.]

10096.3. Liability of former surety. If any order be made reducing the penalty of a bond the former surety shall remain liable for future acts, in the reduced amount, unless such executor or administrator give a new bond in the reduced amount. But on the approval by a court or judge of a new bond in the reduced amount the surety on the former bond shall not be liable for any subsequent act, default, or misconduct of the executor or administrator. [En. Sec. 3, Ch. 179, L. 1937.]

CHAPTER 119, SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES

10107. Special administrators—when appointed.

A special administrator, within the meaning of section 10107, Revised Codes, declaring that the court or judge **must** appoint such an officer in certain contingencies, is one appointed to take temporary charge of an estate until general letters are issued, or during the suspension of a general administrator, and the like; he is an emergency officer appointed solely for the purpose of conserving the property in default of a qualified executor or general administrator. *State ex rel. McCabe v. District Court*, 106 M 272, 275, 76 P 2d 634.

Id. Construing section 10107, *supra*, with reference to the declaration that "the court or judge **must** appoint a special administrator to collect and take charge of the estate" of a decedent, under certain conditions, held that by the use of the word "must" the court is not deprived of all discretion in the matter, but that such compulsory appointment need only be made where a showing of necessity therefor is made for the preservation of the estate, the word "must" being given the meaning of "may".

10108. Special letters may issue at any time.

References

State ex rel. McCabe v. District Court, 106 M 272, 277, 76 P 2d 634.

10109. Preference given to persons entitled to letters.

References

State ex rel. McCabe v. District Court, 106 M 272, 276, 76 P 2d 634.

10112. When letters testamentary or of administration are granted, special administrator's powers cease.

References

State ex rel. McCabe v. District Court, 106 M 272, 276, 76 P 2d 634.

**CHAPTER 122, REMOVAL AND SUSPENSION OF EXECUTORS
AND ADMINISTRATORS**

10124. Suspension of powers of executor.

In view of the power of the district court in probate matters under section 10124 et seq., Revised Codes, relative to the removal and suspension of executors and administrators for misfeasance or nonfeasance, contention of a public administrator who sought appointment as special administrator of an estate upon the death of an administrator appointed

at the request of the widow and who nominated a second person as her successor, that the widow and her second nominee had such adverse interests as to render both improper persons to have control of the estate, held not meritorious. State ex rel. McCabe v. District Court, 106 M 272, 280, 76 P 2d 634.

**CHAPTER 123, INVENTORY AND APPRAISEMENT—POSSESSION
OF ESTATE**

10139. Executor or administrator to deliver real estate to heirs or devisees, when.

References

Gaines v. Van Demark, 106 M 1, 9, 74 P 2d 454.

CHAPTER 125, PROVISIONS FOR THE SUPPORT OF THE FAMILY

10144. Widow and minor children may remain in decedent's house, etc.

References

In re Wilson's Estate, 102 M 178, 196, 56 P 2d 733.

10145. All property exempt from execution to be set apart for use of family.

References

In re Wilson's Estate, 102 M 178, 202, 56 P 2d 733.

10146. May make extra allowance.

References

In re Wilson's Estate, 102 M 178, 188, 56 P 2d 733.

CHAPTER 128, CLAIMS AGAINST ESTATE

10173. Time within which claims against an estate to be presented.

The statute of nonclaim (sec. 10173, Rev. Codes) providing that unless claims against estates are presented within a specified time they are forever barred, does not apply to a claim arising out of an alleged agreement of decedent to make a

will bequeathing a specified sum of money to one in consideration of services rendered to decedent during her lifetime. Erwin v. Mark et al., 105 M 361, 370, 73 P 2d 537.

10178. Limitation of actions on rejected claim. When a claim is rejected, either by the executor or administrator, or the judge, the executor shall within ten (10) days thereafter, file such rejected claim with the clerk of court. Upon the filing of a rejected claim, the clerk of court shall, within three days thereafter, mail a notice of said rejection to the claimant, at his address as designated in said claim, and he shall file an affidavit of such mailing. The claimant must bring suit in the proper court against the executor or administrator within three (3) months after the date such rejected claim is filed, if it be then due, or within two (2)

months after it becomes due, otherwise the claim shall be forever barred. When the claimant has been misled by the false statements of executor, administrator, or his attorney, or personal representatives, regarding the action taken by the executor or administrator on the claim whereby the claimant has been led to believe that his claim was either approved or not yet acted upon, and because of such false information he fails to bring suit within the time herein provided, the time for bringing suit on such claim is hereby extended for a period of three months from and after the discovery by the claimant of the falsity of such statements, provided that suit must be commenced prior to the approval of the final account of the executor or administrator. [En. Sec. 1, Ch. 192, L. 1939.]

10180. Claims must be presented before suit.

References

Swanson v. Gnose, 106 M 262, 267, 76 P 2d 643.

10184. Allowance of claim in part.

Contention of defendant administrator in an action to recover for work done at the request of defendant's decedent, that but for the fact that plaintiff presented his claim for a large amount, two-thirds of which had been paid (as found by the jury), instead of for the balance due which would have been allowed and the suit rendered unnecessary, and the fact that he had no other alternative than to

pay it as presented, an allowance of an attorney's fee was not permissible under section 3089, Revised Codes, held not maintainable in the state of the record and in view of section 10184, permitting an administrator to allow claims in part, and 10188, providing for reference of such a matter with the approval of the court or judge. Swanson v. Gnose, 106 M 262, 267, 76 P 2d 643.

10188. May refer doubtful claims—effect of referee's allowance or rejection.

Contention of defendant administrator in an action to recover for work done at the request of defendant's decedent, that but for the fact that plaintiff presented his claim for a large amount, two-thirds of which had been paid (as found by the jury), instead of for the balance due which would have been allowed and the suit rendered unnecessary, and the fact that he had no other alternative than to

pay it as presented, an allowance of an attorney's fee was not permissible under section 3089, Revised Codes, held not maintainable in the state of the record and in view of section 10184, permitting an administrator to allow claims in part, and 10188, providing for reference of such a matter with the approval of the court or judge. Swanson v. Gnose, 106 M 262, 267, 76 P 2d 643.

CHAPTER 129, SALES OF PROPERTY OF ESTATE IN GENERAL— BORROWING MONEY—SALES OF PERSONAL PROPERTY

10195. Estate chargeable with debts—no priority.

References

Gaines v. Van Demark, 106 M 1, 10, 74 P 2d 454.

10204. Sale of personal property. The sale of personal property must be made at public auction, after public notice given for at least ten days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reason shown the court, or a judge thereof, orders a private sale, or a shorter notice. Public sales of such property must be had at the courthouse door, or at the residence of the decedent, or at some other public place; but no sale shall be made of any personal property which is not present at the time of sale, and the sale must be for cash, unless the court or judge otherwise order. The sale of stocks and bonds, grains, or any other personal property, with the exception of livestock, having an established market, may

be had at private sale, with or without notice in the discretion of the court or judge, and the executor or administrator shall be held accountable for the market value of such personal property at the time such sale was held. [As amended Sec. 1, Ch. 77, L. 1937.]

CHAPTER 131, SALE OF REAL ESTATE AND OF CONTRACTS FOR PURCHASE OF LANDS

10210. Executor or administrator may sell property, when.

Where the statutory requirements relative to a sale of a decedent's real property (sec. 10210, Rev. Codes) up to the time of confirmation thereof were observed, the order of confirmation becomes

a judgment and *res judicata*, operates to divest the heirs of their title, and cures all errors and nonjurisdictional irregularities. State ex rel. Eden v. Schneider, 102 M 286, 294, 57 P 2d 783.

10227. When order of confirmation is to be made, and when not.

Section 10227, Revised Codes, declaring that if after confirmation of a sale of estate real property the purchaser fails to comply with the terms of sale, the court may, on motion of the executor or administrator, order a resale, is a special statute,

fixing no time within which such motion must be made, as does the general statute with relation to setting aside judgments or orders (sec. 9187, Id.). State ex rel. Eden v. Schneider, 102 M 286, 294, 57 P 2d 783.

10228. Conveyances.

References

State ex rel. Eden v. Schneider, 102 M 286, 293, 57 P 2d 783.

CHAPTER 133, GENERAL POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS—TO RECOVER PROPERTY—TO MAINTAIN ACTIONS—OTHER POWERS

10261. Surviving partner to settle up business—interest therein to be appraised—account to be rendered.

Pending an accounting with the estate of a deceased partner, the surviving partner's right in real property of the partnership is something more than that of a tenant in common; he is legally in possession for the purpose of liquidating the affairs of the partnership and neither the personal representative nor the heirs of the deceased partner have any right to the use or possession of the property.

Thompson et al. v. Flynn, 102 M 446, 449 et seq.

Id. On the death of one of two partners the surviving partner, as such, is entitled to the control and management of the property of the firm, and until the partnership administration is closed, the possession of its real property is adverse to the heirs, who otherwise are tenants in common with the surviving partner.

CHAPTER 134, CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS

10269. Petition for executor or administrator to make conveyance, and notice of hearing. On the presentation of a verified petition by the executor or administrator, or by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court, or a judge thereof, shall appoint a time and place for hearing the petition, and shall order notice thereof to be served on the executor or administrator personally when he is not the petitioner, and a copy thereof served upon each known heir, or, in the event of minor or incompetent heirs, upon the duly appointed and qualified guardian for such incompetent or minor, not less than twenty (20) days prior to the date of said hearing; or the court may order notice by publication for four successive weeks and such newspaper in the county as

the court may designate, provided, however, that if such contract was of record at the date of the death of the person executing such contract, then, in that event, notice of such hearing may be given by serving such notice on the executor or administrator personally, when he is not the petitioner, and posting such notice in three public places in the county where the court is held, for at least ten (10) days prior to the day fixed for the hearing; provided, further, that if the written consent of all the known heirs over the age of twenty-one (21) years and the guardian, duly authorized, of all minor or incompetent heirs be obtained and filed in the court before which said hearing is pending, then no other or further notices shall be required. [As amended Sec. 1, Ch. 173, L. 1937.]

10279. Validation of sales—curative deeds. All sales by executors and administrators of their decedent's real and personal property, and all sales by guardians of their ward's real and personal property, in this state, which, previous to the date of this amendatory act, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers to such executors or administrators or guardians, or their successors, in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain an executor's or administrator's or guardian's deed or conveyance to such purchaser for such real or personal property; and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said executor or administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity. [As amended Sec. 1, Ch. 118, L. 1939.]

CHAPTER 135, LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS

10282. Executor or administrator to be charged with all estate, etc.

An administrator is chargeable with the whole of an estate coming into his possession, at the value of the appraisement thereof, but is not liable for loss suffered by reason of decrease or destruction of any part of it without fault on his part; he is not an

insurer and liable only for losses sustained in consequence of bad faith or the want of due diligence in handling the property. In re Astibia's Estate, 100 M 224, 235, 46 P 2d 712.

10283. Not to profit or lose by estate.

An administrator is chargeable with the whole of an estate coming into his possession, at the value of the appraisement thereof, but is not liable for loss suffered by reason of decrease or destruction of any part of it without fault on his part; he is not an

insurer and liable only for losses sustained in consequence of bad faith or the want of due diligence in handling the property. In re Astibia's Estate, 100 M 224, 235, 46 P 2d 712.

10284. Uncollected debts without fault.

Section 10284, Revised Codes, declaring that an administrator is accountable for any debts due the decedent which remain unpaid because of his fault, has no application in a case where loss is sustained by reason of the administrator's action in selling es-

tate property on credit and without security although ordered by the court to sell it for cash; in such circumstances a "debt due the decedent" is not involved. In re Astibia's Estate, 100 M 224, 235 et seq., 46 P 2d 712.

10285. Expenses allowed executor or administrator—attorney's fees—compensation of executor provided in will.

References

In re Astibia's Estate, 100 M 224, 235, 46 P 2d 712.

10287. Compensation of executors and administrators.

Where an allowance of an executor's fee for extraordinary services was made in a separate order on the same day on which decree of final settlement of account was rendered in an estate matter, the order making the allowance must be considered and read into the decree of settlement, and an

interested party attacking the special allowance on the ground of inadvertence and fraud properly proceeded by motion to correct the decree of settlement, under the provisions of section 10303, Revised Codes. State ex rel. Regis v. District Court et al., 102 M 74, 78, 55 P 2d 1295.

CHAPTER 136, ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS

10288. Exhibit of receipts and disbursements and claims allowed.

References

State ex rel. Regis v. District Court et al., 102 M 74, 79, 55 P 2d 1295.

In re Russell's Estate, 102 M 301, 304, 59 P 2d 777.

10300. When settlement is final, notice must so state—final settlement, partition, and distribution.

References

State ex rel. Regis v. District Court et al., 102 M 74, 83, 55 P 2d 1295.

10303. Settlement of accounts to be conclusive, when and when not.

While the rule that the settlement and allowance of an administrator's accounts is conclusive upon all persons interested in the estate (except as to those laboring under some legal disability), in the absence of an affirmative showing on the face of a claim that it is illegal, applies to the confirmation of sales made and reported, in a proceeding by an heir seeking an accounting and his removal the administrator cannot discharge himself from liability by showing that his disregard of the court's order in the premises was disclosed in his report of a sale which was confirmed. In re Astibia's Estate, 100 M 224, 234, 46 P 2d 712.

Where an allowance of an executor's fee for extraordinary services was made in a separate order on the same day on which decree of final settlement of account was rendered in an estate matter, the order making the allowance must be considered and read into the decree of settlement, and an

interested party attacking the special allowance on the ground of inadvertence and fraud properly proceeded by motion to correct the decree of settlement, under the provisions of section 10303, Revised Codes. State ex rel. Regis v. District Court et al., 102 M 74, 78 et seq., 55 P 2d 1295.

Where at the time of the hearing of an executor's account the attorney of the estate presented his petition for allowance of his fees, the decree of settlement and the order allowing the fees, though separate instruments, were in fact parts of one proceeding—the settlement of the account—and the residuary legatee, proceeding under section 10303, Revised Codes, could properly move the court that the order relating to the fees be set aside on the ground of inadvertence or fraud. State ex rel. Clark v. District Court, 102 M 227, 234, 57 P 2d 809.

Id. The term "inadvertence", within the meaning of section 10303, supra, means a want of care, inattention, carelessness, negligence or oversight.

CHAPTER 137, THE PAYMENT OF DEBTS OF THE ESTATE

10307. Order of payment of debts.

References

Erwin v. Mark et al., 105 M 361, 373, 73 P 2d 537.

10309. Estate insufficient, a dividend to be paid.

References

Erwin v. Mark et al., 105 M 361, 373, 73 P 2d 537.

CHAPTER 139, DETERMINATION OF HEIRSHIP AND INTEREST IN THE ESTATE

10324. Proceedings to determine heirship.

The district court, when sitting in probate, is a court of record exercising general jur-

isdiction by virtue of the Constitution; it is not one of limited jurisdiction, and in

heirship proceedings has all the power and jurisdiction made inherent in district courts by the Constitution and statutes. In *re* Baxter's Estate, 101 M 504, 515 et seq., 54 P 2d 869.

Id. A decree in a proceeding to determine heirship, one *in rem* not appealed from, was *res judicata* binding on all the world, including lost, unknown or absent heirs.

Id. In the construction of a statute it is not permissible to read something into or out of it to make it understandable or workable, but in construing an Act such

as the chapter on Determination of Heirship (secs. 10324-10326, Rev. Codes), a construction must be adopted that will give effect to all of its provisions.

Id. Held, that the district court sitting in probate to determine heirship, has jurisdiction under sections 10324-10326, Revised Codes, not only to ascertain and determine the rights of heirs and individuals who may take by succession or will, but also those of all others who claim rights by virtue of assignments from heirs.

10325. Appearance of parties.

A power of attorney given by the heir of a local estate, residing in a foreign country, to the Consul General of that country in the United States to appoint an attorney to represent him in the estate matter, acknowledged as required by section 6908, Revised Codes, the notary's authority being duly certified by the United States Consul, held a sufficient compliance with the re-

quirements of section 10325, relative to proof of authority of counsel in heirship matters, and if the court erred in refusing to require the attorney to prove his authority, the error was nonprejudicial. In *re* Astibia's Estate, 100 M 224, 233, 46 P 2d 712.

References

In *re* Baxter's Estate, 101 M 504, 515, 54 P 2d 869.

10326. Trial and judgment.

Failure of heirs to attack assignments of their interests and powers of attorney for extrinsic fraud in proceedings to establish heirship, decree in which was not entered until about a year and a half after they had been begun, precluded attack thereon in the subsequent proceeding for distribution, in view of the provision of the

statute (sec. 10326, Rev. Codes) declaring that the final determination of the court in the heirship proceedings shall be conclusive in the distribution of the estate. (This ruling not to be understood that interested parties have no recourse on the ground of extrinsic fraud.) In *re* Baxter's Estate, 101 M 504, 515 et seq., 54 P 2d 869.

CHAPTER 140, FINAL DISTRIBUTION OF THE ESTATE— DISCHARGE OF EXECUTOR OR ADMINISTRATOR

10327. Distribution of estate—how made and to whom.

References

State ex rel. Regis v. District Court et al., 102 M 74, 83, 55 P 2d 1295.

10329. Distribution when decedent was not a resident of this state.

References

State ex rel. Hamilton v. District Court, 102 M 341, 346, 57 P 2d 1227.

10330. Decree to be made only after notice.

References

State ex rel. Regis v. District Court et al., 102 M 74, 83, 55 P 2d 1295.

CHAPTER 140-A, INHERITANCE BY ALIENS

10333.1. "Person" defined. "Person" as used in this act shall mean a corporation, association, copartnership, or any other legal entity, as well as a natural person, and the singular thereof shall include the plural. [En. Sec. 1, Ch. 104, L. 1939.]

10333.2. Aliens residing in foreign country may not take of deceased's estate, when. No person shall receive money or property, save and except mining property, as provided in section twenty-five, article III, of the constitution of the state of Montana, as an heir, devisee and/or legatee of a deceased person leaving an estate or portion thereof in the state of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator,

unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country. [En. Sec. 2, Ch. 104, L. 1939.]

10333.3. Disposal of property which alien may not take. In any estate where money or property would have vested in any person but for the provisions of section 10333.1, it shall be the duty of the executor or administrator thereof to set forth the name and residence of such person in his petition for letters and to do likewise in his petition for distribution, in which, also, he shall designate and describe the amount of money and/or property which, but for the provisions of this act, would have passed to said heir, legatee or devisee. Upon the final settlement of said estate upon order of the court it shall be the duty of said executor or administrator to deliver all money and/or property affected by such order of court to the county wherein it is situated, in the case of real property by delivering a certified copy of said order to the clerk and recorder of such county, whose duty it shall be to record the same and, in the case of money and/or other personal property, by delivering the same to the treasurer of said county. All property not theretofore converted into cash shall be sold by the county in the same manner as is property sold for taxes, provided that, in the case of real property the deed of said county shall make reference to the book and page of county records wherein is recorded said order of court transferring said real property to said county. [En. Sec. 3, Ch. 104, L. 1939.]

10333.4. Money received by county, disposal of. All money, including all money realized from the sale or sales of property delivered to the county by an executor or administrator under the provisions of this act, immediately upon its receipt by the county treasurer, shall be placed in the county general fund. [En. Sec. 4, Ch. 104, L. 1939.]

CHAPTER 143. SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATE

10352. Court not to lose jurisdiction of trust by distribution—accounts of trustees.

In a proceeding to set aside a testamentary trust, brought under section 10352, Revised Codes, an appeal from an order or decree made therein must be taken within sixty days after its making. (Sec. 10367).
In re Roberts' Estate, 102 M 240, 250, 58 P 2d 495.

CHAPTER 144. MISCELLANEOUS—ORDERS—PROCESS—MINUTES— RECORDS—TRIALS AND APPEALS

10355. Orders and judgments need not recite jurisdictional facts—orders to be entered in minutes.

References

In re Roberts' Estate, 102 M 240, 258, 58 P 2d 495.

10359. Style of citation.

References

State ex rel. Haynes v. District Court, 106 M 578, 587, 81 P 2d 422.

10362. Personal notice given by citation.

References

State ex rel. Haynes v. District Court, 106 M 578, 587, 81 P 2d 422.

10365. Rules of practice generally.**References**

State v. District Court et al., 105 M 510, 515, 74 P 2d 8.

State ex rel. Haynes v. District Court, 106 M 578, 584, 81 P 2d 422.

10366. New trials and appeals.**References**

In re Roberts' Estate, 102 M 240, 258, 58 P 2d 495.

State v. District Court et al., 105 M 37, 42, 69 P 2d 119.

State v. District Court et al., 105 M 510, 515, 74 P 2d 8.

10367. Within what time appeal must be taken.

In a proceeding to set aside a testamentary trust, brought under section 10352, Revised Codes, an appeal from an order or decree made therein must be taken within sixty days after its making. (Sec. 10367). In re Roberts' Estate, 102 M 240, 258, 58 P 2d 495.

Since under section 10367, Revised Codes, an appeal from a judgment in a will contest must be taken within sixty days after its entry, contention of petitioner for a writ of supervisory control to review the action of

the district court sitting probate in rejecting a special finding of the jury to the effect that testatrix in executing the will was acting under undue influence, that appeal would not afford adequate relief because of the time required in taking it; held not meritorious. State v. District Court et al., 105 M 37, 42, 69 P 2d 119.

References

State v. District Court et al., 105 M 510, 515, 74 P 2d 8.

10370. Court to appoint attorney for minor or absent heirs, devisees, or legatees or creditors—when, and what compensation he is to receive.

Held, on application for writ of supervisory control, under section 10370, Revised Codes, authorizing the district court in certain therein enumerated probate proceedings to appoint an attorney to represent minor, nonresident or unrepresented heirs, that the court may act only when necessary for such appointment arises; hence, where no one of the proceedings mentioned in the statute was pending before the court, and foreign heirs were already represented by counsel in the matter of the probate of a foreign will of one entitled to a distributive share of a pending estate, its action in appointing an attorney for the heirs upon its own motion was error, there having been no necessity for such appointment. State ex rel. Hamilton v. District Court, 102 M 341,

344 et seq., 57 P 2d 1227.

Id. Quare: Is Section 10370, Revised Codes, unconstitutional in so far as it purports to authorize the district court in certain probate proceedings to appoint an attorney to represent absent or nonresident heirs at their expense without first serving process upon them?

Id. The purpose of section 10370, supra, being to enable the court to secure the services of an attorney to protect the rights of those not otherwise represented in a probate proceeding pending before it, the appointment made should be terminated by it as soon as it is made to appear that such persons are represented, since estates should not be mulcted for the benefit of members of the legal profession.

10376. Power of clerk to issue orders and notices. The clerk may make all necessary orders and issue notices of hearing for the probate of wills, both domestic and foreign, and letters of administration or guardianship, may order notices to creditors, appoint appraisers, file and approve all bonds, file and approve all claims against the estate, file and approve all accounts of executors, administrators, and guardians, except final accounts, when no objections are made or filed thereto; and in the absence of the judge may hear and upon the hearing grant such letters, including letters testamentary, when no objections are made or filed, and make orders fixing time and place of hearing accounts and petitions for distribution, and may also make orders to show cause on applications for sale of real estate and orders to show cause or for notice of hearing in any probate or guardianship matter for the hearing of which an order to show cause or notice of hearing it necessary. In the absence of the judge and when no objections are made or filed, the clerk may hear, and upon the hearing grant letters of administration or guardianship and letters testamentary, approve all bonds, claims against estates and all accounts of executors, administrators

and guardians, except final accounts. The court or judge may, at any time within thirty days thereafter set aside or modify any of the orders herein provided for, but unless so set aside or modified, they shall have the same effect as if made by the judge or court. [As amended Sec. 1, Ch. 178, L. 1937.]

CHAPTER 145, INHERITANCE TAX

10400.1. Taxes on transfer—when and how imposed.

An inheritance tax is not a tax upon the property of the decedent's estate, but one upon the privilege of acquiring property by inheritance. *State v. State Board of Equalization*, et al., 104 M 52, 58 et seq., 64 P 2d 1057.

Though repeals by implication are not favored by the courts, it must be held that the contention of the state that sections 10400.1 and 10400.11, Revised Codes (the former being sec. 1 of chapter 186, laws of 1935, and the latter sec. 1 of chapter 130, laws of 1929), the first of which declares that in arriving at the clear market value of estates for inheritance tax purposes federal estate taxes paid shall be deducted, and the second declaring the contrary, are in *pari materia* and must be so construed that both may stand, may not be sustained, the latter act (sec. 10400.1), impliedly repealing the earlier (sec. 10400.11), being controlling, if constitutional under the facts of the instant case. In *re Clark's Estate*, 105 M 401, 407 et seq., 74 P 2d 401.

Id. Held, that chapter 186, laws of 1935 (sec. 10400.1, Rev. Codes), providing, *inter alia*, that, in determining the amount of an inheritance tax due, federal estate taxes paid should be deducted and that estates of all persons who had died since 1921, not yet distributed, should be included in such provision, is violative in that respect of section 39, article V of the constitution, prohibiting the legislature from remitting or releasing an obligation or liability held by the state, except by payment thereof, as applied to an estate where the testator died in 1934, at which time the statute (chap. 105, laws of 1927) declared that such deduction should not be made, the claim of the state under the latter act having become vested at the time of decedent's death and, therefore, not subject to remission or release in effect accomplished by the enactment of chapter 186.

References

In *re Wilson's Estate*, 102 M 178, 189 et seq., 56 P 2d 733.

10400.2. Primary rates, where not in excess of \$25,000.00.

Where decedent during his lifetime had taken a boy into his home and had supervised and directed his education in private schools and had all the necessary documents for adoption prepared for approval when death intervened, and had provided for him in his will, the holding of the district court in fixing the inheritance tax at 8 per cent. of the property so left as to a stranger of the blood, instead of at

2 per cent. as an adopted child, held correct, no contention being made that the decedent had for not less than ten years stood in the mutually acknowledged relation of a parent (sec. 10400.2, subd. 1, Rev. Codes), the contention being that the child had been adopted in accordance with law. In *re Clark's Estate*, 105 M 401, 426, 74 P 2d 401.

10400.4. Exemptions from first \$25,000.

Construing the provision of subsection 2 of section 4, chapter 65, laws of 1923, allowing the widow of a decedent an exemption of \$17,500 from inheritance taxation and declaring that such exemption shall include "all her statutory downer and other allowances", held, that in amending chapter 14, laws extraordinary session 1921, by increasing the exemption from \$10,000 including the widow's "dower and homestead rights", to \$17,

500 with the above clause as to allowances, the legislature evidently intended that such exemption should be all she should be allowed to take tax-free; hence the district court erred in fixing the inheritance tax due from an estate appraised at \$97,149.80, by allowing a deduction of \$3,600, paid for the widow's allowance, from the gross value of the estate. In *re Wilson's Estate*, 102 M 178, 189, 56 P 2d 733.

10400.5. When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed.

Under section 10400.5, Revised Codes, all taxes imposed by the inheritance tax law are due and payable at the time of the death of the decedent, except as otherwise provided therein. In *re Clark's Estate*, 105 M 401, 412, 74 P 2d 401.

10400.6. Discount—interest.

Section 10400.6, Revised Codes, declaring that if an inheritance tax is not paid within eighteen months, interest at the rate of 10 per cent. shall be exacted, unless necessary litigation or other unavoidable delay intervene, in which case the interest rate shall be 6 per cent. "provided that litigation to defeat the payment of the tax shall not be considered necessary litigation",

held not open to the construction that the higher rate of interest shall apply to all litigation, whether justified or successful or not, it being designed only to prevent unjustified delay in the payment of the tax by reason of unnecessary litigation. In re Clark's Estate, 105 M 401, 431 et seq., 74 P 2d 401.

10400.9. Bond for deferred payment of tax.**References**

In re Clark's Estate, 105 M 401, 431, 74 P 2d 401.

10400.11. Payment of tax on transfer of securities by foreign representative—duty of holder of securities or assets of nonresident decedent—apportionment of deductions—information to be given board of equalization—amount of tax to be retained on delivery of assets—penalties.

Though repeals by implication are not favored by the courts, it must be held that the contention of the state that sections 10400.1 and 10400.11, Revised Codes (the former being sec. 1 of chapter 186, laws of 1935, and the latter sec. 1 of chapter 130, laws of 1929) the first of which declares that in arriving at the clear market value of estates for inheritance tax purposes federal estate taxes paid shall be

deducted, and the second declaring the contrary, are in paria materia and must be so construed that both may stand, may not be sustained, the later act (sec. 10400.1), impliedly repealing the earlier (sec. 10400.11) being controlling, if constitutional under the facts of the instant case. In re Clark's Estate, 105 M 401, 407 et seq., 74 P 2d 401.

10400.47. Repealing clause—effect of repeal.

Held, that while section 10400.47 (chap. 65, laws of 1923), repealing all then existing inheritance tax laws but providing that their repeal should not affect any suit or proceeding pending at the time

the 1923 act would take effect, preserved all then existing rights, it did not operate to preserve rights arising subsequent to its enactment. In re Clark's Estate, 105 M 401, 408, 74 P 2d 401.

CHAPTER 146, GUARDIANS OF MINORS**10401. Judge to appoint guardian, when, and on what petition.****References**

State v. District Court et al., 105 M 510, 515, 74 P 2d 8.

State ex rel. Haynes v. District Court, 106 M 578, 584, 81 P 2d 422.

10402. When minor may nominate guardian—when not.

If the district court in appointing the nominee of a minor nineteen years of age as his guardian, where the father also had petitioned for preference appointment, did so without regard to the fitness of the father (sec. 10402, Rev. Codes), his qualifications were never passed upon; hence the order of appointment did not become res judicata on that issue, and the father

had a plain, speedy and adequate remedy at law under section 10083 et seq., Revised Codes, by petition for ousting the guardian appointed, and therefore was not entitled to a writ of supervisory control to annul the order. State v. District Court et al., 105 M 510, 517 et seq., 74 P 2d 8.

10403. When appointment may be made by judge, when minor is over fourteen.

References

State v. District Court et al., 105 M 510, 514, 74 P 2d 8.

10404. Nomination by minors after arriving at fourteen.

If the district court in appointing the nominee of a minor nineteen years of age as his guardian, where the father also had petitioned for preference appointment, did so without regard to the fitness of the father (sec. 10402, Rev. Codes), his qualifications were never passed upon; hence the order of appointment did not

become res judicata on that issue, and the father had a plain, speedy and adequate remedy at law under section 10083 et seq., Revised Codes, by petition for ousting the guardian appointed, and therefore was not entitled to a writ of supervisory control to annul the order. State v. District Court et al., 105 M 510, 520 et seq., 74 P 2d 8.

10405. Father or mother entitled to guardianship.

If the district court in appointing the nominee of a minor nineteen years of age as his guardian, where the father also had petitioned for preference appointment, did so without regard to the fitness of the father (sec. 10402, Rev. Codes), his qualifications were never passed upon; hence the order of appointment did not become

res judicata on that issue, and the father had a plain, speedy and adequate remedy at law under section 10083 et seq., Revised Codes, by petition for ousting the guardian appointed, and therefore was not entitled to a writ of supervisory control to annul the order. *State v. District Court et al.*, 105 M 510, 517 et seq., 74 P 2d 8.

CHAPTER 147, GUARDIANS OF INSANE AND INCOMPETENT PERSONS

10412. Guardians of insane and other incompetent persons.

Under section 10412, Revised Codes, notice must be given to an alleged incompetent of the time and place of the hearing in a proceeding to determine his mental condition and to have a guardian appointed to take care of his person and property, and, if able to attend, such person must be produced at the hearing. *State ex rel. Haynes v. District Court*, 106 M 578, 582 et seq., 81 P 2d 422.

Id. Where the requirements of section 10412, supra, with relation to notice are strictly met, the essential elements of the due process of law clause of the consti-

tution are present and the trial court has jurisdiction to pass upon the matter, as against the contention that such notice as there provided for is insufficient in the absence of notice to others than the alleged incompetent.

Sections 10412 and 10413, Revised Codes, not so declaring, contention that the district court of the county in which an alleged incompetent resides only shall have jurisdiction of a proceeding to have him declared incompetent and a guardian appointed for him, may not be sustained.

10413. Appointment by judge after hearing.

Sections 10412 and 10413, Revised Codes, not so declaring, contention that the district court of the county in which an alleged incompetent resides only shall have jurisdiction of a proceeding to have him

declared incompetent and a guardian appointed for him, may not be sustained. *State ex rel. Haynes v. District Court*, 106 M 578, 585, 81 P 2d 422.

10415. Petition for restoration to capacity.

Adjudication of a person as insane and that he be committed to the insane asylum does not establish a conclusive presumption of insanity until restored to capacity under section 10415, Revised Codes, or

until the certificate required by section 5685 from the proper officer of the asylum is furnished; the presumption, on the contrary, being a rebuttable one. *State v. Bucy*, 104 M 416, 418, 66 P 2d 1049.

10416. Sale of right of dower of insane or incompetent married woman, or of dower of insane or incompetent widow. The right of dower of an insane married woman, or of an otherwise judicially declared mentally incompetent married woman, or dower of an insane widow or of an otherwise judicially declared mentally incompetent widow, may be sold by her guardian, and the title to the real estate transferred to the purchaser, under the direction of the court or judge, in the same manner and with like effect as the property of any insane person may be sold and transferred. [As amended Sec. 1, Ch. 19, L. 1937.]

10416.1. Power to mortgage right of dower of insane or incompetent married woman, or of dower of insane or incompetent widow—guardian. The right of dower of an insane married woman, or of an otherwise judicially declared mentally incompetent married woman, or dower of an insane widow, or of an otherwise judicially declared mentally incompetent widow, may be mortgaged by her guardian for the purpose of paying either debts, costs and charges of maintenance, charges of administration or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said right of dower or dower in real property or for the purpose of benefiting or improving the real estate in which said insane or incom-

petent married woman, or said insane or incompetent widow, has a right of dower or dower and to obtain an order of court to mortgage such right of dower or dower interest, the guardian shall take the same proceedings provided by section 10427 of this code. The right of dower of an insane or incompetent married woman, or dower of an insane or incompetent widow, shall be deemed property for the purpose of authorizing the appointment of a guardian of her estate. [As amended Sec. 2, Ch. 19, L. 1937.]

CHAPTER 148, POWERS AND DUTIES OF GUARDIANS

10419. Guardian to manage his estate, maintain ward, and sell real estate.

While there is no statutory provision to that effect, ordinary prudence dictates that guardianship funds be deposited for safe-keeping in a reputable bank, and if the guardian deposit them subject to withdrawal by check, and they are lost by the closing of the bank, the guardian

is not personally liable therefor; the rule applying to a temporary deposit, subject to withdrawal at any time, of funds held pending investment or other disposition. In re Welch's Estate, 100 M 47, 51, 45 P 2d 681.

CHAPTER 149, SALE OF PROPERTY BY GUARDIANS AND DISPOSITION OF PROCEEDS

10428. May sell property in certain cases.

Quare: Has the district court, sitting in probate, the power to authorize a guardian to exchange or trade personal property of his ward (in the instant case sheep) for property of like character (cattle)? Alexander et al. v. Windsor et al., 107 M 152, 164, 81 P 2d 685.

Id. An order of the district court in a guardianship matter authorizing a

guardian not only to exchange sheep owned by the wards for cattle, but also empowering him to obtain a loan of sufficient funds to pay the difference remaining due to the owner of the cattle and to execute a mortgage on such animals payable in a year, held void on the authority of Davidson v. Wampler, 29 M 61, 74 P 2d 82.

10431. Investments of proceeds of sales.

While there is no statutory provision to that effect, ordinary prudence dictates that guardianship funds be deposited for safe-keeping in a reputable bank, and if the guardian deposit them subject to withdrawal by check, and they are lost by the closing of the bank, the guardian is not

personally liable therefor; the rule applying to a temporary deposit, subject to withdrawal at any time, of funds held pending investment or other disposition. In re Welch's Estate, 100 M 47, 52, 45 P 2d 681.

10443. Court may order the investment of money of the ward.

Though section 10443, Revised Codes, provides only impliedly that a guardian may apply to the court for an order authorizing him to invest funds of his ward, if he does loan such funds without such order, he assumes the risk of loss and if loss occurs and it is shown that the loan

is uncollectible, he is properly chargeable therewith. In re Welch's Estate, 100 M 47, 51 et seq., 45 P 2d 681.

References

Alexander et al. v. Windsor et al., 107 M 152, 164, 81 P 2d 685.

CHAPTER 151, GENERAL AND MISCELLANEOUS PROVISIONS

10458.1. Dispensing with guardian's bond—when authorized. If, at the time of hearing any application for letters of guardianship, it satisfactorily appears to the court or judge that the assets of the estate for which such letters of guardianship are sought do not warrant the necessity of a bond on the part of the applicant, the court or judge may in its discretion order such letters to issue without bond; but such guardian may at any time

afterward, if it appear from any cause necessary or proper, be required to file a bond as in other cases. [En. Sec. 1., Ch. 76, L. 1937.]

10463. Orders to be entered in minutes—provisions applicable to practice.

References

State v. District Court et al., 105 M 510, 515, 522, 74 P 2d 8.

CHAPTER 153, FINANCIAL AID OF DEPENDENT CHILDREN (MOTHERS' PENSION ACT)

10480-10487. [Repealed Sec. II, Pt. VII, Ch. 82, L. 1937.]

CHAPTER 154, DEFINITIONS, KINDS AND DEGREES OF EVIDENCE

10491. The degree of proof required to establish facts.

The rule against the use of abstract statements of law in instructions ordinarily does not apply where the court gives instructions defining the meaning of words and phrases; hence, the giving of

an instruction defining "moral certainty" in the language of section 10491, Revised Codes, objected to as an abstract statement of law, was not error. State v. Clark et al., 102 M 432, 436, 58 P 2d 276.

10497. Indirect evidence defined.

References

In re Bragg's Estate, 106 M. 132, 139, 76 P 2d 57.

CHAPTER 155, GENERAL PRINCIPLES OF EVIDENCE

10505. One witness sufficient to prove a fact.

While section 6980, subd. 4, Revised Codes, makes the indispensable requirement to a valid will that two attesting witnesses must sign it, the satisfactory testimony of one witness entitles the will to probate as against the objection of de-

fective execution of the attestation clause. In re Bragg's Estate, 106 M 132, 139 et seq., 76 P 2d 57.

References

Hodgkiss v. Northland Petroleum Consol. 104 M 328, 363, 57 P 2d 811.

10508. Witness presumed to speak the truth.

Jurors are the exclusive judges of the weight and credibility of evidence; they may reject the evidence offered by one party and accept that offered by the other.

Freeman v. Withers, 104 M 166, 172, 65 P 2d 601 (See also State v. Espelin, 106 M 231, 238, 76 P 2d 629).

10509. One person not affected by acts of another.

Evidence relating to transactions occurring after the consummation of a contract of lease of oil land and with which plaintiff and his grantor had nothing to do was

inadmissible in an action to quiet title. Nadeau v. Texas Co., 104 M 558, 568, 69 P 2d 586, 593.

10510. Declarations of predecessor in title evidence.

References

Nadeau v. Texas Company, 104 M 558, 568, 69 P 2d 586, 593.

10511. Declarations which are a part of the transaction.

Where the intention of a workman to aid in supporting his parents was an important fact in the matter of the parents' claim as his major dependents upon his death, the statement of a witness for claimants, decedent's brother-in-law, that decedent shortly before his death told him that he intended to send his next pay

check to his parents and thereafter every other check, was admissible under section 10511, Revised Codes, as part of the res gestae, and the Industrial Accident Board was not warranted in rejecting the testimony as hearsay. Ross et al. v. Industrial Acc. Board, 106 M 486, 495, 80 P 2d 362.

10512. Evidence relative to third person.

References

Wills v. Morris et al., 100 M 514, 523, 50 P 2d 862.

10515. When part of the transaction proved, the whole is admissible.

When part of an act or conversation is given in evidence by one party, the whole thereof on the same subject may be inquired into by the other. *McGonigle et al.*

v. Prudential Ins. Co., 100 M 203, 223, 46 P 2d 687. (See also *Rasmussen v. Lee & Co., Inc.*, 104 M 278, 282, 66 P 2d 119).

10516. Contents of writing—how proved.

Plaintiff (defendant in an action on an account) who, in his suit to set aside a default judgment in the account action, in his effort to state the condition of the account had prepared in his own hand-

writing a memorandum of statements and canceled checks, could properly testify therefrom as to the condition of the account. *Stocking v. Charles Beard Co.*, 102 M 65, 72, 55 P 2d 949.

10517. An agreement reduced to writing deemed the whole.**References**

Story Gold Dredging Co. v. Wilson, 106 M 166, 181, 76 P 2d 73.

10519. Construction of statutes and instruments—general rule.

In interpreting the language of a contract or trust agreement the province of the court is, under section 10519, Revised Codes, simply to ascertain and declare what is in terms or substance, contained therein. *Conley et al. v. Johnson et al.*, 101 M 376, 384, 54 P 2d 585.

While the provisions of the Workmen's Compensation Act must be liberally construed, such construction is no justification for disregarding the plain provisions thereof relative to the time within which a petition for rehearing upon rejection of a claim by the Industrial Accident Board must be filed. *State ex rel. Magelo v. Indus. Acc. Board*, 102 M 455, 462, 59 P 2d 785.

Courts must construe the law as they find it, giving the words employed their usual meaning unless it is apparent from the context of the subject that a different one was intended. Where the language of a statute is plain, simple, direct and without ambiguity, the Act construes itself; it must be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the

purpose of either limiting or extending its operation. *State v. Board of County Commrs. et al.*, 104 M 21, 24, 64 P 2d 1060.

It is not the province of courts to make contracts for parties or to read provisions into them which the parties failed to insert. *Hier v. Farmers Mutual Fire Ins. Co.*, 104 M 471, 489, 67 P 2d 831.

Under section 10519, Revised Codes, the office of the judge in construing a statute is to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted; viz: He may not indulge in judicial legislation. *Taylor v. Rann*, 106 M 588, 595, 80 P 2d 376.

References

State v. Foot, 100 M 33, 41, 48 P 2d 1113; *Wills v. Morris et al.*, 100 M 504, 508, 50 P 2d 858; *Koppang v. Sevier*, 101 M 234, 241, 53 P 2d 455; *In re Baxter's Estate*, 101 M 505, 515, 54 P 2d 869; *Gahagan v. Gugler*, 103 M 521, 523, 63 P 2d 145; *State ex rel. Riley v. District Court*, 103 M 576, 582, 64 P 2d 115.

10520. The intention of the legislature or parties.

In the construction of a statute the primary duty of the court is to give effect to the intention of the legislature in enacting it, its intention to be deduced from a view of every material part of the Act; every word, clause, phrase and sentence must be given effect, if possible. *In re Wilson's Estate*, 102 M 178, 193, 56 P 2d 733.

Contracts must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful, the intention to be gathered from the entire agreement, not from

particular words or phrases or disjointed parts of it. *Snider v. Carmichael*, 102 M 387, 409, 58 P 2d 1004.

Where a general and a specific provision in a statute are inconsistent, the latter prevails. *State ex rel. Griffin v. Green et al.*, 104 M 460, 469 et seq., 67 P 2d 995.

References

State v. Board of County Commrs. et al., 104 M 21, 24, 64 P 2d 1060; *State ex rel. Matson v. O'Hern et al.*, 104 M 126, 141, 65 P 2d 619; *State ex rel. Wilson v. Weir et al.*, 106 M 526, 539, 79 P 2d 305.

10525. Of two constructions, which preferred.

Where a contract contains terms or expressions of doubtful import, proof of the mutual intentions of the parties may be

resorted to as evidenced by its construction by the parties themselves. *Snider v. Carmichael*, 102 M 387, 410, 58 P 2d 1004.

10527. Construction in favor of natural right preferred.**References**

Snider v. Carmichael, 102 M 387, 410, 58 P 2d 1004.

10529. Evidence confined to material allegations.**References**

McGonigle et al. v. Prudential Ins. Co., 100 M 203, 219, 46 P 2d 687.

10531. Facts which may be proved on trial.

Evidence of a physician in substance explaining the character of plaintiff's injuries for which he sought disability benefits under an insurance policy, and stating in answer to a question whether plaintiff could follow a gainful occupation that in his opinion he could not engage in an occupation requiring physical effort, was

not open to the objection that it invaded the province of the jury; particularly not where defendant insurer had theretofore introduced testimony of a physician on the same subject to the contrary. *DeVore v. Mutual Life Ins. Co.*, 103 M 599, 614, 64 P 2d 1071.

CHAPTER 156, JUDICIAL NOTICE OF FACTS**10532. Certain facts of general notoriety assumed to be true—specification of such facts.**

Though the power of courts to take judicial notice of matters should be exercised with caution, they should take such notice of whatever is or ought to be generally known, within the limits of their jurisdiction, justice not requiring that they profess to be more ignorant than the rest of mankind. *State ex rel. Kern et al. v. Arnold*, 100 M 346, 363.

Id. On application to the supreme court for writ of mandate to compel a city to comply with the provisions of Chapter 49, Laws of 1935, *inter alia* fixing the salaries of members of fire departments and limiting the hours during which they may be required to be on duty, involving determination of the question whether in maintaining such departments cities are acting in a governmental or proprietary capacity, the court will take judicial notice of the facts that the greater portion of the time of firemen when on duty is devoted to holding themselves in readiness for calls and during such periods are not exercising any function on behalf of the city, and that the city is exercising its proprietary right over their time.

Courts of this state will take judicial notice of the public and official acts of executive departments of the United States, under section 10532, subdivision 3, Revised Codes, but that they are not required to admit in evidence a public document unless it be the original or a copy certified by its legal custodian. *Kibble v. Morris*, 101 M 308, 312, 53 P 2d 1150.

Though the statement of the mayor of defendant city in his affidavit in support of a motion for change of place of trial of an action against the city to recover for services rendered, that payment was to be made in the county in which the city was located, was a conclusion of law and not a statement of fact, the matter was immaterial, since the trial court was required to take judicial notice of the statutory provisions relating to claims against and payment of the same by municipal corporations. *Lillis v. City of Big Timber*, 103 M 206, 213, 62 P 2d 219.

References

Matteson v. Ackerson et al., 104 M 239, 243, 66 P 2d 797.

CHAPTER 156-A, UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT

10532.1. Judicial notice of laws of other jurisdictions. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. [En. Sec. 1, Ch. 60, L. 1937.]

10532.2. Information concerning laws. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information. [En. Sec. 2, Ch. 60, L. 1937.]

10532.3. Question for court. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable. [En. Sec. 3, Ch. 60, L. 1937.]

10532.4. Notice to adverse party. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party

to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise. [En. Sec. 4, Ch. 60, L. 1937.]

10532.5. Proof of other foreign laws. The law of a jurisdiction other than those referred to in section 10532.1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. [En. Sec. 5, Ch. 60, L. 1937.]

10532.6. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [En. Sec. 6, Ch. 60, L. 1937.]

10532.7. Citation of act. This act may be cited as the uniform judicial notice of foreign law act. [En. Sec. 7, Ch. 60, L. 1937.]

CHAPTER 157, WITNESSES

10535. Persons who cannot be witnesses.

Before the testimony of a proposed witness as to oral communications had with the deceased agent of a corporation may be admitted, under section 10535, subdivision 4, Revised Codes, the court should have as a foundation sufficient other testimony to warrant it, in the exercise of its discretion, to render a ruling in favor of such questionable testimony, and it should be made to appear that without such testimony injustice will result. *Phelps v. Union Central Life Ins. Co.*, 105 M 195, 203 et seq., 71 P 2d 887.

Under subdivision 3, section 10535, Revised Codes, declaring that testimony of oral communications had between a wit-

ness and a deceased during the latter's lifetime are inadmissible in evidence in an action on a claim or demand against the latter's estate except when it appears to the court that without such testimony injustice will be done, the matter whether such declarations shall be admitted is addressed to the discretion of the court, which discretion may not be said to have been abused where the testimony was not finally admitted until the court had heard all the evidence to satisfy itself that without such testimony an injustice would be done to plaintiff. *Rowe v. Eggum et al.*, 107 M 378, 388, 87 P 2d 189.

10536. Persons in certain relations cannot be examined.

The purpose of section 10536, subdivision 4, Revised Codes, relating to the disability of a physician to testify in a civil action as to information obtained while attending a patient is not absolutely to disqualify a physician, the patient being privileged to waive the objection, in which

event the court may compel the physician to testify; the physician, however, cannot waive the statutory privilege and testify against the wishes of the patient. *Hier v. Farmers Mutual Fire Ins. Co.*, 104 M 471, 486, 67 P 2d 831.

10537. Judge or juror may be witness.

In view of the provision of section 10537, Revised Codes, that a judge may be called as a witness by either party, the propriety of two members of the supreme court testifying in a proceeding for criminal con-

tempt of the same court, whose testimony went only to the question of intent on the part of contemnor and was undisputed, may not be questioned. *In re Nelson et al.*, 103 M 43, 56, 60 P 2d 365.

CHAPTER 158, WRITINGS—PUBLIC WRITINGS

10540. Public writings defined.

Held, on application for writ of mandate, that irrespective of whether or not referendum petitions delivered to the county clerk for certification to the Secretary of State constitute public records and as such are open to inspection, they are "other matters" within the meaning of section

455, Revised Codes, declaring that "public records and other matters in the office of any officer" are open to the inspection of any person during office hours, and that mandamus lies to compel such clerk to permit inspection. *State ex rel. Holloran v. McGrath*, 104 M 490, 498, 67 P 2d 838.

10542. Every citizen entitled to inspect and copy public writings.

Held, on application for writ of mandate, that irrespective of whether or not

referendum petitions delivered to the county clerk for certification to the Secretary

of State constitute public records and as such are open to inspection, they are "other matters" within the meaning of section 455, Revised Codes, declaring that "public records and other matters in the office

of any officer" are open to the inspection of any person during office hours, and that mandamus lies to compel such clerk to permit inspection. *State ex rel. Holloran v. McGrath*, 104 M 490, 498, 67 P 2d 838.

10555. Record—how authenticated as evidence.

Since certified copies of records in the custody of the county clerk and the clerk of the district court of the county to which a cause is sought to be removed may be resorted to in proof of their authenticity, or, if deemed necessary, records themselves may be removed from the of-

fice in which they are kept on order of the court or judge, the fact that removal of the cause would serve the convenience of those officers is insufficient to compel an order of removal. *Kroehnke v. Gold Creek Min. Co.*, 100 M 571, 577, 51 P 2d 640.

10558. Effect of a judgment or final order upon rights in various cases.

A judgment which in some measure affects one's water right (which is property), though not binding upon a stranger to the suit in which rendered, is admissible against him as some evidence of the right of him in whose favor it was rendered,

and may be considered in connection with the other evidence received in a later suit between different parties but concerning the same right, as a part of his chain of title thereto. *Wills v. Morris et al.*, 100 M 514, 523, 50 P 2d 862.

10561. What deemed adjudged in a judgment.

Where in a water right suit plaintiff relief upon the decree entered in a former action involving the same right as *res judicata*, in which defendants' predecessor appeared and answered making claim to a certain right but the trial court failed to

make disposition of the claim and apparently ignored it, defendants were not barred by the former decree to have their right adjudicated. *Missoula Light & Water Co. v. Hughes*, 106 M 355, 373, 77 P 2d 1041.

10568. Manner of proving other official documents.

In an action against the president of an insolvent national bank to recover on an alleged guaranty of a deposit made during the time the bank was a going concern, offered proof of the appointment of a receiver by the Comptroller of the Currency, consisting of the county clerk's record of

the appointment and a certified copy of such record, held properly refused in the absence of a certificate, or other proof, of due execution of the order of appointment by the officer having it in his custody. (Sec. 10568, subd. 9, Rev. Codes) *Kibble v. Morris*, 101 M 308, 312, 53 P 2d 1150.

10570.1. Official reports or findings as evidence. Written reports or findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein. [En. Sec. 1, Ch. 143, L. 1937.]

NOTE.—Uniform State Law: Sections 10570.1 through 10570.5 constitute the "Uniform Official Reports as Evidence Act" approved by the National Confer-

ence of Commissioners on Uniform State Laws in 1936 and adopted in the State of North Dakota.

10570.2. Admissibility of report or finding. Such report or finding shall be admissible only if the party offering it has delivered a copy of it or so much thereof as may relate to the controversy, to the adverse party a reasonable time before trial, unless in the opinion of the trial court the adverse party has not been unfairly surprised by the failure to deliver such copy. [En. Sec. 2, Ch. 143, L. 1937.]

10570.3. Cross examination. Any adverse party may cross-examine any person making such reports or findings or any person furnishing information used therein; but the fact that such testimony may not be obtainable shall not affect the admissibility of the report or finding, unless, in the opinion of the court, the adverse party is unfairly prejudiced thereby. [En. Sec. 3, Ch. 143, L. 1937.]

10570.4. Construction of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [En. Sec. 4, Ch. 143, L. 1937.]

10570.5. Title of act. This act may be cited as the uniform official reports as evidence act. [En. Sec. 5, Ch. 143, L. 1937.]

CHAPTER 159, WRITINGS—PRIVATE WRITINGS

10585. Original writing to be proved or accounted for.

A copy of a notice of cancellation of a life insurance policy held properly excluded where the original had been received in evidence and plaintiffs had admitted that pencil marks made thereon had been made by one of them after receipt thereof. *McGonigle et al. v. Prudential Ins. Co.*, 100 M 203, 221 46 P 2d 687.

10586. When in possession of adverse party, notice to be given.

References

Ralph v. MacMarr Stores et al., 103 M 421, 435, 62 P 2d 1285.

10597. Removal of public records.

References

Kroehnke v. Gold Creek Mining Co., 100 M 571, 577, 51 P 2d 640.

10598. Certified copies of records as evidence.

Since certified copies of records in the custody of the county clerk and the clerk of the district court of the county to which a cause is sought to be removed may be resorted to in proof of their authenticity, or, if deemed necessary, records themselves may be removed from the office in which they are kept on order of the court or judge, the fact that removal of the cause would serve the convenience of those officers is insufficient to compel an order of removal. *Kroehnke v. Gold Creek Min. Co.*, 100 M 571, 577, 51 P 2d 640.

References

Kibble v. Morris, 101 M 308, 311, 53 P 2d 1150.

CHAPTER 159-A, UNIFORM BUSINESS RECORDS AS EVIDENCE ACT

10598.1. "Business" defined. The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not. [En. Sec. 1, Ch. 59, L. 1937.]

10598.2. Business records as evidence. A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. [En. Sec. 2, Ch. 59, L. 1937.]

10598.3. Purpose of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [En. Sec. 3, Ch. 59, L. 1937.]

10598.4. Citation of act. This act may be cited as the uniform business records as evidence act. [En. Sec. 4, Ch. 59, L. 1937.]

CHAPTER 161, INDIRECT EVIDENCE—INFERENCES AND PRESUMPTIONS

10602. Presumption defined.

References

Wibaux Realty Co. v. Northern Pac. Ry. Co., 101 M 126, 132, 54 P 2d 1175.

10603. When an inference arises.

While from one fact found another fact may be presumed if the presumption is a logical result, a fact presumed may not be made the basis for a further presumption. *Ashley v. Safeway Stores, Inc.*, et al., 100 M 312, 323, 47 P 2d 53.

Id. Held that where the only evidence that a corporate defendant in a personal

injury action was the owner of an offending instrumentality (a truck) and that its co-defendant (driver) was its employee was based on an inference drawn from the fact that the truck bore the company's name, evidence that the driver after the accident said the truck was owned by the company—an attempt to draw another inference from the first to the effect that the relationship of master and servant existed between the company and the driver . . . was properly excluded so far as it sought to fasten liability upon the company.

10606. All other presumptions may be controverted.

The disputable presumption declared by subdivision 30, section 10606, Revised Codes "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage" must be repelled by the party disputing it, and this may be done only by satisfactory evidence. *Elliott v. Industrial Accident Board*, 101 M 246, 254, 53 P 2d 451.

While a presumption has the effect of evidence, and the question whether testimony to the contrary overcomes the presumption is one for the jury, where the facts proved are overwhelmingly against the presumed facts and permit of but one rational and reasonable conclusion, the matter becomes one of law for the court's decision. *Gagnon v. Jones et al.*, 103 M 365, 367, 62 P 2d 683.

Where, in a suit involving water rights, the judgment in a former suit between the same parties was relied on in aid of the plea of *res judicata*, the disputable presumption is that the proceedings had in such suit were regular, under section 10606, subdivision 17, Revised Codes. *Cocanougher v. Montana L. Ins. Co. et al.*, 103 M 536, 544, 64 P 2d 845.

A petition for writ of mandate to compel a county canvassing board to make a correct computation of election returns was not rendered insufficient by failure to set forth all of the various statutory steps beginning with the canvass of the vote by the election judges and ending with delivery of the returns to the board, where sufficient facts, aided by the presumptions that official duty was regularly performed and the law obeyed, were alleged. *State ex rel. Lynch v. Batani et al.*, 103 M 353, 363, 62 P 2d 565.

The disputable presumptions that a person is innocent of wrong, that private transactions have been fair and legal, that the ordinary course of business has been

Instruction, in an action against a railway company to recover damages for injury to property by flood waters as the alleged result of negligence of defendant in failing to provide sufficient openings for the escape of such waters in an embankment constructed in connection with a railway bridge over a creek, that the jury's conclusions must be based upon the facts shown by the evidence, and not upon inferences or conclusions based upon other inferences or conclusions, held proper. *Wibaux Realty Co. v. Northern Pac. Ry. Co.*, 101 M 126, 132, 54 P 2d 1175.

followed, and that the law has been obeyed (sec. 10606, Rev. Codes), relied upon by defendant in an action to set aside a fraudulent conveyance, fade away in the face of contrary facts satisfactorily established. *Johnson v. Kaiser et al.*, 104 M 261, 276, 65 P 2d 1179.

Quare: Is evidence, in an action in conversion, that plaintiff was the reputed owner of the property in question admissible in view of the disputable presumption declared by subdivision 12, section 10606, Revised Codes, that a person is the owner "from common reputation of his ownership"? *Brennan v. Mayo et al.*, 105 M 276, 277, 72 P 2d 463.

The presumption that a man and woman holding themselves out as husband and wife have entered into a contract of lawful marriage is a disputable one. *Stevens v. Woodmen of the World*, 105 M 121, 141, 71 P 2d 898.

Where the record on appeal in an equity (water right) case does not present the evidence heard in the court below, the supreme court on appeal will presume that there was sufficient to sustain the findings of the trial court; every presumption will be indulged in favor of the correctness of its decision. *Missoula Light & Water Co. v. Hughes*, 106 M 355, 366, 77 P 2d 1041.

References

Rock Island Plow Co. v. Cut Bank Imp. Co., 101 M 117, 123, 53 P 2d 116; *State ex rel. Tillman v. District Court*, 101 M 176, 181, 53 P 2d 107; *Kibble v. Morris*, 101 M 308, 313, 53 P 2d 1150; *Peasley v. Trosper et al.*, 103 M 401, 410, 63 P 2d 131; *Matteson v. Ackerson et al.*, 104 M 239, 243, 66 P 2d 797; *Hodgkiss v. Northland Petroleum Consol.*, 104 M 328, 340, 57 P 2d 811; *Gaines v. Van Demark*, 106 M 1, 11, 74 P 2d 454; *Sherlock et al. v. Greaves et al.*, 106 M 206, 221, 76 P 2d 87.

CHAPTER 162, INDISPENSABLE EVIDENCE—EVIDENCE OF AGREEMENTS NOT IN WRITING—CONCLUSIVE AND UNANSWERABLE EVIDENCE

10613. Agreement not in writing—when invalid.

References

Barrett v. McHattie et al., 102 M 473, 475, 59 P 2d 794.

CHAPTER 163, PRODUCTION OF EVIDENCE—BY WHOM PRODUCED

10616. Evidence to be produced, by whom.

The plea of payment is an affirmative defense which must be proved by the one asserting it. *Rock Island Plow Co. v. Cut Bank Imp. Co.*, 101 M 117, 123, 53 P 2d 116.

Where upon the filing of the complaint in an action to recover possession of lands in the hands of a cropper, a temporary restraining order was issued as well as an order to show cause why an injunction pendente lite should not issue, and at the hearing of such order to show cause defendant moved for dissolution of the tem-

porary order, held, that while the court erred in placing the burden of proof upon defendant, the error, in the absence of a showing of prejudice, will be deemed immaterial in view of the rule that in such matters the order of proof is largely discretionary with the trial judge, and the fact that in the final analysis the determination of the question is dependent upon where the preponderance of the evidence lay. *Gibbons v. Huntsinger*, 105 M 562, 571, 74 P 2d 443.

CHAPTER 164, PRODUCTION OF EVIDENCE—MEANS OF PRODUCTION—SUBPOENA

10622. When a witness is not compelled to attend.

Where the testimony desired of a liquidating officer of a defunct bank located in a county other than that in which a cause was set for trial, went only to the production and identification of documents in his possession, and the witness could not be compelled to attend the trial because

his residence was more than thirty miles from the place of trial the court nevertheless did not abuse its discretion in denying a change of venue, since his testimony was obtainable by deposition. *Kroehnke v. Gold Creek Min. Co.*, 100 M 571, 579, 51 P 2d 640.

10625. Forfeiture therefor.

In an action to recover the penalty prescribed by section 10625, Revised Codes, for disobeying a subpoena duces tecum issued by a notary public for the purpose of taking a deposition, in which a motion for nonsuit was granted, held, that the subpoena was void because issued before the

affidavit and notice provided for by section 10651, were served upon the adverse party, and that, being void, there could be no disobedience thereof upon which to base the action. *Hiber v. Morrill*, 105 M 323, 324, 72 P 2d 685.

CHAPTER 165, PRODUCTION OF EVIDENCE—MANNER OF PRODUCTION—BY AFFIDAVIT, DEPOSITION, AND EXAMINATION

10632. Affidavit defined.

While section 9862, Revised Codes, provides that the writ of prohibition is issued upon affidavit of the applicant beneficially interested, a verified petition, like an affidavit, being a written declaration

under oath, is equivalent to, and may be used as, an affidavit in instituting the proceeding. *State ex rel. Redle v. District Court*, 102 M 541, 545, 59 P 2d 58.

CHAPTER 167, DEPOSITIONS—HOW TAKEN WITHOUT AND WITHIN THE STATE

10645. In the state—when taken.

Within the meaning of section 10645, Revised Codes, declaring that the testimony of witnesses may be taken by deposition "in an action at any time after service of summons and in a special proceeding after a question of fact has arisen there-

in", an appeal to the district court from an order of the Industrial Accident Board under the Workmen's Compensation Act is a "special proceeding". *Best v. London Guarantee & Acc. Co.*, 100 M 332, 341, 47 P 2d 456.

10651. Deposition for use within state—notice—physical examination to be submitted to by party.

In an action to recover the penalty prescribed by section 10625, Revised Codes, for disobeying a subpoena duces tecum is-

sued by a notary public for the purpose of taking a deposition, in which a motion for nonsuit was granted, held, that the sub-

poena was void because issued before the affidavit and notice provided for by section 10651, were served upon the adverse party, and that, being void, there could be

no disobedience thereof upon which to base the action. *Hiber v. Morrill*, 105 M 323; 325, 72 P 2d 685.

CHAPTER 168, GENERAL RULES OF EXAMINATION

10665. Cross-examination, as to what.

Though the right of cross-examination is a substantial one and should not be unduly restricted and may extend not only to the facts stated by the witness in his direct examination, but to all other facts connected therewith which tend to enlighten the jury upon the questions in controversy, the latitude of such examination is largely in the discretion of the trial court, with which the supreme court on appeal will not interfere except where

there has been a manifest abuse thereof. *McGonigle et al. v. Prudential Ins. Co.*, 100 M 203, 219, 46 P 2d 687.

Id. A party cannot under the guise of cross-examination make out his case by witnesses of the other side; nor may he complain of refusal to permit cross-examination where later in the course of trial he was permitted to elicit the desired information.

10668. How impeached.

Proof of falsity in part of the testimony of prosecutrix in a prosecution for rape, contradictory evidence, evidence that her reputation for truth and veracity was bad, or that she had at other times made statements inconsistent with her testimony, goes only to the credibility of the witness, of which, as well as the weight to be given to her testimony, the jury is the sole judge. *State v. Peterson*, 102 M 495, 499,

59 P 2d 61.

The testimony of a witness shown to have been convicted of a felony may, under section 10668, Revised Codes, be disbelieved by the trial court, though the witness explained the nature of the offense and testified to facts which might have tended to excuse it. *Osnes Livestock Co. et al. v. Warren*, 103 M 284, 301, 62 P 2d 206.

10669. Same—by evidence of declarations.

References

State v. Peterson, 102 M 495, 499, 59 P 2d 61.

CHAPTER 169, EFFECT OF EVIDENCE

10672. Jury judges of effect of evidence, but to be instructed on certain points.

Instruction in a prosecution for robbery that the jury could disregard the entire testimony of a witness believed by it to have wilfully and deliberately testified falsely to any material fact unless he was corroborated by other and credible evidence, though section 10672, subdivision 3, Revised Codes, goes no further than to declare that a witness false in one part of his testimony is to be distrusted in others, held prejudicially erroneous, irrespective of the fact that defendant had admittedly suffered four previous convictions for felony; the rule is applicable in civil cases as well. *State v. Hogan*, 100 M 434, 436 et seq., 49 P 2d 446.

In a prosecution for rape, testimony of prosecutrix, under thirteen years of age at the time of the alleged crime, held sufficient to sustain judgment of conviction, notwithstanding prior contradictory statements made by her, which tended to discredit but not to destroy her testimony. *State v. Peterson*, 102 M 495, 498, 59 P 2d 61.

Where a party omits to produce evidence which it is within his power to produce and which rests peculiarly within his knowl-

edge, a strong suspicion is raised that such evidence, if adduced, would operate to his prejudice. *State ex rel. Nagle v. Naughton et al.*, 103 M 306, 317, 63 P 2d 123.

Id. Under the last above rule, where defendants in an abatement proceeding were present at the trial and heard witnesses testify that gambling was permitted in their place of business but did not testify nor call their employees to testify in their behalf, the conclusion was justifiable that the evidence, if produced, would have been detrimental to their cause.

The mere fact that plaintiff in a personal injury action may have testified falsely in one particular, standing alone, does not justify denial of recovery, but, under subdivision 3 of section 10672, Revised Codes, would simply warrant the jury in distrusting his testimony in other respects. *McCulloch v. Horton*, 105 M 531, 542, 74 P 2d 1.

Where the president and secretary of a real estate brokerage corporation who were active in drafting commission agreements relating to the sale of lands and whose names as such officers were affixed there-

to, were not called as witnesses in its action, one purpose of which was to secure reformation of the instruments, nor were their depositions taken and there was no explanation why their testimony was not secured, plaintiff's case was open to the objection that the best evidence . . .

that of the two officers . . . had not been introduced. *Cook-Reynolds Co. v. Beyer*, 107 M 1, 16, 79 P 2d 658.

References

Gagnon v. Jones et al., 103 M. 365, 367, 62 P 2d 683; *State v. Espelin*, 106 M 231, 238, 76 P 2d 629.

CHAPTER 171, EVIDENCE IN PARTICULAR CASES

10684. Compromise offer of no avail.

Refusal to permit a witness who in another action against the defendants had settled or compromised it, relative to such settlement, held proper, since the law favors compromises and an offer of compromise is not an admission that anything is due. *Ashley v. Safeway Stores, Inc. et al.*, 100 M 312, 324, 47 P 2d 53.

The fact that a bank officer sought to be held under a personal guaranty of the

safety of plaintiff's deposit in case of the bank's insolvency, stated on demand for the money that he could not pay but that "he had some coal leases", held to have amounted to an offer of compromise or settlement of the asserted claim, and that, under section 10684, Revised Codes, the statement did not constitute an admission of liability. *Kibble v. Morris*, 101 M 308, 314, 53 P 2d 1150.

CHAPTER 172, PROCEEDINGS TO PERPETUATE TESTIMONY

10687. Manner of application for order.

The fact that section 10687, Revised Codes, providing for the perpetuation of testimony, does not provide in express terms for such perpetuation where the de-

fendant is a nonresident of the state, does not deprive the local courts of jurisdiction to act. *State ex rel. Cook v. District Court*, 102 M 424, 427, 58 P 2d 273.

CHAPTER 174, DECISION OF QUESTIONS OF FACT AND OF LAW— MONEYS PAID INTO COURT

10698. Questions of fact to be decided by the jury, and the evidence addressed to them.

Jurors, as triers of the facts, are the sole judges of the credibility of witnesses, their power in that respect, however, not to be exercised arbitrarily but in subordination to the rules of evidence, and the

weight and effect of the testimony given is a matter wholly within their province. *State v. Espelin*, 106 M 231, 238, 76 P 2d 629.

10699. Questions of law addressed to the court.

References

State ex rel. Wilson v. Weir et al., 106 M 526, 538, 79 P 2d 305.

